

**Responses of James A. Wynn, Jr.  
Nominee to the U.S. Court of Appeals for the Fourth Circuit  
to the Written Questions of Senator Jeff Sessions**

1. **In a 2004 law review article entitled, “Judicial Diversity: Where Independence and Accountability Meet,” published in the *Albany Law Review*, you stated:**

**“The representative function of the judiciary is not limited to fact-finding and case outcomes. Even when a litigant is unsuccessful, a judge’s ability to empathize with his or her diverse perception and circumstance is essential to the litigant’s respect for the court’s adverse action. . . . [J]udges must engage in the diverse and disaffected life stories of these groups.”**

**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 do not know, and cannot comment as to, President Obama’s criteria for selecting federal judges. I assume, because he nominated me, that President Obama believes that my record demonstrates that I am qualified to serve as a federal judge.

- 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, I agree with her statement.

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

Response: Empathy should not play any role in a judge’s applying the law to the facts. The judge’s job is to apply the law to the facts of the particular case in front of him.

- 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: Not applicable.

**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: None. In each case in which I participate, I provide the parties with a neutral and impartial decision. I base my decisions on the law, not empathy.

**iii. Please provide an example of a case where you have set aside your own subjective sense of empathy and ruled based solely on the law.**

Response: None. In each case in which I participate, I provide the parties with a neutral and impartial decision. Empathy plays no role in that.

**e. Do your above-quoted statements reflect your judicial philosophy?**

Response: No. The quotes from our article are not statements about judicial philosophy. Rather, they are simply observations about the representative function of judges in a democracy.

**f. Do your above-quoted statements reflect your view of the role of a judge? If not, please explain your view of the role of a judge.**

Response: No. The role of a judge is to apply the pertinent law to the facts in a neutral and impartial manner. The above-quoted statements are an abbreviated excerpt from our article about the role of diversity in achieving an impartial and representative judiciary. The very next sentence after the above-noted quotations plainly states that “[t]o be sure, the absence of diversity in the judiciary does not necessarily mean that nondiverse judges are unable to adjudicate matters fairly and impartially.”

**2. In your article, you stated that “lack of diversity has direct and deleterious impacts on the success of minority litigants, the representative function of the elected judiciary, and most importantly, the quality of judicial decisionmaking.”**

**a. Do you believe that a judge’s racial or ethnic background affects the quality of his or her decision-making? Please explain your answer.**

Response: No. Decisions should be the product of a neutral and impartial application of the pertinent law to the facts of a case. That process should not be affected by the judge’s race or ethnic background.

- b. Please explain how “lack of diversity” impacts “the quality of judicial decisionmaking.”**

Response: My co-author and I wrote that diversity in the judiciary broadens the variety of experiences informing the deliberative process. This is a view expressed by other judges. For example, in his testimony to the Senate Judiciary Committee during his confirmation hearings on January 11, 2006, Justice Alito eloquently spoke of the impact of his immigrant background on his judicial decisionmaking, stating:

When I get a case about discrimination, I have to think about people in my own family who suffered discrimination because of their ethnic background or because of religion or because of gender. And I do take that into account.

The statements in our article are narrower than those given by Justice Alito. Our article addresses the fact that elected judiciaries are generally less diverse than their appointed federal counterparts. Our article concludes that where there is a lack of diversity in the elected system, there is a general lack of a variety of experiences informing the deliberative process.

- 3. You also argued that “each judge brings to the bench a sum of life experience [of race and gender]” and that experience influences perception, which in turn influences judicial decisionmaking. You concluded that “a lack of diversity in the judiciary creates a structural bias – a partiality – which is biased against [minorities].”**

- a. Do you agree that every judge has an obligation render justice impartially, without respect to persons?**

Response: Yes.

- b. How do you reconcile the above statements with the judicial oath, which requires judges to faithfully and impartially “administer justice without respect to persons, and do equal right to the poor and the rich . . . under the Constitution and the laws of the United States”?**

Response: The statements do not conflict with the judicial oath. Indeed, I believe that diversity on the bench helps to prevent the public’s perception of a structural bias and enhances a judge’s ability to “administer justice without respect to persons, and do equal right to the poor and the rich.”

- c. Please explain your statement that a lack of diversity creates a structural bias against minorities.**

Response: In this section of our article, my co-author and I looked at the potential value of diversity within the judicial system. In this context, for example, we looked at laws regarding diversity in the jury system. We cited *Taylor v. Louisiana*, 419 U.S. 522, 42 L. Ed. 2d 690 (1975), as an example that “the Supreme Court has endorsed the view that the Fourteenth Amendment and Sixth Amendment require structural impartiality in a jury venire.” The Supreme Court there held that the systematic exclusion of women from the jury panel violated the Sixth Amendment’s fair-cross-section requirement, and that “[t]he broad representative character of the jury . . . [is an] assurance of a diffused impartiality.” *Id.* At 530, 42 L. Ed. 2d at 698.

Diversity itself will not change the outcome of a case. In fact, as Justice Scalia says in *Republican Party v. White*, 536 U.S. 765, 153 L. Ed. 2d 694 (2002), “it is virtually impossible to find a judge who does not have preconceptions about the law . . . . Indeed, even if it were possible to select judges who did not have preconceived views on legal issues, it would hardly be desirable to do so.” *Id.* at 777-78, 153 L. Ed. 2d at 706. Justice Scalia explained that the fundamental guarantee of impartiality is that every person coming before a court will have the law applied to him or her equally because a judge is “willing to consider views that oppose his preconceptions and remain open to persuasion.” *Id.* at 778, 153 L. Ed. 2d at 707.

Our article’s point is that “judicial ‘diversity promotes impartiality by ensuring that no one viewpoint, perspective, or set of values can persistently dominate legal decisionmaking.’” Therefore, the converse is that a lack of diversity and the dominance of one perspective might, under certain circumstances, result in a structural bias as opposed to an individual bias.

**4. In your article, you also argued that “[i]n the absence of diversity, the goals of obtaining an impartial and representative judiciary are credibly challenged.”**

**a. Do you believe that it is necessary to have a diverse court in order to have a fair and functioning court? If so, what kind of diversity?**

Response: No, it is not necessary to have a diverse court in order to have a fair and functioning court. As our article states, “[t]o be sure, the absence of diversity in the judiciary does not necessarily mean that nondiverse judges are unable to adjudicate matters fairly and impartially.”

**b. Do you believe that if a court does not have the proper level of diversity with respect to race and gender, minorities and women will not receive justice?**

Response: No.

5. **In *State v. McClendon*, 130 N.C. App. 368 (N.C. Ct. App. 1998), you argued in dissent that it violated the Fourth Amendment to detain an individual who was stopped for speeding, appeared nervous, gave inconsistent and vague answers regarding his destination, and could not produce a registration card for the vehicle. A search yielded over 50 pounds of marijuana. The North Carolina Supreme Court affirmed the majority’s conclusion that “based on the totality of the circumstances . . . the detention of the defendant beyond the issuance of the warning ticket was justified and . . . no violation of defendant’s constitutional rights occurred.”**

a. **Please explain your reasoning in this case.**

Response: My dissent in *McClendon* did not address the Fourth Amendment and, in fact, did not even mention the Fourth Amendment. Rather, the dissent relied on two binding North Carolina precedents. (States may provide greater protection than is required by the federal constitution.) As I wrote in the *McClendon* dissent:

Because our Supreme Court in *State v. Pearson*, 348 N.C. 272, 498 S.E.2d 599 (1998), and this Court most recently in *State v. Falana*, 129 N.C. App. 813, 501 S.E.2d 358, found that evidence similar to that in the case at hand was insufficient to support a conclusion that the officers were justified in detaining the drivers in those cases, I dissent from the majority's decision in this case.

*State v. McClendon*, 130 N.C. App. 368, 379, 502 S.E.2d 902, 909 (1998). Significantly, in its decision in *McClendon*, the Supreme Court of North Carolina “recognize[d] that *Pearson* could be so construed,” as in my dissent. *State v. McClendon*, 350 N.C. 630, 637, 517 S.E.2d 128, 133 (1999). The Supreme Court “revisit[ed] *Pearson* . . . in order to clarify its meaning and to illustrate how the totality of the circumstances are distinguishable from those in the case.” *Id.*

b. **Do you accept the Supreme Court’s decision?**

Response: Yes, I accept the Supreme Court’s decision as binding North Carolina law and have faithfully followed it as such. I relied on and cited the Supreme Court’s decision, for example, in *State v. Hernandez*, 170 N.C. App. 299, 612 S.E.2d 420 (2005), to uphold an officer’s detention of a suspect.

6. **In *State v. Brooks*, 111 N.C. App. 558 (N.C. Ct. App. 1993), rev’d, 337 N.C. 132 (N.C. 1994), you held that approaching a parked car and talking with the driver constituted an investigatory stop requiring reasonable suspicion for purposes of the Fourth Amendment. There, a State Bureau of Investigation Agent was executing a search warrant on a business where the car was parked when he noticed the defendant in a parked car. When he walked over to the car and engaged the driver**

**in conversation, he noticed an empty gun holster next to the driver. When he asked where the gun was located, the defendant told the agent that he was sitting on it. After seizing the gun, the agent obtained consent to search the car and found drugs. The North Carolina Supreme Court unanimously reversed your decision.**

**a. Please explain your reasoning in this case.**

Response: Sixteen years ago, when the *Brooks* opinion was issued, the law in this area was less clear than it is today. In *Brooks*, the case in state court arose after a federal judge had dismissed similar charges arising from the same facts. The federal judge who reviewed the case reached the same conclusion that we did. In reaching our decision, we looked to then-recent and binding state law precedent, *State v. Fleming*, 106 N.C. App. 165, 415 S.E.2d 782 (1992), indicating that generalized suspicion was insufficient to comport with the Fourth Amendment. Our panel, which included a concurring judge who authored *Fleming*, found the *Brooks* facts similar to those in *Fleming*.

On discretionary review, the Supreme Court of North Carolina provided clarity in this area by addressing, for the first time, a then-recent United States Supreme Court opinion, *Florida v. Bostick*, 501 U.S. 429, 115 L. Ed. 2d 389 (1991).

In the fifteen years since the Supreme Court of North Carolina's decision in *Brooks*, I have relied on and cited it. For example, in *State v. Wilson*, No. COA08-1536, 2009 WL 2177694 (N.C. App. July 21, 2009), I cited *Brooks* and wrote for a panel that no seizure had occurred and that the defendant's motion to suppress was therefore properly denied.

**b. The North Carolina Supreme Court concluded that “upon seeing the empty holster, the officer was not required to give Miranda warnings prior to asking the defendant, ‘where is your gun?’ [and] that upon being told by the defendant that the weapon was under the defendant’s thigh, the officer had probable cause to arrest him.” Do you disagree with this analysis? Please explain your answer.**

Response: I agree with the Supreme Court of North Carolina's analysis. Significantly, my colleagues and I on the Court of Appeals panel did not reach the issue of whether the officer was required to Mirandize the defendant.

**7. In *State v. Smith*, 123 N.C. App., 162 (1996), *rev'd*, 346 N.C. 794 (1997), an unpublished opinion, you affirmed a lower court's decision that police violated the defendant's Fourth Amendment rights when they employed a technique called “knock and talk.” Even though police suspected that drugs were present in the defendant's home, and although they obtained permission to enter and search the home, you affirmed the trial court's decision that the search violated the Fourth**

**Amendment. The North Carolina Supreme Court unanimously reversed your decision. Citing the U.S. Supreme Court’s decision in *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), the North Carolina Supreme Court noted that while searches of a home without a warrant are presumptively unreasonable, “[c]onsent . . . has long been recognized as a special situation excepted from the warrant requirement, and a search is not unreasonable within the meaning of the Fourth Amendment when lawful consent to the search is given.”**

- a. Did you consider the Supreme Court’s decision in *Bustamonte* in affirming the trial court’s decision? If so, please explain how the decision figured into your reasoning.**

Response: Thirteen years ago, our opinion in *Smith* cited *Bustamonte*. We did not, however, hold that the “knock and talk” procedure was unconstitutional. Rather, we affirmed the trial court’s holding on the basis that, under the totality of the circumstances, the consent to search was invalid. We cited *Bustamonte* as support for the principle that, although a valid consent is a recognized exception to the Fourth Amendment’s warrant requirement, the prosecution must prove and the court must find that the consent was valid, voluntary, and untainted by illegality in any form.

On discretionary review, the Supreme Court of North Carolina addressed the “knock and talk” procedure. However, regarding the consent issue addressed in our Court of Appeals opinion, the Supreme Court concluded that “the trial court did not make a specific finding” regarding whether the consent was voluntary, and that “the evidence on this point is conflicting.” *Smith*, 346 N.C. at 801, 488 S.E.2d at 214. Accordingly, the Supreme Court remanded the matter to the trial court “for reconsideration of, and further findings on, defendant’s motion to suppress in light of this opinion.” *Id.*

No appeal followed from the trial court’s ruling upon remand by the Supreme Court. Records in the county of origin indicate that the case was dismissed.

- b. Do you believe that the police technique of conducting a “knock and talk” is unconstitutional? Please explain your answer and whether this was part of your reasoning in this case.**

Response: The Supreme Court of the United States and the Supreme Court of North Carolina have held that the “knock and talk” technique is constitutional. I have faithfully followed that precedent without any reservation. As stated above, the constitutionality of a “knock and talk” was not addressed by our Court of Appeals opinion in *Smith*.

- c. Considering the potential impact of the decision, why was this opinion unpublished?**

Response: In 1996, the North Carolina Court of Appeals consisted of twelve judges who wrote over 1200 opinions each year. To expedite the adjudication of the high number of appeals before the court, the Court of Appeals employed a “fast-track” calendar by which the Chief Judge determined that certain cases could be decided quickly. Since one of the three judges on the *Smith* panel was a special emergency judge, it appears that *Smith* was a fast-track case. As with nearly every case placed on the fast-track calendar, it was not published.

Because the decision was unpublished, under North Carolina’s Rules of Appellate Procedure, it had no precedential value. Additionally, in 1996, it could not have been cited even as “guidance.” Thus, it would have had no “potential impact” on North Carolina jurisprudence.

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

Response: I reread the relevant materials and cases, conducted research on the issues raised by the questions presented, and drafted responses to each of the questions. The Department of Justice reviewed my responses and discussed them with me, and I made some revisions thereafter. These answers are my own.

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

Response: Yes.



**Responses of James A. Wynn , Jr.**  
**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 adjudicate disputes in a neutral and impartial manner by applying the pertinent law to the facts.

**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: Not applicable.

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

Response: There are no examples.

**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: There are no examples.

**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: Not applicable.

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

Response: None. In each case in which I participate, I provide the parties with a neutral and impartial decision. Individual policy preferences play no role.

**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: None. In each case in which I participate, I provide the parties with a neutral and impartial decision. Individual policy preferences play no role.

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

Response: Judicial activism is not a term that I use. My understanding is that some people use the term to refer to a judge’s basing decisions on personal views rather than on the letter of the law.

**Responses of James A. Wynn , Jr.**  
**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: I do not agree that the Constitution is a “living” document that constantly evolves as society sees fit.

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

Response: First and foremost, in this type of analysis, a court must give the words of the Constitution their plain meaning to determine whether a particular statute infringes upon some individual right.

Second, the court must apply the presumption that the statute is constitutional. In some situations, the statutory language could be interpreted to have more than one meaning. In such cases, courts apply the interpretation that will render the statute constitutional, that is, one that would not infringe upon the individual right in question.

Third, if the statute infringes upon some individual right, then the court looks to existing case law and precedent to determine the nature and scope of the right at issue, and applies the proper standard of judicial review to weigh the asserted government interest against the individual right allegedly infringed.

- 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 Supreme Court of the United States has held that the right to bear arms is an individual right. If confirmed to serve as a federal circuit court judge, I would apply that binding precedent without any reservation whatsoever.

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

Response: The Supreme Court of the United States has held that an individual Second Amendment right exists outside the context of military service or hunting. If confirmed to serve as a federal circuit court judge, I would be bound by this precedent and would apply it without any reservation whatsoever.

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

Response: I understand that the Supreme Court of the United States has not yet ruled on this issue. If confirmed to serve as a federal circuit court judge, I would adhere to Supreme Court precedent and apply it without any reservation whatsoever.

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

Response: If confirmed to serve as a federal circuit court judge, I would faithfully follow the constitutional analysis set forth by the Supreme Court of the United States.

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

Response: I understand that the Supreme Court of the United States has not yet ruled on this issue. If I am confirmed to serve as a federal circuit court judge, I will adhere to Supreme Court precedent and apply it without any reservation.

**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: The Supreme Court, in *Gonzales v. Raich*, 545 U.S. 1 (2005), indicated that its decisions in *Lopez* and *Morrison* were consistent with its earlier Commerce Clause decisions.

**b. Why or why not?**

Response: The Supreme Court in *Raich* distinguished the circumstances presented in *Lopez* and *Morrison*, which challenged laws that were noneconomic in nature and thus outside of the Commerce Clause's scope.

**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: I do not agree that the Constitution is a "living" document that constantly evolves as society interprets it.

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 to serve as a federal circuit court judge, I would faithfully follow Supreme Court precedent and apply it without any reservation.

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

Response: If confirmed to serve as a federal circuit court judge, I will faithfully follow precedent and apply the analysis set forth by the Supreme Court of the United States.

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: I am not aware of any circumstances under which it would be proper for judges to rely on contemporary foreign or international laws or decisions in determining the meaning of provisions of the United States Constitution.

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

Response: None. If confirmed as a federal circuit court judge, I would rely only on American law in determining the meaning of the United States Constitution.

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

Response: No. If confirmed as a federal circuit court judge, I would rely only on American law in determining the meaning of the United States Constitution.

7. **From 2005 to 2009, you served as Vice-Chair of the Board of Directors of Justice at Stake, a nonpartisan interest group founded to combat the impact of “special interests” on judges. According to press reports, Justice at Stake is funded substantially by George Soros’ Open Society Institute. The organization has been highly critical of national security reforms, such as the USA PATRIOT Act, and of the Obama Administration for not trying all terrorist detainees on American soil. Given that you were Vice-Chair of this organization for 5 years, it is only reasonable to assume that you agree with the organization’s views, and as a circuit court judge, these issues may come before you.**

**a. Do you agree with the organization's views regarding the USA PATRIOT Act? Please explain your answer.**

Response: As an active reserve military officer (Captain) in the United States Navy for 30 years with service as a certified military judge (Commanding Officer of the Navy Reserve Trial Judiciary Unit), I never expressed, endorsed, adopted, or joined in any view on the constitutionality of the USA PATRIOT Act. Nor have I ever expressed, adopted, or endorsed any criticism of any decision made by the President, who serves as the Commander-in-Chief of the Armed Forces, regarding where detainees are tried.

Regarding my former affiliation with Justice at Stake, that nonpartisan organization works with more than 50 national partners to keep state and federal courts fair and impartial. Its board of directors is comprised of diverse individuals, including the Chief Justice of the Supreme Court of Ohio, a former President of the National Center for State Courts, a Republican nominee for the U.S. Senate in 1982, a board member of the Institute for Legal Reform with the U.S. Chamber of Commerce and former General Counsel for General Motors, a federal judge, a former President of the National Hispanic Bar Association, a former Director of the League of Women Voters in Illinois, and the Vice-President of the Committee on Economic Development.

Although Justice at Stake staff and partner organizations may comment on various issues, those comments do not necessarily reflect the views of the Justice at Stake board members. Generally, comments by Justice at Stake partners, as well as the Justice at Stake blog, explicitly state that the views expressed are the commentators' own and do not necessarily reflect those of other Justice at Stake campaign partners, or Justice at Stake staff or board members.

**b. Do you believe you can render fair and impartial judgment on matters involving the USA PATRIOT Act?**

Response: Yes.

**c. Do you share the organization's view that all detainees should be tried in American courts? Please explain your answer.**

Response: Although Justice at Stake staff and partner organizations may comment on various issues, those comments do not necessarily reflect the views of the Justice at Stake board members. Moreover, as an active reserve military officer (Captain) in the United States Navy for 30 years

with service as a certified military judge (Commanding Officer of the Navy Reserve Trial Judiciary Unit), I never expressed, endorsed, adopted, or joined in any view on the constitutionality of the USA PATRIOT Act. Nor have I ever expressed, adopted, or endorsed any criticism of any decision made by the President, who serves as the Commander-in-Chief of the Armed Forces, regarding where detainees are tried.

- d. Do you believe that the Constitution requires the United States to try all detainees in United States courts? Please explain your answer.**

Response: I very respectfully submit that this question seeks an opinion on an issue that, if confirmed, I may be asked to address as a federal judge. Accordingly, I must respectfully decline to render an advisory opinion on this issue.

- e. As mentioned above, the organization is substantially funded by the George Soros' Open Society Institute. Do you know who the other persons or entities are who fund the organization?**

Response: Yes.

- i. If so, please list them.**

Response: My understanding is that Justice at Stake is funded almost entirely by foundations: the Carnegie Corporation, the Herbert Block Foundation, the Joyce Foundation, the Moriah Fund, the Open Society Institute, and the Public Welfare Foundation. It has received a small amount of support from some of its board members and from citizens. I have made no financial contributions to the organization.

- ii. Did you ever participate in the fund raising activities of this organization?**

Response: No. Canon 5 B(2) of the North Carolina Code of Judicial Conduct prohibits me, as a sitting judge, from actively assisting such an organization in raising funds.

- 1. If so, whom did you solicit for money?**

Response: Not applicable.

- 8. The Justice at Stake website recently had posted some comments attributed to you regarding the need for diversity on the courts: "The American judiciary is**

**disproportionately white and male. These white men disproportionately make judgments affecting African-Americans, women, and other minorities . . . . This disparity between the judges and the judged creates a crisis of legitimacy.”**

- a. Do you believe that there is a relationship between a judge’s race and the legitimacy of his rulings?**

Response: No. To the contrary, as a result of my personal experiences growing up in the era of legally-enforced segregation in North Carolina, I believe that no citizen, including a judge, should be treated or viewed differently on account of his or her race, gender, ethnic origin, religion or other traits. My personal experiences reinforce my commitment to unbiased judging based on the law.

**If not, what did you mean by this statement?**

Response: The three statements in the question appear in a 2004 *Albany Law Review* article that I co-authored (*Judicial Diversity: Where Independence and Accountability Meet*, 67 *Albany Law Review* 775 (2004)).

The first and second sentences are statements of fact as we understood such facts to be at the time of writing our article. Footnotes 24 and 25 in our article provide the sources on which these statements of fact were based.

Regarding the third statement, it may be useful to provide the full context in which that statement appears in our article. The complete statement was,

“Scholars have detailed how this disparity between the judges and the judged creates a crisis of legitimacy because our courts are perceived by much of the public as biased ‘instruments of oppression.’”

Thus, the statement is simply an attribution to the research findings of scholars regarding the *perception* by the public of our courts. Footnote 26 of our article provides the sources on which the attribution is based.

- b. You use the phrase “crisis of legitimacy” to describe the current state of the American judiciary. Please explain what you meant by this phrase.**

Response: Our article focused on the issue of diversity in the context of electing judges. In that context, we used this phrase in the same manner that it was used by Justice Kennedy in an interview with Bill Moyers in November of 1999, in which he stated: "If there is the perception or the



reality that courts are influenced in their decisions based upon campaign funding sources, we will have a crisis of legitimacy, a crisis of belief, a crisis of confidence." (available at <http://www.pbs.org/wgbh/pages/frontline/shows/justice/etc/synopsis.html>) Our 2004 article used Justice Kennedy's analogy to indicate that if there is the perception that courts are influenced in their decisions based upon a lack of diversity, then, as the research findings of scholars suggest, an analogous crisis could develop. Our article applied Justice Kennedy's phrase "crisis of legitimacy" to another context; it was not my description of "the current state of the American judiciary."

Additionally, in his 2006 Year-End Report on the Federal Judiciary, Chief Justice Roberts addressed the categorical exclusion of nonwealthy persons from the judiciary arising from "the failure to raise judicial pay." He characterized this issue as having "reached the level of a constitutional crisis that threatens to undermine the strength and independence of the federal Judiciary." As in our article, Chief Justice Roberts' reference to a "constitutional crisis" highlights the necessity of diversity in the judiciary, not only in regards to race, gender and religion, but also in regards to wealth, legal experience, and background.

**c. Do you believe that African American defendants are currently being discriminated against by white judges?**

Response: No.

**Please explain your answer.**

Response: I have no personal knowledge that any sitting judge has unlawfully discriminated against any defendant. Indeed, various state and federal laws prohibit such discrimination including the North Carolina Code of Judicial Conduct and the American Bar Association Model Code of Judicial Conduct. If I knew of any such discrimination, I would report it to the appropriate authority.

**d. If justice is blind, why do you believe it matter if a white judge or an African-American judge is ruling in a case affecting a minority?**

Response: I very respectfully submit that I have neither stated nor held any such belief. As I stated in an earlier response, as a result of my personal experiences growing up during the era of legally-enforced segregation in North Carolina, I have devoted my life to promoting my belief that no citizen, including a judge, should be treated or viewed differently on account of his or her race, gender, ethnic origin, religion or other traits. Indeed, I explicitly expressed this life-long belief in a published opinion, *Johnson v. Amethyst Corp.*, 120 N.C. App. 529, 463 S.E.2d 397 (1995).

In *Johnson*, counsel argued to a jury that it should disregard defendant's plea of guilty to prior counts of sexual harassment because the female judge would not have given him probation if the sexual harassment charges had merit. I rejected this argument as offensive and inappropriate, stating:

Finally and most egregious are counsel's disparaging statements that because District Court Judge Jane Harper is a female judge, she would not have accepted a plea bargain giving Bartolotta "no active time if there was believable evidence that any of the [allegations] were true." This argument is not only insulting to the judicial system as a whole, it further calls into question the fairness of female judges who preside over trials involving sexual misconduct. It is no more than a blatant attack on the integrity of judges who may share diverse qualities with a particular litigant. This court will neither condone nor permit practicing attorneys to take leave of their responsibilities to uphold the respectability of the judicial system.

*Id.* at 537, 463 S.E.2d at 402 (emphasis added).

- e. **Do you believe that African-American defendants are being subjected to unconstitutional conditions when white judges hear their cases? Please explain your answer.**

Response: Of course not. My judicial career has been devoted to ensuring that judges are fair and impartial. The North Carolina Code of Judicial Conduct and the American Bar Association Model Code of Judicial Conduct, of which I was one of the drafters, affirmatively require judges to be fair and impartial.

- f. **How would you correct the "crisis" you describe?**

Response: I very respectfully submit that, as I stated in response to an earlier question, the word "crisis" is not my word but is one that arose from Justice Kennedy's analogy in his interview with Bill Moyers. Our article attributed the analogy to the research findings of scholars on diversity. I believe, however, that to alleviate any potential "crisis" that the scholars indicate arises from the public's perception of the judiciary, we must work to promote and enhance the public's confidence and trust in the integrity of the judicial system.

- g. Do you believe presidents should employ affirmative action principles in the selection of federal judges?**

Response: No. While a diverse judiciary broadens the variety of voices and experiences informing the deliberative process, I believe a president's primary focus should be on selecting qualified judges who will be fair and impartial.

- 9. In *State v. Turnage*, you held that the state did not provide sufficient evidence to support the defendant's conviction for first-degree burglary. At four o'clock in the morning, a homeowner heard breaking glass and called the police. The police found the defendant behind the house carrying tool. His hand was bloody and his fingerprints were found on the front door of the house. After noting that neither the defendant's fingerprints nor his blood were not found inside the house and that no glass was found on the defendant, you held that the evidence only gave rise to "mere speculation" that the defendant carried out the burglary. The North Carolina Supreme Court reversed noting that, in ruling on a motion to dismiss for lack of evidence, a court must consider evidence in the light most favorable to the State.**

- a. Please explain your reasoning in this case.**

Response: In *State v. Turnage*, the Supreme Court of North Carolina did not decide the issue of whether the state proffered sufficient evidence to support the defendant's conviction for first-degree burglary. Instead, the Supreme Court considered "the only issue before this Court on the State's appeal of right, namely, the sufficiency of the evidence as to defendant's identity as the perpetrator of the offense *if a burglary occurred*." *State v. Turnage*, 362 N.C. 491, 496, 666 S.E.2d 753, 757 (2008) (emphasis added). Thereafter, the Supreme Court remanded the case to the Court of Appeals to decide the issue of "the sufficiency of the evidence on the element of entry for purposes of first-degree burglary...." The Supreme Court left undisturbed the Court of Appeals' holding that affirmed the defendant's convictions for possession of housebreaking implements and habitual felon status which did not involve the issue of the defendant's identity.

Because the issue of whether the state presented sufficient evidence to establish the element of entry for purposes of obtaining a conviction on first-degree burglary remains pending on remand before the North Carolina Court of Appeals, I must respectfully decline to offer an opinion on the issue.

- b. Do you agree with the North Carolina Supreme Court that "the evidence was sufficient to support a reasonable inference that**

**defendant was the perpetrator of the crime and to withstand a motion to dismiss”?**

Response: Yes. As a North Carolina appellate judge for over nineteen years, I faithfully follow without any reservation whatsoever the precedent set by the Supreme Court of North Carolina, including but not limited to *State v. Turnage*.

**10. In *Parker v. Union Camp Corp.*, you argued in dissent that an individual confined in jail could continue to collect worker’s compensation because being confined in jail was not the kind of “change of condition” that allowed for the modification of a compensation award.**

**a. Please explain your reasoning in this case.**

Response: As the majority opinion stated, “The only issue on appeal is whether imprisonment of a person already receiving worker's compensation disability payments cuts off the employer's duty to make payments during the period of confinement.” *Parker v. Union Camp Corp.*, 108 N.C. App. 85, 86, 422 S.E.2d 585, 587 (1992). At the time of the *Parker* decision, other states did not statutorily cut off an employer’s duty to make workers’ compensation payments if the worker was already receiving benefits before imprisonment. *See, e.g.*, OKLA. STAT. ANN. tit. 57, § 549(B) (West 1996) (providing that workers compensation benefits shall be placed into an inmate account, from which the Oklahoma State Board of Corrections may charge up to 50% of any deposits to cover costs of incarceration).

In *Parker*, I stated in my dissent that “[i]f a different result is desired by the legislature, then it is up to that body of government, not this Court, to enact laws to that effect.” *Id.* at 89, 422 S.E.2d at 587.

**b. Do you accept the majority’s decision in this case that the individual could not continue to collect worker’s compensation?**

Response: Yes. In North Carolina, the decisions of one North Carolina Court of Appeals panel binds all subsequent panels. *In re Civil Penalty*, 324 N.C. 373, 379 S.E.2d 30 (1989). As a North Carolina appellate judge for over nineteen years, I faithfully follow without any reservation whatsoever all binding precedent, including but not limited to *Parker v. Union Camp Corp.*

**11. In *Arp v. Parkdale Mills*, you affirmed the grant of worker’s compensation for an employee who was injured after he attempted to climb a locked gate leading out of the employer’s facility. As Judge Tyson noted in dissent, the employee “climbed a**

**seven and one-half foot chain link and barbwire gate to leave work when another safe route was provided by defendant.” Clearly, the plaintiff’s injuries did not ‘arise out of’ and ‘in the course of’ his employment.” The North Carolina Supreme Court unanimously reversed your ruling in a one-sentence *per curiam* opinion.**

- a. In this case, you were willing to grant worker’s compensation to an individual whose actions contributed to his disability. Under your ruling, when would an individual’s actions bar him from receiving worker’s compensation?**

Response: Because the Supreme Court of North Carolina reversed our Court of Appeals decision in *Arp v. Parkdale Mills*, our Court of Appeals decision cannot serve as the basis for a worker’s compensation benefits determination. If faced with this question again, I would faithfully follow the Supreme Court’s ruling in *Arp*.

Additionally, the North Carolina Workers’ Compensation Act vests the Industrial Commission with the exclusive jurisdiction to hear evidence from the parties, find the relevant facts, and make initial determinations as to the compensability of injuries. If there is any competent evidence in the record to support those facts – regardless of the weight of the evidence, or the quantum of evidence with which it conflicts – North Carolina statutory law and precedent bind an appellate court to those findings of fact. Thus, without being presented with an opinion and award from the Commission, I am not in a position to state, under North Carolina law, when an individual’s actions might bar him or her from receiving worker’s compensation.

- b. Do you accept the North Carolina Supreme Court’s reversal of your opinion?**

Response: Yes. As a North Carolina appellate judge for over nineteen years, I faithfully follow without any reservation whatsoever the precedent set by the Supreme Court of North Carolina, including but not limited to *Arp v. Parkdale Mills*.

- c. Do you agree with it? Why or why not?**

Response: Yes. I appreciate the clarification and additional guidance that the Supreme Court of North Carolina provided on its earlier holding, which stated that “[t]he only ground set out in the statute upon which compensation may be denied on account of the fault of the employee is

when the injury is occasioned by his intoxication or willful intention to injure himself or another.” *Hartley v. North Carolina Prison Dept.*, 258 N.C. 287, 290, 128 S.E.2d 598, 600 (1962) (holding that the employee’s injury while using a shortcut (climbing a fence) was compensable). As *Arp* is the more recent pronouncement by the Supreme Court of North Carolina on this issue, it is the current binding and controlling precedent. I faithfully follow that precedent without any reservation.

12. **In *Whitt v. Harris Teeter Inc.*, you held that a former employee could pursue a state wrongful discharge claim based on a “constructive discharge” theory. That is, even though the employee was not fired from her job, she could pursue her claim as if she had been terminated. This was a novel theory that had not been recognized previously by the North Carolina Supreme Court. Indeed, the state Supreme Court unanimously reversed your ruling in a one-sentence *per curiam* opinion.**

a. **Why did you decide to recognize a novel cause of action?**

Response: I very respectfully submit that I did not recognize a “novel” cause of action in *Whitt v. Harris Teeter*. The law in North Carolina regarding constructive discharge was, at the time of the *Whitt* opinion, not fully settled. My understanding of binding North Carolina precedent, at that time, specifically *Coman v. Thomas Mfg. Co.*, 325 N.C. 172, 381 S.E.2d 445 (1989) and *Garner v. Rentenbach Constructors Inc.*, 350 N.C. 567, 515 S.E.2d 43 (1999), the latter of which expressly used the term “constructive discharge” in referring to the former, indicated that North Carolina, like a number of other states, recognized constructive discharge. *See, e.g., Collier v. Insignia Financial Group*, 981 P.2d 321, 326 (Okla., 1999) (holding that a victim of quid pro quo sexual harassment may maintain a tort claim against her employer based on her constructive discharge).

Further, several North Carolina Court of Appeals decisions alluded to constructive discharge claims. *See, e.g., Doyle v. Asheville Orthopaedic Assocs., P.A.*, 148 N.C. App. 173, 177, 557 S.E.2d 577, 579 (2001) (“We recognize the viability of [the plaintiff’s claim for constructive discharge] in the context of interpreting whether constructive termination by her employer triggered the termination payment provision of the employment contract.”), *disc. review denied*, 355 N.C. 348, 562 S.E.2d 278 (2002); *Wagoner v. Elkin City Schools’ Bd. of Education*, 113 N.C. App. 579, 588, 440 S.E.2d 119, 125 (“Assuming that plaintiff was wrongfully constructively discharged, she is nonetheless not entitled to assert the tort of wrongful discharge because the tort of wrongful discharge arises only in the context of employees at will.”), *disc. review denied*, 336 N.C. 615, 447 S.E.2d 414 (1994).

- b. What led you to believe that the plaintiff could pursue this particular claim?**

Response: As stated above, I understood binding North Carolina precedent to allow the plaintiff to pursue this claim.

- c. In recognizing this theory, were you influenced by the equities at stake and the outcome of your decision?**

Response: No, I was not influenced by the equities or outcome.

- d. Did you rely on a particular judicial philosophy or approach in recognizing this constructive discharge theory?**

Response: No. In *Whitt*, as in all cases in which I participate, I faithfully followed North Carolina binding precedent as I understood it at the time and applied it neutrally and impartially to the facts of the case.

- e. Do you accept the North Carolina Supreme Court's reversal of your opinion?**

Response: Yes. As a North Carolina appellate judge for over nineteen years, I faithfully follow without any reservation whatsoever the precedent set by the Supreme Court of North Carolina, including but not limited to *Whitt v. Harris Teeter*.

- f. Do you agree with the North Carolina Supreme Court's decision?**

Response: Yes. I faithfully follow without any reservation whatsoever the precedent set by the Supreme Court of North Carolina, including but not limited to *Whitt v. Harris Teeter*.