

Responses of Timothy S. Black
Nominee to the U.S. District Court for the Southern District of Ohio
to the Written Questions of Senator Jeff Sessions

- 1. Prior to taking the bench, you were once a Director and President of Planned Parenthood Association of Cincinnati. Planned Parenthood has been very critical of the U.S. Supreme Court's opinion in *Gonzales v. Carhart*, which upheld as constitutional the Partial Birth Abortion Ban Act of 2003.**

- a. Regardless of your personal *policy* preferences, do you believe that *Gonzales v. Carhart* was properly decided as a *constitutional* matter? Please explain your answer.**

Response: Yes, *Gonzales v. Carhart* was properly decided as a constitutional matter because the role of the Supreme Court of the United States is to decide constitutional issues. If I have the privilege of being confirmed as a United States District Judge, I will be bound by the decisions of the Supreme Court and the United States Court of Appeals for the Sixth Circuit, as I am now.

- b. If you are confirmed as a District Court judge, you will be bound by that precedent. Are you prepared to do so, despite the fact that you may personally disagree with the Supreme Court?**

Response: Yes, I will be bound by the precedent of *Gonzales v. Carhart* and by all precedents of the Supreme Court and the United States Court of Appeals for the Sixth Circuit. I fully appreciate that my role as a trial court judge is to decide each case on the facts and law according to settled precedent.

- 2. According to a press article, on at least one occasion you represented Planned Parenthood and advocated that five anti-abortion protesters be given substantial fines. In the course of doing so, you publicly stated that "if the protestors are fined substantially and often, and those fines are collected, it will help dissuade them. Incarceration makes them martyrs. Fine after fine after fine makes it tougher for them." I recognize that the protesters in that case were arrested for defying a judge's order and that you were advocating on behalf of a client.**

- a. In your questionnaire, you stated that you were a Director of Planned Parenthood and also served as its President. The press article in which you were quoted identified you as Planned Parenthood's lawyer. Were you counsel for Planned Parenthood as well as a Director, or was the article inaccurate?**

Response: The article was inaccurate. I was not Planned Parenthood's lawyer. Planned Parenthood had its own retained lawyer, Alphonse A. Gerhardstein. I was a Director of Planned Parenthood for three years, 20-plus years ago, and served as its President in one of those years. I did not represent the client Planned Parenthood as its lawyer.

- b. **Although I believe that we cannot tolerate people defying court orders, regardless of the seriousness of the political topic they wish to speak on, it is undeniable that orders and fines such as these have a chilling effect on free speech. Recently, in *G.B. v. Rogers*, you held that the manager of a store dealing in sexually-oriented materials could challenge the constitutionality of a law that required all people convicted of pandering obscenity to register as sex offenders. You based that holding on the “chilling effect” that the law might have on the traffic of sexually-oriented materials. How do you reconcile your concern for the chilling effect on free speech in *Rogers* with your statement regarding the abortion protesters?**

Response: In *G.B. v. Rogers*, I decided only that plaintiff had stated a claim sufficient to survive a motion to dismiss. I ruled on a pre-trial question of law: did plaintiff have standing to bring the claim. In the protesters’ case, they were violating a court order, and I believed that any chilling effect of prohibiting a person from acting in defiance of court orders was proper at law and required in an ordered democracy.

3. **In *Kennedy v. City of Cincinnati* (Jan. 19, 2009), you held that the right to access public swimming pools was a property interest within the meaning of the Fourteenth Amendment because the pools were “open to all persons who [did] not possess a disqualifying condition, and plaintiff [sic] having been an approved purchaser of a pool pass, [thus] plaintiff had a legitimate claim of entitlement to access the pools [sic] and not merely a unilateral desire for access.” The natural result is that, when a revocable license to enter property is granted by the government, it cannot be revoked without providing the licensee with notice and an opportunity to be heard. Do you believe that the Constitution requires notice and a hearing every time the government acts, according to its rights under a contract, in a way that deprives a party of a something he expected to gain from a contract? Please explain your answer.**

Response: No. According to Supreme Court precedent, which I am required to and do apply, procedural due process, including notice and an opportunity to be heard, must be afforded only if the state’s action will impinge upon a citizen’s fundamental right (not simply upon a contract right).

4. **During one of your campaigns for the Ohio Supreme Court, you referred to the seat held by the previous justice as “labor’s seat.” What did you mean by this statement?**

Response: I said “this is labor’s seat” while trying to motivate union members to work on my campaign. I meant that I wanted them to work on my campaign. I regret those four words, and I repudiated them promptly, because they did not reflect what I meant. I know that seats on courts do not belong to any special interest group.

5. **You also contended that unless a “progressive majority” remained on the Ohio Supreme Court, “the lights go out at the Supreme Court” for “working men and women” and for “school kids.”**

- a. **What did you mean by a “progressive majority”?**

Response: I was endorsed by progressive groups and, in a heated, political campaign, my rhetoric was aimed to those supporters. By progressive majority, I meant a Democratic-endorsed majority.

- b. **Your comment seems to suggest that, as a judge, you would be an advocate for particular litigants, namely “working men and women” and “school kids.” What is your view of the proper role of a judge?**

Response: The role of a judge is to decide each case with independence and impartiality, based solely on the evidence and the law, and certainly not to act as an advocate for particular litigants.

6. **As you may know, President Obama has described the types of judges that he will nominate to the federal bench as follows:**

“We need somebody who’s got the heart, the empathy, to recognize what it’s like to be a young teenage mom. The empathy to understand what it’s like to be poor, or African-American, or gay, or disabled, or old. And that’s the criteria by which I’m going to be selecting my judges.”

- a. **Without commenting on what President Obama may or may not have meant by this statement, do you believe that you fit President Obama’s criteria for federal judges, as described in his quote?**

Response: Yes, as I believe I am an understanding person. Yet I fully recognize that my role as a judge is to decide each case with independence and impartiality, based solely on the evidence and the law.

- b. **During her confirmation hearing, Justice Sotomayor rejected this so-called “empathy standard” stating, “We apply the law to facts. We don’t apply feelings to facts.” Do you agree with Justice Sotomayor?**

Response: Yes, I agree with Justice Sotomayor’s statement.

- c. **What role do you believe empathy should play in a judge’s consideration of a case?**

Response: I do not believe that empathy should play any role in a judge’s deciding of a case. Empathy is helpful to a judge only in communicating to all parties that their case will be decided impartially.

- d. Do you think that it's ever proper for judges to indulge their own subjective sense of empathy in determining what the law means?**

Response: No, I do not think it's ever proper for judges to indulge their own subjective sense of empathy in determining what the law means.

- i. Please identify any cases in which you've done so.**

Response: I have not done so.

- ii. If not, please discuss an example of a case where you have had to set aside your own subjective sense of empathy and rule based solely on the law.**

Response: I have always ruled solely on the evidence and law and therefore I have never had to set aside my own subjective sense of empathy. In my 16 years as a trial court judge, I have felt sorry for some people against whom I have ruled, but I have ruled against them, whenever the evidence and law required it.

- 7. Please describe with particularity the process by which these questions were answered.**

Response: I drafted my responses. I then finalized them, after discussing my drafts with representatives of the Department of Justice.

- 8. Do these answers reflect your true and personal views?**

Response: Yes.

Responses of Timothy S. Black
Nominee to the U.S. District Court for the Southern District of Ohio
to the Written Questions of Senator Charles E. Grassley

1. What is your view of the role of a judge?

Response: The role of the judge is to decide each case with independence and impartiality, based solely on the evidence and the law.

2. Do you believe it is ever appropriate for judges to indulge their own values in determining the meaning of statutes and the U.S. Constitution?

Response: No.

a. If so, under what circumstances?

Response: None.

b. Please provide an example of a case in which you have done so.

Response: I have not done so.

c. Please provide an example of a case where you have had to set aside your own values and rule based solely on the law.

Response: I rule solely on the evidence and the law, without consideration of my own values.

3. Do you believe it is ever appropriate for judges to indulge their own policy preferences in determining the meaning of statutes and the U.S. Constitution?

Response: No.

a. If so, under what circumstances?

Response: None.

b. Please provide an example of a case in which you have done so.

Response: I have not done so.

c. Please provide an example of a case where you have had to set aside your own policy preferences and rule based solely on the law.

Response: I rule solely on the evidence and the law, without consideration of my own policy preferences.

4. How do you define “judicial activism?”

Response: It is not a term I use, but I understand others to define it as conduct by a judge in deciding a case according to his or her own personal predilections and not based solely on the evidence and the law as required.

Responses of Timothy S. Black
Nominee to the U.S. District Court for the Southern District of Ohio
to the Written Questions of Senator Tom Coburn, M.D.

1. Since at least the 1930s, the Supreme Court has expansively interpreted Congress' power under the Commerce Clause. Recently, however, in the cases of *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000), the Supreme Court has imposed some limits on that power.

- a. Generally speaking, are *Lopez* and *Morrison* consistent with the Supreme Court's earlier Commerce Clause decisions?

Response: Yes.

- b. Why or why not?

Response: In *Gonzales v. Raich*, the Supreme Court indicated that its *Lopez* and *Morrison* decisions are consistent with earlier Supreme Court Commerce Clause decisions.

2. Some people refer to the Constitution as a "living" document that is constantly evolving as society interprets it. Do you agree with this perspective of constitutional interpretation?

Response: No.

3. In *Roper v. Simmons*, 543 U.S. 551 (2005), Justice Kennedy relied in part on the "evolving standards of decency" to hold that capital punishment for any murderer under age 18 was unconstitutional. I understand that the Supreme Court has ruled on this matter, but do you agree with Justice Kennedy's analysis?

Response: I am bound by the Supreme Court's rulings and I would apply Supreme Court law.

- a. How would you determine what the evolving standards of decency are?

Response: I would apply the analysis established by Supreme Court law.

4. At your hearing, I asked you whether, in your view, it is ever proper for judges to rely on contemporary foreign or international laws or decisions in determining the meaning of the Constitution. You answered "no," for which I commend you. However, in a couple of cases including *Roper v. Simmons*, and *Lawrence v. Texas*, 539 U.S. 558 (2003), a majority of the Supreme Court considered and cited foreign law in its majority opinion. Do you believe the majority was incorrect in these cases? Please explain.

Response: I am bound by the Supreme Court's rulings and would apply Supreme Court law. I do not believe it is proper for judges to rely on contemporary foreign or international laws or decisions to determine the meaning of the U.S. Constitution.

a. Do you believe foreign law has any bearing on a court's interpretation of the Eighth Amendment? What about any other amendments?

Response: No, I do not believe that foreign law has any bearing on a court's interpretation of the Eighth Amendment or any other amendments.