

**Responses of Albert Diaz
Nominee to the U.S. Court of Appeals for the Fourth Circuit
to the Written Questions of Senator Jeff Sessions**

- 1. At your hearing, you testified that you believe empathy has a role to play in the judicial process. 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. Do you believe that you fit President Obama’s criteria for federal judges, as described in his quote?**

Response: I cannot speak for the President, but I am honored that he believes me qualified to serve as a federal judge. If confirmed, I will abide strictly by the federal judicial oath to “administer justice without respect to persons, and do equal right to the poor and to the rich.”

- b. During her confirmation hearing, Justice Sotomayor rejected this 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.

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

Response: Empathy for a litigant or a cause should play no role in deciding a case. As I define the term, however, an empathetic judge is one who (1) respects those who come before the court, (2) affords all parties a full and fair hearing, and (3) recognizes that the court’s decisions have substantial consequences for the parties and the public. Viewed in that light, empathy helps to promote public confidence in the decisions a judge makes.

- d. Do you think that it is proper for judges to consider their own subjective sense of empathy in determining what the law means?**

Response: No.

i. If so, under what circumstances?

Response: I do not think it proper for judges to consider their own subjective sense of empathy in determining what the law means.

ii. Please provide an example of a case in which you have considered your own subjective sense of empathy in determining what the law means.

Response: I have not done so.

iii. Please provide 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 have on occasion been called upon to hear appeals of foreclosure orders entered by our Clerk of Court. There are few things more devastating to an individual's sense of self-worth than to lose his or her home. At the time I considered these appeals, North Carolina law required that I affirm the Clerk's order upon a finding that (1) the lender was the holder of a valid debt secured by the property, (2) the borrower was in default, (3) the debt instrument allowed for foreclosure, and (4) proper notice was provided. Although I felt great empathy for the homeowners, in each case where the lender made the required showing, I affirmed the Clerk's order.

2. At your hearing, you testified that, if confirmed, you will follow the law with respect to the U.S. Sentencing Guidelines. Under the Supreme Court's decision in *United States v. Booker*, the federal sentencing guidelines are advisory, rather than mandatory. It seems to me that as long as the sentencing judge (1) correctly calculates the guidelines, and (2) appropriately considers factors set forth therein, the judge may impose any sentence ranging from probation to the statutory maximum.

Following the Supreme Court's decision in *Gall v. United States*, appellate courts must apply the highly deferential "abuse of discretion" standard when reviewing these sentencing decisions. As a result, district court judges may impose virtually any sentence, and as long as the decision is procedurally sound, there is virtually no substantive review on appeal.

a. Do you agree that the sentence a defendant receives for a particular crime should not depend on the judge he or she happens to draw?

Response: Yes. My view is that general uniformity in sentencing best promotes confidence in our criminal justice system. As with any decision that involves

some level of discretion, however, there will be occasions where it may be appropriate for a sentencing judge to depart from this general principle.

b. Under what circumstances do you believe it appropriate for a district court judge to depart downward from the sentencing guidelines?

Response: *Gall* addresses this issue. A district court's sentencing decision begins by correctly calculating the applicable guidelines range. *Gall v. United States*, 552 U.S. 38, 49 (2007). From there, the court should consider the parties' respective proposals for an appropriate sentence, in light of the factors set out in 18 U. S. C. § 3353(a). If a district court elects to deviate from the applicable guideline, the court must explain its conclusion so as "to allow for meaningful appellate review and to promote the perception of fair sentencing." *Id.* at 50. If confirmed, I would apply *Gall* in reviewing a district court's sentencing decisions.

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

Response: I received the questions on December 24, 2009. I did some legal research and prepared my answers. I then discussed my answers briefly with lawyers at the Department of Justice on January 6, 2010, before submitting them in final form.

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

Response: Yes.

**Responses of Albert Diaz
Nominee to the U.S. Court of Appeals for the Fourth Circuit
to the Written Questions of Senator Charles E. Grassley**

1. What is your view of the role of a judge?

Response: The role of a judge is to decide cases by fairly and impartially applying the law, as set forth in the Constitution, applicable statutes and regulations, and precedent. In doing so, a judge should be mindful of the limits of judicial power, and respect the constitutional prerogatives of the other co-equal branches of government.

2. Do you believe it is ever appropriate for judges to indulge their own values in determining the meaning of statutes and the U.S. Constitution?

Response: No.

a. If so, under what circumstances?

Response: See my response above.

b. Please provide an example of a case in which you have done so.

Response: I have never done so.

c. Please provide an example of a case where you have had to set aside your own values and rule based solely on the law.

Response: I do not recall ever having done so.

3. Do you believe it is ever appropriate for judges to indulge their own policy preferences in determining the meaning of statutes and the U.S. Constitution?

Response: No.

a. If so, under what circumstances?

Response: See my response above.

b. Please provide an example of a case in which you have done so.

Response: I have never done so.

- c. **Please provide an example of a case where you have had to set aside your own policy preferences and rule based solely on the law.**

Response: In *Latigo Invs. II, LLC v. Waddell & Reed Fin., Inc.*, 06 CVS 18666, 2007 NCBC LEXIS 17 (N.C. Super. Ct. Jun. 11, 2007), I dismissed a claim alleging a violation of the North Carolina Unfair and Deceptive Trade Practices Act arising out of alleged misrepresentations made by the defendant during the issuance of corporate securities. I did so because binding precedent excluded capital raising transactions from the reach of the statute. As I noted in my order, however, I believed that result to be inconsistent with the broad remedial purpose of the statute. *Id.* at ¶ 47.

4. **How do you define “judicial activism?”**

Response: I have no personal definition of the term, but as commonly used, it describes a process by which a court extends judicial power beyond its proper limits and engages in results-oriented decision making at the expense of applicable law and precedent.

**Responses of Albert Diaz
Nominee to the U.S. Court of Appeals for the Fourth Circuit
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, the text of the Constitution is fixed and may only be modified by amendment. The framers, however, penned broad constitutional principles that courts are often called upon to interpret in light of modern circumstances.

- 2. What principles of constitutional interpretation help you to begin your analysis of whether a particular statute infringes upon some individual right?**

Response: My analysis would begin with the text of the statute. I would also look to U.S. Supreme Court or Fourth Circuit precedent, and would consider persuasive authority from other circuits. If the statute infringes upon a fundamental right, it would pass constitutional muster only if narrowly tailored to serve a compelling governmental interest. *Reno v. Flores*, 507 U.S. 292, 302 (1993). If the right being infringed upon is not fundamental, a court should (1) presume the statute is constitutional, and (2) uphold it so long as the statute is rationally related to a legitimate governmental interest. *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997).

- 3. As you know the Second Amendment right to bear arms is one that is very important to all Americans, but particularly those in my home state of Oklahoma. Do you believe that the Second Amendment is an individual right or a collective right? Please explain your answer.**

Response: The U.S. Supreme Court held in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) that the Second Amendment right to keep and bear arms is an individual right, at least in federal enclaves. If confirmed, I would apply that holding.

- a. Do you believe an individual Second Amendment right exists outside the context of military service or hunting? If so, please explain.**

Response: Yes, *Heller* extends the Second Amendment right to keep and bear arms beyond the context set out in your question.

- b. Do you believe the right to bear arms is a fundamental right?**

Response: The U.S. Supreme Court will decide this issue in *McDonald v. City of Chicago*, 567 F.3d 856 (7th Cir. 2009), *cert. granted*, 130 S. Ct. 48 (2009). If confirmed, I would apply the Supreme Court’s holding in that case.

- c. **What constitutional analysis would you use to determine whether it is a fundamental right?**

Response: The U.S. Supreme Court will determine the appropriate constitutional analysis governing this question when it decides *McDonald*. If confirmed, I would apply the Supreme Court's holding in that case.

- d. **Do you believe the right to self defense is a fundamental right?**

Response: In *Heller*, the U.S. Supreme Court stated that “the inherent right of self-defense [is] central to the Second Amendment right” to keep and bear arms. 128 S. Ct. at 2817. Whether the right to keep and bear arms is a fundamental right will be decided by the Supreme Court in *McDonald*. If confirmed, I would apply the Supreme Court's holding in that case.

4. **Since at least the 1930s, the Supreme Court has expansively interpreted Congress' power under the Commerce Clause. Recently, however, in the cases of *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000), the Supreme Court has imposed some limits on that power.**

- a. **Generally speaking, are *Lopez* and *Morrison* consistent with the Supreme Court's earlier Commerce Clause decisions?**

Response: Yes.

- b. **Why or why not?**

Response: As the Supreme Court noted in *Lopez*, Congress' regulatory authority under the Commerce Clause has historically extended to (1) the use of channels of interstate commerce, (2) protection of the instrumentalities of interstate commerce, as well as persons or things in interstate commerce, and (3) activities that substantially affect interstate commerce. 514 U.S. at 558-59. In *Lopez* and *Morrison*, the Court concluded that the two statutes in question—the first making it a crime to possess a gun in a school zone and the second providing a civil remedy for victims of gender-motivated crimes of violence—were unconstitutional because they had no logical nexus to interstate commerce and did not regulate economic activity. Viewed in that context, I believe *Lopez* and *Morrison* are consistent with the Supreme Court's Commerce Clause jurisprudence.

- c. **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, the text of the Constitution is fixed and may only be modified by amendment. The framers, however, penned broad constitutional principles that courts are often called upon to interpret in light of modern circumstances.

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, but do you agree with Justice Kennedy’s analysis?**

Response: If confirmed, I would apply the holding in *Roper v. Simmons*, whether I agree with it or not.

- a. **How would you determine what the evolving standards of decency are?**

Response: In *Roper*, the Supreme Court explained that determining evolving standards of decency regarding the proportionality of punishments for criminal offenses begins with a review of objective indicia of consensus, as expressed by legislative enactments, followed by an independent judicial determination as to whether a particular punishment violates the constitutional prohibition against “cruel and unusual punishments.” *Roper*, 543 U.S. at 564. If confirmed, I would apply this analysis.

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

Response: Foreign or international laws or decisions should never bind a judge when determining the meaning of provisions of the Constitution. The Supreme Court has on occasion cited foreign law as persuasive authority for its decisions. *See e.g. Roper* and *Lawrence v. Texas*, 539 U.S. 558 (2003). If confirmed, I would apply the Supreme Court’s holdings in these cases.

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

Response: I cannot envision any circumstance where I would consider foreign law when interpreting the Constitution, except when applying Supreme Court precedents that cite foreign law as persuasive authority,

- b. **Would you consider foreign law when interpreting the Eighth Amendment? Other amendments?**

Response: See response above.