

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

1. **At your hearing, I asked you about remarks you made in 2007 regarding the use of foreign law. You stated that your remarks were “from an academic perspective and was just suggesting a type of argument that may be made.”**

In *Khouzam v. Hogan*, 529 F. Supp. 2d 543 (M.D. Pa. 2008), the Secretary of State had received diplomatic assurances from the Egyptian government that an Egyptian man who had fled to the U.S. would not be tortured if returned. In your analysis of whether he had a due process right to challenge the assurances, you stated:

“[a]lthough the opinions of international tribunals and courts of other countries have no binding effect in the United States, they are nonetheless often viewed as relevant in determining whether certain actions in the United States violate fundamental interests.”

You then cited *Lawrence* and *Roper* as examples of this practice.

- a. **Can you explain how the opinions of foreign courts were “relevant in determining whether certain actions in the United States violate fundamental interests” in this case?**

Response: I believed that the opinions of foreign courts were relevant to the question of whether an opportunity to be heard on the reliability of diplomatic assurances would impair the foreign relations prerogative of the executive, and whether meaningful standards could be developed to assess such assurances. I considered the decisions of tribunals of other nations who, like the United States, had ratified the Convention Against Torture. Earlier in my opinion, I found that the postratification understanding of parties to the Convention Against Torture 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. In support of the proposition that citation to such authority was appropriate, 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 poststratification understanding of the contracting parties.

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. **In your speech, you stated that the Court reached its decision in *Roper* “because of the overwhelming international consensus prohibiting this practice.” Did you reach your decision in this case “because of the overwhelming international consensus” that persons subject to transfer have a right to challenge the diplomatic assurances?**

Response: I did not reach my decision in Khouzam because of any international consensus that persons subject to removal and who have shown that they are likely to be tortured are entitled to an opportunity to challenge the reliability and sufficiency of diplomatic assurances that torture will not occur. My decision was firmly rooted in the law of the United States, as confirmed by the unanimous ruling of the Court of Appeals that the Due Process Clause did require that the alien be accorded such an opportunity. Having reviewed anew the Roper decision, my notes for my lecture were plainly in error in stating that the Court reached its decision in Roper *because of* overwhelming international consensus. It is my understanding that the Supreme Court has cited foreign sources for the purpose of confirming a conclusion reached under the law of the United States, which was the purpose for which I cited foreign sources in Khouzam.

- c. **In a speech delivered this year, you stated: “I also propose that the rule of law is best preserved by a model of judicial restraint that the executive and legislative branches are in the best position to make policy judgments.” Do you believe your opinions in *Khouzam* embodied judicial restraint?**

Response: I do believe that the opinions were faithful to this model of judicial restraint. I concluded that Congress had intended to afford impartial review of

claims for relief under the Convention Against Torture, and that executive branch agencies could not override the congressional determination. I based my decision on a careful review of the applicable legislation and judicial precedents. With respect to the due process determination, I noted that ultimately it is the responsibility of the courts to decide whether the interests at stake are worthy of some opportunity to be heard. I cited an 1852 decision, in which the Supreme Court stated:

Public opinion ha[s] settled down to a firm resolve ... that so dangerous an engine of oppression as secret proceedings before the executive, and the issuing of secret warrants of arrest founded on them, ... and then, an extradition without an unbiased hearing before an independent judiciary, were highly dangerous to liberty and ought never to be allowed in this country.

In re Kaine, 55 U.S. 103, 113, 14 How. 103, 14 L.Ed. 345 (1852). I did not prescribe any particular process that was due, but left that matter for the executive branch agencies to decide.

2. **During your hearing, you testified: “I do think however that when it comes to treaty obligations, a common source of treaty obligations can be how other member nations have applied certain provisions.” You then cited your decision in *Khouzam* as an example.**

- a. **Do you believe there is a distinction between your utilization of international law in *Khouzam* and the Supreme Court’s reliance on foreign law in *Lawrence* and *Roper* and, in your words, the “overwhelming international consensus” prohibiting a particular practice? If so, please explain the distinction.**

Response: I believe there is a distinction between my utilization of international law in Khouzam and the Supreme Court’s use of foreign law in Lawrence and Roper. In Khouzam, I cited international law to assist in interpreting and applying the Convention Against Torture. In particular, I considered the practice of other nations that had ratified the Convention Against Torture in determining that diplomatic assurances could be relied upon to return an alien to a country despite that country’s recent record of human rights abuses. I also considered the practice of other nations in determining that giving an alien, who had demonstrated a probability of torture, a right to challenge the reliability and sufficiency of diplomatic assurances before an impartial adjudicator was consistent with the Convention Against Torture. Neither Roper nor Lawrence involved the obligations of the United States under an international treaty ratified by the United States.

- b. **During your hearing, I asked you whether a U.S. Federal judge was free to survey world opinion and foreign law as it examines domestic statutes.**

You answered: “no, I don’t think that if I feel a law is unjust that I could look around to see how that particular matter has been handled by other foreign nations.” Do you believe the Supreme Court considered foreign law in *Lawrence* and *Roper*?

Response: I believe the Court in Lawrence and Roper considered the view of foreign nations as expressed in their laws and judicial decisions.

- c. If so, do you believe the Supreme Court’s consideration of foreign law in *Lawrence* and *Roper* was appropriate?**

Response: I believe that foreign law is not controlling on any issue arising under the law of the United States. My understanding is that the Supreme Court did not give such effect to foreign laws in Lawrence or Roper.

- 3. 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, what is your opinion with respect to President Obama’s criteria for federal judges, as described in his quote?**

Response: I believe that it is important to appoint impartial, competent, and fair judges, and that qualified nominees should be drawn from all cultural and socio-economic backgrounds.

- b. In your opinion, do you fit President Obama’s criteria for federal judges, as described in the quote?**

Response: Neither of my parents completed high school. My father was a bricklayer, and my mother was a factory worker. They raised seven children under tough economic circumstances. I do not know whether those circumstances played any role in my selection.

- c. During her confirmation hearings, Justice Sotomayor rejected President Obama’s 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.

- d. **What role do you believe that empathy should play in a judge's consideration of a case?**

Response: I believe that empathy should not play a role in judicial decisions.

- e. **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. **If so, under what circumstances?**

Response:

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

Response:

- iii. **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 sentenced a defendant to a mandatory minimum prison term after he refused to provide information that would have directly implicated his brother, even though he had provided substantial assistance that resulted in the prosecution of others, who were able to implicate his brother directly. I was bound to impose the mandatory prison term because the government did not file a motion for a departure under the appropriate statute.

4. **What in your view is the role of a judge?**

Response: The role of a judge is to be an impartial adjudicator who provides a full and fair opportunity for the litigants to be heard, and then decides the case based on the facts and the law with a clearly reasoned explanation of the decision rooted in the text of the law, logic, and precedent.

5. **Do you think it is ever proper for judges to indulge their own values in determining what the law means?**

Response: No.

- a. **If so, under what circumstances?**

Response:

- b. Please identify any cases in which you have done so.**

Response:

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

Response: I cannot cite such a case because personal values are not part of my decision making process.

- 6. Do you think it is ever proper for judges to indulge their own policy preferences in determining what the law means?**

Response: No.

- a. If so, under what circumstances?**

Response:

- b. Please identify any cases in which you have done so.**

Response:

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

Response: Prior to Booker and Kimbrough, I routinely sentenced defendants charged with crack cocaine offenses within the guidelines imprisonment range determined on the basis of a ratio of 1 gram of crack cocaine to 100 grams of powder cocaine, even though my policy preference would have been to abandon that particular ratio as recommended by the United States Sentencing Commission in several studies.

- 7. How would you define “judicial activism?”**

Response: I believe that a decision is a product of judicial activism when it does not give proper deference to the policy decisions of Congress and the Executive Branch, and is not made in accord with the discipline of judicial decision making, paying close attention to the language of the document under consideration, the evident purposes of the instrument, its structure and history, as well as relevant judicial precedents.

- 8. 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: I do not agree with this perspective of constitutional interpretation. The words, purposes, and structure of the Constitution are fixed. The Constitution is to be interpreted as a document intended to be enduring, and that objective is met by paying careful attention to its text, purpose, structure, history, and Supreme Court interpretations of its provisions. If confirmed, I will continue to defend, obey, and bear true faith and allegiance to the Constitution, as I have endeavored to do as a District Judge, by adhering to controlling precedent and applying the Constitution's provisions to new contexts by careful attention to its text, structure, purpose, history, and analogous precedents of the Supreme Court.

9. Please describe with particularity the process by which these questions were answered.

Response: I pursued the same process I followed in preparation for the confirmation hearing. I reviewed my remarks and the opinions that are the subjects of questions. I undertook some research. I drafted the responses, and forwarded them to the Department of Justice. I discussed the draft responses with representatives of the Department of Justice. I then finalized my responses.

10. Do these answers reflect your true and personal views?

Response: Yes