Responses to Questions Submitted by Senator Sessions

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1. *What are some of the problems with a pragmatic or flexible approach to judging?*

Response:

Judge Richard Posner, one of the foremost modern defenders of pragmatism, summarizes the core of legal pragmatism as "a disposition to ground policy judgments on facts and consequences rather than on conceptualisms and generalities."[1] A pragmatic judge must make the most reasonable decision, "all things considered."[2] While this approach may have some advantages and may in fact describe what many judges do, nonetheless it is insufficiently attentive to the formal requirements of the law.

A pragmatic judge will carefully consider the law, but in difficult cases, may rely on practical considerations, such as what outcome will have the best consequences overall. A pragmatic judge does not feel unduly bound by the text of statutes or the Constitution, or previously decided cases. Moreover, a judge who tries to determine the best outcome all things considered will have greater latitude to consider his or her own assessments of what is the best outcome. Such an approach will be necessarily more open to the individual beliefs and commitments of each judge, an openness that undermines the understanding that we are a government of laws, not men.

2. *Judge Sotomayor says that she admires Justice Benjamin Cardozo. In his classic text on judging, Justice Cardozo wrote:*

> *The great generalities of the constitution have a content and a significance that vary from age to age. The method of free decision sees through the transitory particulars and reaches what is permanent behind them. Interpretation, thus enlarged, becomes more than the ascertainment of the meaning and intent of lawmakers whose collective will has been declared.*

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[1] RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 59 (2005). *See also id.* at 85 ("[Pragmatism] is resolutely antiformalist, it denies that legal reasoning differs importantly from ordinary practical reasoning, it favors narrow over broad grounds of decision at the outset of the development of an area of law, it is friendly to rhetoric and unfriendly to moral theory, it is empirical, it is historicist but recognizes no 'duty' to the past, it distrusts exception-less legal rules, and it doubts that judges can do better in reasonable cases than to reach reasonable (as distinct from demonstrably correct) results.").

[2] *Id.* at 64.

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It supplements the declaration, and fills the vacant spaces, by the same processes and methods that have built up the customary law.

Benjamin N. Cardozo, THE NATURE OF THE JUDICIAL PROCESS, 17-18 (Yale Univ. Press, 1921).

If Judge Sotomayor agrees with this classic quote from Justice Cardozo, what does that say about her view of the role of a judge?

Response:

This quotation comes from a discussion by Justice Cardozo about the process of judge-made law. He explains that in every system of written law is the need for gap-filling or legislation by the judge. His understanding of the judicial role comes from various legal theorists who understand the "judge as the interpreter for the community of its sense of law and order" who "must supply omissions, correct uncertainties, and harmonize results with justice through a method of free decision."[3] Justice Cardozo goes on to explain that in American constitutional law, the "method of free decision" has become the dominant one.[4] This description reflects a wide-ranging view of the role of the judge, who serves in a common law fashion to make law where statutes and the Constitution may be silent, ambiguous, obscure, or unjust.

Justice Cardozo explains that the judge's role is essentially the same when interpreting written texts as when developing the common law.[5] This view may be sharply contrasted with that of modern-day textualists who believe that when interpreting written law, whether statutory or constitutional, judges have a particular duty to interpret the meaning of the law, not impose their own will over that of the legislature or the people.[6]

Justice Cardozo's view of the judge becomes even clearer in his chapter on "The Judge as a Legislator" in which he explains that when the judge has to make difficult decisions he acquires knowledge "just as the legislator gets it, from experience and study and reflection; in brief, from life itself. … The choice of methods, the appraisement of values, must in the end be guided by life considerations for the one as for the other. Each

[3] BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 16 (1921).

[4] *Id.* at 17.

[5] "I will dwell no further for the moment upon the significance of constitution and statute as sources of the law. The work of a judge in interpreting and developing them has indeed its problems and its difficulties, but they are problems and difficulties not different in kind or measure from those besetting him in other fields." *Id.* at 18.

[6] *See generally* ANTONIN SCALIA, A MATTER OF INTERPRETATION (1997).

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indeed is legislating within the limits of his competence."[7] Justice Cardozo acknowledges that the judge's sphere is narrower, but nonetheless requires the same legislative process to make, not find, the law.[8] This conclusion reflects a wide-ranging conception of the role of the judge, little constrained by constitutional or prudential considerations.

[7] CARDOZO, *supra* note 3, at 113.

[8] *Id.* at 115.

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Responses to Questions Submitted by Senator Hatch

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1. Judge Sotomayor described her judicial philosophy as "fidelity to the law." Some have described this as a slogan and not a philosophy. Do you agree? Has there been a Supreme Court nominee that has refused to pledge "fidelity to the law"?

Response:

Standing alone, the ideal of "fidelity to the law" says little about judicial philosophy. All federal judges take an oath to "administer justice without respect to persons, and do equal right to the poor and to the rich" and to "faithfully and impartially discharge and perform all the duties" required of them "under the Constitution and laws of the United States."[1] The oath requires allegiance to the Constitution and faithful execution of the judicial role. "Fidelity to the law" echoes an essential commitment of every judge. It does not, however, express how a judge intends to be faithful to the law. A judicial philosophy may be difficult to articulate with clarity and comprehensiveness, but such a philosophy should begin with a conception of the judicial role and explain how judges should interpret the Constitution as well as statutes.

I am not aware of any nominee to the Supreme Court who has refused to pledge fidelity to the law. Recent nominees have appropriately and consistently pledged to uphold the law. For example, during his confirmation hearings, Justice Samuel Alito explained, "A judge can't have any agenda. A judge can't have any preferred outcome in any particular case. And a judge certainly doesn't have a client. The judge's only obligation—and it's a solemn obligation—is to the rule of law, and what that means is that in every single case, the judge has to do what the law requires." Similarly, Chief Justice John Roberts said during his confirmation hearings, "I will decide every case based on the record, according to the rule of law, without fear or favor, to the best of my ability, and I will remember that it's my job to call balls and strikes, and not to pitch or bat."

2. What is the proper role of judges as the Founders understood?

What the Founders considered to be the proper role of a judge is a difficult and complicated question. A number of scholars have addressed this topic with significant

[1] 28 U.S.C. § 453.

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erudition.[2] To mention just one source of understanding at the time of the founding, in Federalist 78, Alexander Hamilton provides one of the most frequently cited discussions of the position and obligations of the federal judiciary. Hamilton explained that judicial review arises from the fact of a written constitution. Courts can review acts of Congress for constitutionality, but this does not mean that the judiciary is superior to the legislature: "It only supposes that the power of the people is superior to both; and that where the will of the legislature declared in its statutes, stands in opposition to that of the people declared in the constitution, the judges ought to be governed by the latter, rather than the former."[3] Hamilton also explained that structural limitations on the judiciary made it the weakest branch as it has "neither Force nor Will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."[4] One might draw from these statements a conclusion that the judiciary should robustly enforce the Constitution, but also that it must stay within the boundaries of its particular role.

3. *If judges fail to be restrained, what are some potential problems that could result from their lack of self-restraint?*

Response:

Judges may lack self-restraint in a number of different contexts, each of which could raise difficulties. As one general example of overreaching, judges may essentially rewrite outdated or ambiguous laws in order to address modern-day problems. Such rewriting, however, frustrates the rule of law by creating uncertainty for parties who must rely on what the law says. Interpretation of laws beyond what the language reasonably includes is not part of the judicial role because judges lack democratic legitimacy and accountability, as well as institutional competence, for legislating. Moreover, if judges regularly update statutes in this way it may undermine the incentives for Congress to fix problems as they arise.

4. *What problems result from judges believing that it is possible to change the meaning of the Constitution?*

Response:

The framers wrote our Constitution to establish the structure of government and to protect individual freedom and liberty. They provided that the Constitution would be the

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[2] *See, e.g.*, PHILIP HAMBURGER, LAW AND JUDICIAL DUTY (2008) (tracing the history of judicial review and examining ideals about law and judging).

[3] THE FEDERALIST NO. 78, at 404 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

[4] *Id.* at 402.

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supreme law of the land and therefore would supersede all laws inconsistent with the Constitution. As Justice Scalia has explained, the whole purpose of a constitution is "to embed certain rights in such a manner that future generations cannot readily take them away."[5] If the meaning of the Constitution can change without formal amendment, then it no longer possesses the character of a constitution, but is more like ordinary legislation. Legislation can and should respond to new problems and changing social norms. The Constitution, however, was designed to ensure that legislative majorities would not trample on certain fundamental liberties. Simply put, evolution of constitutional meaning can undermine the essential purpose of a written constitution and upset the balance between the judiciary and the political branches.

[5] ANTONIN SCALIA, A MATTER OF INTERPRETATION 40 (1997).

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