

Responses of Gershwin A. Drain
Nominee to be United States District Judge for the Eastern District of Michigan
to the Written Responses of Senator Chuck Grassley

1. During the hearing I asked you if you agreed that the sentence a defendant receives for a particular crime should not depend on the judge he or she happens to draw. You whole heartedly agreed with this statement. I then asked if you were willing to sentence an elderly person and a young person to the same amount of time and you paused and said “probably.” I would like you to clarify your position on this issue.

a. All other factors being equal, would you sentence an elderly individual differently than a young individual, if each committed the same offense? Why or why not?

Response: As a general matter, no. Age is an extremely rare sentencing consideration, but there might be some cases in which the defendant’s age would be relevant to the appropriate sentence under the applicable statutes and sentencing guidelines.

2. Do you believe the fact that taxpayers pay for a defendant’s incarceration is a relevant factor when deciding on an appropriate sentence?

Response: No.

3. Senator Lee asked you about some of the articles you have written regarding the death penalty. You said that you have changed your positions on the death penalty over the years.

a. Is there any doubt in your mind that the death penalty is constitutional?

Response: No. The Supreme Court has made clear that the death penalty is constitutional.

b. Would you be able to apply the death penalty, if confirmed?

Response: Yes.

4. You told Senator Lee that you would be able to follow the precedent established in *Heller* and *McDonald* regarding Second Amendment and the rights it affords.

a. You wrote that you “envision a day when the National Rifle Association with its lobby will not be feared, and that legislators and congressmen will stand up strong against them instead of bowing to them.” Do you still hold this view?

Response: No. My statement almost 20 years ago was based on an erroneous perception of the NRA's influence. In addition, I was using an exaggerated metaphor to make a rhetorical point, but on reflection I should have chosen my words more carefully.

- b. Considering you have made statements like these, do you believe you will be able to impartially handle any case that comes before you where the NRA or any of its supporters are involved?**

Response: Yes. My personal beliefs, both past and present, have no bearing on the decisions I make in court.

- 5. I asked you a question about applying a sentence required by law even when you did not personally agree with it. You responded, "The fact that I wrote some side comments about it, about my personal feelings, which really, really shouldn't have anything to do with my decision-making, is really kind of irrelevant or unimportant to me." Can you please explain what you meant by this statement?**

Response: My personal feelings about sentencing in a particular case should have no bearing on the sentence to be imposed. I am committed to following the law that governs sentencing whether there is a mandatory sentence, a mandatory minimum, or a guidelines system.

- 6. What is the most important attribute of a judge, and do you possess it?**

Response: I believe that impartiality is the most important attribute of a judge. A judge must apply the law impartially and treat everyone equally regardless of their status and situation in life. When people see a judge acting impartially they feel that the system is fair and they have confidence in the process and in having their day in court.

- 7. Please explain your view of the appropriate temperament of a judge. What elements of judicial temperament do you consider the most important, and do you meet that standard?**

Response: Having a good judicial temperament is essential to being a good judge. A judge must be calm, patient and exercise self-control. The judge must be a good listener. A judge should be humble, respectful, courteous, diligent, decisive and prepared. A judge should always operate with integrity and impartiality. Essentially, judges should treat people the way they want to be treated. Judges should not lose their temper in the courtroom and they should not make fun of the parties or lawyers, nor demean or denigrate people. I believe that I meet the standard and I always try to maintain good courtroom demeanor.

- 8. In general, Supreme Court precedents are binding on all lower federal courts and Circuit Court precedents are binding on the district courts within the particular circuit. Are you committed to following the precedents of higher courts faithfully and giving them full force and effect, even if you personally disagree with such precedents?**

Response: Yes.

- 9. At times, judges are faced with cases of first impression. If there were no controlling precedent that was dispositive on an issue with which you were presented, to what sources would you turn for persuasive authority? What principles will guide you, or what methods will you employ, in deciding cases of first impression?**

Response: If I was faced with a case of first impression and there were neither Supreme Court precedent nor Sixth Circuit precedent, I would first look to the other Circuits to see if there was a decision on point. If I still found none, I would look at the other District Courts to see if any had encountered the issue. If nothing could be found on point in a published opinion, I would look for federal unpublished cases. If I found nothing on point I would look for cases addressing analogous situations, starting with the Supreme Court. If faced with a question of first impression of statutory interpretation, I would begin with the plain meaning of the text, the structure of the statute as a whole and the applicable canons of statutory construction.

- 10. What would you do if you believed the Supreme Court or the Court of Appeals had seriously erred in rendering a decision? Would you apply that decision or would you use your best judgment of the merits to decide the case?**

Response: I would apply all prior decisions made by the Supreme Court or the Court of Appeals even if I thought they had eroded.

- 11. Under what circumstances do you believe it appropriate for a federal court to declare a statute enacted by Congress unconstitutional?**

Response: Courts are to give great deference to laws enacted by legislators. It should be an extremely rare occasion for a court to declare a law unconstitutional. In addition to that, if there is any binding precedent on the issue it must be followed.

- 12. As you know, the federal courts are facing enormous pressures as their caseload mounts. If confirmed, how do you intend to manage your caseload?**

Response: I currently have a docket of over 900 civil cases. Shortly after a case is filed, I have a status conference where the case is put on one of three tracks,

depending on its complexity. Each track has a deadline for filing a witness list, for concluding discovery and for setting a month for case evaluation. Case evaluation is a stage where three lawyers evaluate a case and put a value on the case. Roughly six weeks after that I hold a settlement conference. If the case does not settle after exhaustive discussions I set a trial date on the case. If I were to become a District Judge I would seek to use a similar procedure, as adopted for the federal system. I would also consult with my colleagues and with other federal judges to identify ways to further improve my case management. One of the most important elements in docket management is having firm trial dates and sticking to those dates.

- 13. Do you believe that judges have a role in controlling the pace and conduct of litigation and, if confirmed, what specific steps would you take to control your docket?**

Response: Judges play the most important part in controlling the pace and conduct of litigation. Judges must meet with the parties early and often to keep cases moving forward toward resolution. I would employ the procedure mentioned in response to question 12 in addition to fully utilizing the resources available to federal judges, like the law clerks and magistrates.

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

Response: I prepared my own answers and discussed them with the Department of Justice staff and then submitted them.

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

Response: Yes.

Responses of Gershwin A. Drain
Nominee to be United States District Judge for the Eastern District of Michigan
to the Written Questions of Senator Amy Klobuchar

- 1. If you had to describe it, how would you characterize your judicial philosophy? How do you see the role of the judge in our constitutional system?**

Response: As a trial judge my judicial philosophy is to closely follow and apply the law that is set forth in statutes, and to follow the case law found in precedents pronounced by higher courts. The judicial branch, along with the executive and legislative branches form the three equal branches of government. The judicial branch interprets and applies the law in cases and controversies, whereas the executive enforces the law and the legislature creates or modifies the law.

- 2. What assurances can you give that litigants coming into your courtroom will be treated fairly regardless of their political beliefs or whether they are rich or poor, defendant or plaintiff?**

Response: I am totally committed to treating all those who would come before me impartially and fairly and I have endeavored to do that for the 25 years I have been a judge. I believe that all political and personal beliefs must be checked at the courthouse door and that when coming onto the bench a judge must be neutral and unbiased in all matters.

- 3. In your opinion, how strongly should judges bind themselves to the doctrine of stare decisis? How does the commitment to stare decisis vary depending on the court?**

Response: All judges should be thoroughly committed to the principle of stare decisis. A judge must completely adhere to and abide by controlling precedent from higher courts. Stare decisis creates stability and predictability in the law for the litigants.

Responses of Gershwin A. Drain
Nominee to be United States District Judge for the Eastern District of Michigan
to the Written Questions of Senator Jeff Sessions

1. **In a 1985 Letter to the Editor of the *Detroit News* entitled “Death Penalty Brands Society,” you wrote: “The death penalty is primitive punishment that is brutal and barbaric. Advanced, mature societies should engage in punishment and not vengeance as a way of dealing with crime.” When asked about these statements at your hearing, you testified: “It would not affect my being a judge. The article was written over 30 years ago. I no longer hold to that position. My views about the death penalty have been evolving and changing. I no longer believe that. I was a pretty young zealous defense lawyer in those days and am now older and more mature and no longer subscribe to that.” Senator Lee then asked, “So, your views have evolved?”, and you answered “Yes.” What are your views of the death penalty today?**

Response: I believe that the death penalty is an acceptable and appropriate form of punishment. The United States Supreme Court has so held and I would faithfully apply that precedent.

2. **Do you believe that the death penalty constitutes cruel and unusual punishment under the Constitution? Please explain your answer.**

Response: No. Again the United States Supreme Court has held that it is not and I have no problem following and abiding by that law.

3. **Do you believe that the death penalty is an acceptable form of punishment? Please explain your answer.**

Response: Yes. The federal government and most of the states have decided through their legislatures and constitutions that the death penalty is an acceptable form of punishment, and the Supreme Court has agreed that it is constitutional.

4. **Do you believe that the death penalty is a deterrent? Please explain your answer.**

Response: Yes. I believe it is a deterrent. When people see the severity of the punishment inflicted and know of its existence it will serve to deter and prevent conduct that would bring the death penalty.

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

Response: I first prepared my answers, then discussed them with an attorney with the Department of Justice and then submitted them.

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

Response: Yes.

Responses of Gershwin A. Drain
Nominee to be United States District Judge for the Eastern District of Michigan
To the Written Questions of Senator Mike Lee

- 1. During the hearing, in response to my question regarding your published statement that “the death penalty is primitive punishment that is brutal and barbaric,” you said that your “views about the death penalty have been evolving and changing.” Could you please articulate what your current views on the death penalty are?**

Response: My current views on the death penalty are that it is acceptable and appropriate and the United States Supreme Court has so held. If confirmed, I will apply the death penalty in appropriate cases consistent with this precedent.

- 2. During the hearing, I asked about some negative statements you made about Justice Clarence Thomas in a 1998 Michigan Chronicle article. In response, you suggested that you met Justice Thomas “some time” after writing the article, when he came to present the Devitt Award to Judge Keith, and that this meeting helped you gain a good deal of respect for him. In the Michigan Chronicle article, however, you specifically mention that meeting between Judge Keith and Justice Thomas, suggesting that the article was actually written *after* you had met Justice Thomas.**

- a. Did the personal meeting you mentioned in your testimony occur before you wrote the article in the Michigan Chronicle?**

Response: Yes. After looking back, I realized that the meeting did take place before I wrote the article. These events took place 14 years ago and were not fresh in my mind at the time of the hearing. I apologize for this mistake, and my intention was not to misconstrue the events.

- b. If so, would you please explain why, after a meeting in which you claim to have gained such respect for the Justice, you would then write inappropriate remarks about him in a public forum?**

Response: I regret my poor choice of words and I apologize for comments made about Justice Thomas. In hindsight, they were inappropriate. In meeting Justice Thomas I did gain tremendous respect for him personally. Justice Thomas is truly an American success story. He pulled himself up from very humble beginnings to become a United States Supreme Court Justice, which is an inspiration to anyone. At the time I wrote the article, my thoughts about some of his civil rights views clouded my judgment which led to those inappropriate comments. Notwithstanding any view I might have about any Supreme Court Justices, I would faithfully apply all Supreme Court precedent if I were confirmed to be a District Court Judge.

- 3. How would you describe your judicial philosophy?**

Response: As a trial judge my judicial philosophy is to closely follow and apply the law that is set forth in statutes, and to follow the case law found in precedents pronounced by higher courts. My role is not to try to enforce the law or create, modify or change it. Those are things that are reserved for the executive and legislative branches.

a. To what sources would you look in deciding a case that turned on interpretation of a federal statute?

Response: In deciding a case that turned on the interpretation of a federal statute, I would first do a thorough review of the statute and try to decide what the language of the statute says and means. I would then look at cases that had previously dealt with the statute both at the Supreme Court level and the Sixth Circuit Court of Appeals. If I needed to, I would then look to see if another Circuit Court of Appeals or District Court had interpreted the statute. If there was nothing on point then I would look for analogous cases.

b. To what sources would you look in deciding a case that turned on interpretation of a constitutional provision?

Response: In deciding a case that turned on the interpretation of a constitutional provision, I would first do a thorough review of the constitutional provision and try to decide what the language of the provision meant. I would then follow the procedure outlined in question 3a.

4. In your view, what are the constitutional requirements for standing and how robustly should those requirements be applied to novel assertions of standing?

Response: The Constitutional requirements for standing are injury, causation and redressability, *Allen v. Wright*, 468 U.S. 737 (1984). The Supreme Court has made clear that these requirements should be robustly applied in all cases.

5. What role do the text and original meaning of a constitutional provision play in interpreting the Constitution?

Response: The text and original meaning of a Constitutional provision play perhaps the most important role in interpreting the Constitution. They are the starting point for any analysis of a Constitutional issue.

6. Do you believe that Congress has implied powers beyond those enumerated in the Constitution?

Response: No, although the Constitution grants Congress powers to pass unspecified laws that are “necessary and proper” for the exercise of its expressed powers, Article I, Section 8, Clause 18.

- a. **If so, which ones? And which provisions of the Constitution account for these implicit rights?**

Response: Please see previous answer.

- b. **If not, how would you approach the multitude of legislation that Congress has enacted without reference to an appropriate authorizing provision of the Constitution?**

Response: In any case in which Congress's power to enact a law was challenged, I would carefully review the relevant provisions of the Constitution and the applicable precedents from the Supreme Court and the Sixth Circuit to determine whether the law was within an appropriate authorizing provision of the Constitution.

- i. **Would you strike down laws not properly authorized by the Constitution?**

Response: Yes.

7. **Do you believe that the Constitution protects rights not specified in the Constitution?**

Response: No.

- a. **Do you believe that the Constitution provides for a right of privacy?**

Response: The Supreme Court has so held in a line of cases, including *Griswold v. Connecticut*, 381 U.S. 479 (1965). The Supreme Court has also held that the Fourth Amendment protects certain privacy interests in cases including *Katz v. United States*, 389 U.S. 347 (1967).

- b. **If so, which provision of the Constitution provides for that right?**

Response: In *Katz* the Supreme Court held that the Fourth Amendment protects certain privacy interests. In *Griswold* and other cases the Court held that the right of privacy is in one of the liberty interests protected by the Due Process Clause of the Fifth and Fourteenth Amendments.

8. **Do you believe there the Constitution provides for substantive due process—that is to say, that the Constitution does not allow the government to infringe certain fundamental rights regardless of the procedural guarantees that might be afforded?**

Response: Yes. The Supreme Court has so held and I would be bound to apply that precedent.

- a. **Which do you believe are protected under substantive due process?**

Response: I have not analyzed this area of constitutional law so as to form an opinion or belief as to the extent of substantive rights that are protected under the Due Process Clause.

- b. If you believe such rights are protected, is it also your belief that *Lochner v. New York*, 198 U.S. 45 (1905) was correctly decided and should be the state of the law? *Lochner*, to paraphrase, was a case in which the Court held unconstitutional a New York statute that prohibited employment of bakery employees for more than 10 hours a day or 60 hours a week.**

Response: I do not feel it is my position to decide whether or not *Lochner v. New York* was correctly decided. If confirmed as a District Court Judge it would be my obligation to follow and apply current Supreme Court precedent.

- c. If you believe substantive due process protects some personal rights such as a right to abortion, but not economic rights such as those at stake in *Lochner*, on what basis do you distinguish these types of rights for constitutional purposes?**

Response: I have not analyzed this area of constitutional law to be able to distinguish the differences between personal rights and economic rights for constitutional purposes.

- 9. In the case of the Commerce Clause, apart from circumstances present in *Lopez* and *Morrison*, what are the limits on Congress's Commerce Clause power?**

Response: One of the limits on Congress's Commerce Clause power is the Tenth Amendment, which provides for state sovereignty.

- a. Do you believe that Congress has at any time overstepped its authority under that provision since *Wickard*, other than in *Lopez* and *Morrison*?**

Response: I have not researched nor analyzed the law since *Wickard* as to whether Congress has overstepped its authority under the Commerce Clause.

- 10. How would you go about determining whether a group of persons is a "suspect class," such that laws affecting that group should receive strict scrutiny?**

Response: The Supreme Court has held that race, alienage, and national origin are suspect classifications and that laws that discriminate based on those characteristics deserve strict scrutiny. *Loving v. Virginia*, 388 U.S. 1 (1967); *City of Cleburne v. Cleburne Living Center*,

Inc., 473 U.S. 432 (1985). The Court has also held that laws that discriminate based on gender or against non-marital children are subject to heightened scrutiny.

11. Under what circumstances do you think it proper for a court to conclude that Congress has delegated legislative power to the executive branch in violation of the Article I of the Constitution?

Response: I have not analyzed or researched this area of constitutional law to determine when it's proper for a court to conclude that Congress has delegated legislative power to the executive branch in violation of Article I of the Constitution.

12. How would you describe the role that checks and balances and separation of powers play in the Constitution's structure?

Response: The Constitution established three separate branches of government, the Legislative branch, the Executive branch and the Judicial branch. The Constitution ensures that each branch serves to check the power of the other two branches of government.

a. How would you go about deciding a case in which one branch assumed an authority not granted it by the text of the Constitution?

Response: I would closely scrutinize the constitutional language and would also apply any relevant precedent from the Supreme Court and the Sixth Circuit.

b. What is your understanding of the Recess Appointments Clause?

Response: The Recess Appointments Clause of the Constitution allows the President to make temporary appointments to fill "vacancies that may happen during the recess of the Senate."

i. To what sources would you look in interpreting that clause?

Response: I would look to the same sources that I would consider in deciding any other constitutional issue, including the text of the Constitution and the applicable precedents of the Supreme Court and Sixth Circuit.

ii. Which branch should determine whether the Senate is in recess?

Response: Because there is litigation currently pending on this issue, I believe it would be inappropriate for me to express a view.

iii. In the event of a dispute, how you would you determine whether the Senate is in recess? Would you employ a functionalist approach, and if so, why?

Response: Because there is litigation currently pending on this issue, I believe it would be inappropriate for me to express a view.

13. What legal experience do you think is necessary for a person to make a good federal judge and what have you done to gain this experience?

Response: The legal experience necessary for a person to be a good United States District Court Judge is to have extensive judicial experience in both criminal and civil cases, because that's the lion's share of the work of a District Court Judge. To gain that type of experience I spent 12 years (1974-1986) at the Federal Defender's Office, where I handled probably 8-10 jury trials a year. One of those trials was a drug conspiracy trial that lasted six weeks. While in that office I also argued a number of my cases before the Sixth Circuit Court of Appeals. As a state court judge I handled criminal matters for 13 years (1987-2000) that consisted of murder, robbery, rape, drugs, assaults, thefts, weapons violations, breaking and entering, essentially the whole gamut of state crimes. In 2000 I moved from the criminal division to the civil division and have handled solely civil matters to the present. The monetary limit is \$25,000 and above. In this division I have handled personal injury cases, contract cases, cases involving property disputes, malpractice (legal and medical), civil rights cases, employment cases, and a host of other types of cases that involved money or property. Over the 25 years I have conducted hundreds of jury trials and hundreds of non-jury trials and dealt with all the issues and motions that accompany them.

14. What role should empathy play in a judge's consideration of a case?

Response: A case must be decided based on the facts and the law that applies to the case. For the last 25 years as I have handled jury trials, one of the standard jury instructions that I give is to tell the jury that they are not to decide the case based on sympathy for any of the parties. The same standard applies to judges.

Responses of Gershwin A. Drain
Nominee to be United States District Judge for the Eastern District of Michigan
to the Written Questions of Senator Tom Coburn, M.D.

- 1. 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.

- a. If not, please explain.**

Response: The Constitution changes only through the amendment process that is set forth within the Constitution itself.

- 2. Do you believe judicial doctrine rightly incorporates the evolving understandings of the Constitution forged through social movements, legislation, and historical practice?**

Response: No.

- a. If not, please explain.**

Response: The Constitution does not change through social movements, historical practice or legislation. Again, it changes only through the amendment process that is set forth within the Constitution itself.

- 3. What principles of constitutional interpretation would you look to in analyzing whether a particular statute infringes upon some individual right?**

Response: In analyzing whether any particular statute infringes upon a Constitutional right, I would look to United States Supreme Court precedent to resolve the question. If there was no controlling precedent from the Supreme Court, I would then look to case law from the Sixth Circuit.

- 4. In a column entitled “I have a dream of nonviolence,” you said you look “forward to a time when a person with a gun will be viewed as a coward or chicken.” Senator Lee asked you about this article and your views on Second Amendment rights, but I would like to ask you some additional questions.**

Response: My statement in that 1994 column was meant to cover a very limited situation. I had no intent to discuss the Second Amendment or the Constitutional right to bear arms. As a trial judge in the City of Detroit I saw so many situations where arguments erupted on the street and in other public places or at some other place than at home. Instead of a fist fight young people would go for a gun and there would be a senseless shooting. When I referenced “a coward or chicken” I was thinking about situations where instead of using fists young people in my city unnecessarily resorted to guns. That was the context of my statement.

- a. **In your opinion, why do you think our founders included this right as the second in its list of amendments?**

Response: I believe that the founders included this right as the second in its list of amendments because of its significance and importance.

- b. **The U.S. Supreme Court held in *District of Columbia v. Heller*, 554 U.S. 570 (2008), that the Second Amendment of the United States Constitution “protects an individual right to possess a firearm unconnected to service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home.” As Justice Scalia’s opinion in *Heller* pointed out, Sir William Blackstone, the preeminent authority on English law for the Founders, cited the right to bear arms as one of the fundamental rights of Englishmen. Leaving aside the *McDonald v. Chicago* decision, do you personally believe the right to bear arms is a fundamental right?**

Response: Yes. *Heller* and *McDonald* make clear that the Second Amendment protects a fundamental right.

- c. **Do you believe that explicitly guaranteed substantive rights, such as those guaranteed in the Bill of Rights, are also fundamental rights? Please explain why or why not.**

Response: Yes. With a few exceptions, the Supreme Court has held that the rights enumerated in the Bill of Rights are fundamental rights that apply against the states under the 14th Amendment.

- d. **Is it your understanding of Supreme Court precedent that those provisions of the Bill of Rights that embody fundamental rights are deemed to apply against the States? Please explain why or why not.**

Response: Yes. The United States Supreme Court has held that most of the provisions of the Bill of Rights protect fundamental rights and are therefore applicable to the states through the 14th Amendment.

- e. **The *Heller* Court further stated that “it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right.” Do you believe that the Second Amendment, like the First and Fourth Amendments, codified a pre-existing right? Please explain why or why not.**

Response: Yes. The Supreme Court has said that the Second Amendment codified a pre-existing right.

- f. **What limitations remain on the individual Second Amendment rights now that the amendment has been incorporated against the States?**

Response: The Supreme Court in *District of Columbia v. Heller*, 554 U.S. 570 at

626 (2008) said “nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.”

5. **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 and you are obliged to follow it, but do you agree with Justice Kennedy’s analysis?**

Response: I do not believe I can give an opinion on that question except to say that the *Roper* case is Supreme Court precedent and I, as a lower court judge, would be obligated to follow it.

- a. **When determining what the “evolving standards of decency” are, justices have looked to different standards. Some justices have justified their decision by looking to the laws of various American states, in addition to foreign law, and in other cases have looked solely to the laws and traditions of foreign countries. Do you believe either standard has merit when interpreting the text of the Constitution?**

Response: If confirmed as District Court Judge I would not look at either of those standards and would be bound by decisions of the United States Supreme Court and the decisions of the Sixth Circuit Court of Appeals.

- i. **If so, do you believe one standard more meritorious than the other? Please explain why or why not.**

Response: I do not feel it is my position to evaluate standards used by the United States Supreme Court. Whatever measure they use in evaluating and deciding a case, I must abide by it.

6. **In your view, is it ever proper for judges to rely on foreign or international laws or decisions in determining the meaning of the Constitution?**

Response: As a District Court Judge it would not be appropriate for me to rely on foreign or international law in determining the meaning of the United States Constitution.

- a. **If so, under what circumstances would you consider foreign law when interpreting the Constitution?**

Response: As a District Court Judge I would never use foreign law when interpreting the Constitution.

- b. **Do you believe foreign nations have ideas and solutions to legal problems that could contribute to the proper interpretation of our laws?**

Response: Foreign nations may or may not have ideas or solutions that might be helpful to legislators, but as a judge I would not look to those sources in interpreting U.S. law.

7. As a judge, have you ever presided over a death penalty case? If so, please provide a summary of and citations for these cases.

Response: I have never presided over a death penalty case because we do not have the death penalty in the State of Michigan. In fact, there is a Michigan Constitutional provision that specifically prohibits the legislature from enacting any law that would impose the death penalty.

a. As an attorney, did you ever represent a defendant who could receive the death penalty as a sentence? If so, please provide a summary of and citations for these cases.

Response: When I practiced law for 12 years at the Federal Defender's Office I never represented a defendant who could have received the death penalty.

8. You wrote, "One of my unpleasant tasks on occasion is to impose mandatory sentences." When asked about this statement at your hearing, you stated: "A lot of times when I imposed a mandatory sentence I didn't do it with any type of joy or happiness. It was something that was hard to do." And, you said, "in dealing with mandatory sentences sometimes ... I would rather do something different." You also testified, "to have mandatory sentences is difficult to deal with and to handle cases in an equitable fashion. They just present some, like I said, very difficult situations." You also have written, "[w]e need to trust our judiciary and give judges discretion to impose the sentence they feel is appropriate." Given the dozens if not hundreds of mandatory minimums in federal law and your obvious aversion to imposing those sentences, why do you want to be a federal judge?

Response: In the 25 years of my judicial career, 13 of which were in criminal court, I have handled several thousand cases. In Michigan there are many mandatory minimum sentences and it was only in a small percentage of the cases that I heard where I felt the mandatory minimum sentence was too harsh. Most of the time I felt the mandatory sentence was appropriate. I believe that personal feelings should not be considered when sentencing and I am committed to following the mandatory sentences in federal court if I am confirmed. I enjoy serving as a judge and am deeply honored to be considered to serve on the federal bench.

a. You specifically noted in your testimony that, in certain cases such as "aiding and abetting" and "conspiracy" cases, "people who do very little toward the commission of a crime are treated just as though they were the major offender or the shooter." 18 U.S.C. §2 states: "Whoever commits an offence against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal." Do you believe Congress was wrong when it enacted this statute?

Response: No. I believe that Congress was very wise in enacting that statute. Many times “drug kingpins” do very little in a major drug operation and insulate themselves from direct contact with narcotics and aiding and abetting and conspiracy are sometimes the only way that the “kingpins” can be reached.

- i. Do you believe it is the role of a judge to question the law the legislature makes?**

Response: No.

- ii. Do you believe a judge who issues a mandatory sentence as directed by the legislature is not handling a case in an “equitable fashion?”**

Response: No.

- iii. Given that you made many of the statements about your aversion to mandatory minimums as a sitting judge and your statement in one case that you were “looking for any reason to be lenient,” do you believe a victim could perceive your statements as showing empathy towards defendants?**

Response: No. My sentences are based on the law and the circumstances of each case, in that sometimes there are reasons consistent with the law to impose a lesser sentence, and in other cases I have not hesitated to impose a harsh sentence. It is important for a judge to understand the impact of crime on crime victims.

- iv. If, based on your statements, a victim might believe you were empathetic towards defendants in some cases, do you believe it was appropriate to make these statements?**

Response: My statements do not reflect inappropriate empathy for defendants.

- 9. When asked what you meant when you stated, “it does not make sense to keep people in prison during their later years when the crime-committing period is over,” you stated, “the older a person gets, I think the less likely they are to commit crime.” And, when asked whether you are willing to sentence an older person to the same amount of time as a younger person for a similar crime, you were uncertain and merely answered “probably.” How much weight would you give to the age of the defendant when determining the sentence?**

Response: It would be an extremely rare situation where I would give any weight to a person’s age in sentencing. There might be some cases in which the defendant’s age would be relevant to the appropriate sentence under the applicable statutes and sentencing guidelines.

- a. **You have also stated: “Advanced, mature societies should engage in punishment and not vengeance as a way of dealing with crime.” Are the victims of crimes and their family and loved ones not entitled to see the person who committed a crime against them or their loved one punished if the perpetrator is older?**

Response: All crime victims and their families are entitled to see the perpetrators punished in accordance with the law.

10. **You were asked about sentencing under the guidelines in Michigan and you stated: “there were some mitigating circumstances where I went below the guidelines.” Recently, a few federal judges have expressed concerns about mandatory minimums in child pornography laws.¹ Do you have any concerns about mandatory minimums in child pornography laws?**

Response: No.

- a. **Do you believe mandatory minimums in child pornography laws allow judges to be equitable to the defendant?**

Response: Yes.

- b. **Have you ever handled a child pornography case either as a judge or a lawyer?**

Response: No.

- i. **If so, please provide a summary of and citations for all the cases in which you participated.**

Response: Not applicable.

- ii. **If you handled these cases as a judge, please include the sentencing range called for under the Michigan guidelines, if applicable, and the sentence you issued.**

Response: Not applicable.

¹ A.G. Sulzberger, “Defiant Judge Takes on Child Pornography Law,” *New York Times*, May 21, 2010, available at <http://www.nytimes.com/2010/05/22/nyregion/22judge.html>.