

**Responses of Thomas I. Vanaskie
Nominee to the U.S. Court of Appeals for the Third Circuit
to the Written Questions of Senator Orrin G. Hatch**

- 1. In a March 2009 speech, you advocated a judicial approach that, "by reason, attention to accumulated wisdom, and a sense of justice, the judiciary evolves the rules best suited to human needs and aspirations." This description is more suited to common law judges than federal judges. Each of the elements in that approach invite a judge to use his personal values, preferences, or opinions rather than the law. And the very notion that the judiciary evolves legal rules appears inconsistent with the role judges should play in our system of government. I understand that you made similar comments in other speeches dating back about a decade.**

a. Does this describe your judicial approach?

Response: I do not subscribe to an approach in which a judge uses personal values, preferences or opinions to decide cases. I stated in the March 2009 remarks, and on other occasions as well, that the proper approach to case adjudication is "intended . . . to assure that decisions are not based upon personal values or preferences, but are instead made according to law." My judicial approach was expressed during these remarks as one of "judicial restraint that recognizes that the Executive and Legislative Branches are in the best position to make policy judgments, provided [these co-equal branches of government] act within the constraints established by the Constitution." As I also stated in my March 2009 remarks to a local chapter of the Junior Statesmen Club of America, it is the responsibility of the judge to decide cases "according to law." I expressed my firmly held opinion that if judges decided cases "in accordance with individual value preferences, the rule of law is threatened." Consistent with my view of judicial accountability, I observed that judges have an obligation "to decide [cases] in accordance with a continuing body of principles found in accepted sources of law."

b. Please explain how these subjective elements are consistent with the judicial oath of impartiality and the duty to follow the law.

Response: I am of the belief that personal values, preferences and opinions play no role in judicial decision making, and that it is inconsistent with the judicial oath of impartiality and the duty to follow the law to allow personal predilections to influence judicial decision making.

2. **In your pair of decisions in the *Khouzam v. Hogan* case, you appear to endorse the notion that judges may consider decisions of foreign courts or practices in foreign countries in making decisions. You said that such factors are not binding but are relevant.**

- a. **Please explain the ways in which those foreign decisions or practices can be relevant to American judges deciding cases under American law.**

Response: As I indicated in the second of my opinions in the Khouzam case, courts in the United States may consider foreign decisions or practices as aids in interpreting a treaty ratified by the United States. In support of this proposition, I followed the Supreme Court's decision in Zicherman v. Korean Air Lines Co., 516 U.S. 217, 226 (1996), in which Justice Scalia, writing for the unanimous Court, observed:

Because a treaty ratified by the United States is not only the law of the land, see U.S. Const., Art. II, § 2, but also an agreement among sovereign powers, we have traditionally considered as aids to its interpretation the negotiating and drafting history (*travaux préparatoires*) and postratification understanding of the contracting parties.

In Khouzam, I found that the postratification understanding of parties to the Convention Against Torture (which has been ratified by the United States) was helpful in determining that diplomatic assurances may be sufficient to enable a contracting State to return an alien to a country despite a recent record of human rights abuses.

I also observed in Khouzam that although opinions of international tribunals and foreign courts may be relevant in considering whether certain actions violate fundamental interests, they are never controlling. Consideration of such sources is extremely rare. To the best of my recollection, Khouzam is the only case in which I considered such sources in more than fifteen years on the federal bench. In Khouzam, the fundamental interest in not being tortured was at stake, and there was no precedent in the United States addressing the right to a hearing on the reliability of diplomatic assurances. It was in this unique context that I believed it appropriate to consider foreign precedents for the limited purpose of confirming my conclusion that the law of the United States made the “‘inalienable human right’ to be free from torture . . . worthy of protection under the Due Process Clause.” It should be noted that Judges Marjorie O. Rendell, D. Brooks Smith, and D. Michael Fisher of the Court of Appeals for the Third Circuit agreed unanimously with this conclusion.

b. Do you believe that judges may use such foreign sources to determine the meaning of statutory or constitutional provisions?

Response: I do not believe that judges may use foreign sources to determine the meaning of statutory or constitutional provisions. In the exceptional case where the Supreme Court has referenced non-U.S. law in a majority opinion, it has done so only to confirm conclusions reached under American law or to refute assertions made by a party, and those were the limited purposes for which I made reference to foreign law in Khouzam. Judges should follow the Supreme Court's restraint on this issue.