QUESTIONS AND ANSWERS

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May 19, 2008

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

Attached are my responses to written questions from Senator Specter and Senator Grassley.

Sincerely,

Raymond M. Kethledge

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Encls.

cc: The Honorable Arlen Specter
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

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Responses of Raymond M. Kethledge
Nominee to the U.S. Court of Appeals for the Sixth Circuit
to the Written Questions of Senator Arlen Specter

1. **In your response to question 17(c)(2) of the Committee questionnaire, you state that 50 percent of your practice has been in federal courts and 50 percent has been in state courts. Please describe the types of federal issues on which you have worked, including issues that you handled during your clerkship on the Court of Appeals for the Sixth Circuit and your clerkship with Justice Kennedy on the U.S. Supreme Court.**

The proportion and composition of federal issues in my practice has fluctuated over time. The federal issues on which I have worked as a practicing attorney include the scope of various federal jurisdictional statutes, the constitutional "case or controversy" requirement, the elements of standing, the scope of "[t]he judicial power" under Article III, federal constitutional limitations on punitive damages, various other limitations and guarantees arising from the federal Due Process Clauses, the admissibility of expert testimony under Federal Rule of Evidence 702, the admissibility of hearsay under Federal Rules of Evidence 803 and 804, a wide range of issues under the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure, the interpretation of Treasury Regulations and federal tax statutes, the scope of federal preemption of state-law claims, various aspects of patent law, and the prerequisites for class certification in federal courts, among other issues.

I worked on many of these same issues as a law clerk. I also worked extensively on issues of federal criminal law, including the constitutional guarantees afforded criminal defendants, the elements of various statutory crimes and the proof required to establish them, the application of the Federal Sentencing Guidelines, and issues related to the writ of habeas corpus, among other issues.

2. **If confirmed as a judge on the Sixth Circuit, you will frequently be called upon to construe statutes. Can you please describe your views on statutory construction and to what would look to for guidance in interpreting statutes?**

I would follow Supreme Court precedent regarding the manner in which statutes should be interpreted. To that end, I would begin with the text of the statute. If the meaning of the statute is clear from its text, the inquiry would end there. I would also consider the structure of the statute as necessary to determine the meaning or scope of its text. In most cases, I believe, a court can determine the meaning of a statute by close and careful examination of its text and structure.

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Responses of Raymond M. Kethledge
Nominee to the U.S. Court of Appeals for the Sixth Circuit
to the Written Questions of Senator Charles E. Grassley

1. **Can you please tell us your views on statutory construction? What do you look to for guidance in interpreting statutes?**

I would follow Supreme Court precedent regarding the manner in which statutes should be interpreted. To that end, I would begin with the text of the statute. If the meaning of the statute is clear from its text, the inquiry would end there. I would also consider the structure of the statute as necessary to determine the meaning or scope of its text. In most cases, I believe, a court can determine the meaning of a statute by close and careful examination of its text and structure.

2. **In the confirmation hearings for Chief Justice Roberts and Justice Alito, there was extensive discussion about the amount to which judges are bound by *stare decisis*. What is your opinion as to how strongly judges should be guided by the doctrine of *stare decisis*?**

Stare decisis is a foundational principle of the law. Legal reasoning simply could not go on if all of a court's prior precedents could be freely revisited in each case. Moreover, citizens may act in reliance, and Congress and state legislatures may make decisions, based in part on the extant law as declared by the courts. In addition, the courts themselves may have derived other doctrines from the precedent under consideration. Any decision whether to overrule precedent, therefore, must take into account not only the extent to which the court believes the precedent is wrong, but also the disruption that would result in the law and in society generally. Finally, a court of appeals cannot overrule Supreme Court precedent in any event, and the prior published decisions of one panel are binding on future panels in the Sixth Circuit. Thus, a decision to overrule prior precedent should very much be the exception rather than the rule.

3. **Judges in both federal and state courts have come under criticism for engaging in "judicial activism." How would you define "judicial activism?" What assurances can you give the Committee that, if confirmed, you will not engage in judicial activism?**

I believe that judicial activism is the act of a judge imposing his own policy views on society for no better reason than that he holds them. In my view, a judge must always be mindful that he is an unelected official among a self-governing people. It may be tempting for a judge to construe a statute to mean what she wants it to mean, or to reach a result she prefers in a particular case. A judge must be ever vigilant against these temptations. The judge who succeeds in this task—and who subordinates her own will to that reflected in a democratically adopted text—thereby acts in the highest tradition of the judiciary. The judge who fails, and who imposes his own will on society, detracts to that extent from the reality of self-government in our Nation. If confirmed, I would not decide cases on the basis of my own policy views.

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