

**Responses of John A. Gibney
Nominee to be United States District Judge for the Eastern District of Virginia
to the Written Questions of Senator Jeff Sessions**

- 1. In 2009, you represented Virginia state court Judge Smiley who set aside the death penalty for Daryl Renard Atkins. Before that case reached your client, it went up on appeal to the U.S. Supreme Court (*Atkins v. Virginia*), which held that it was unconstitutional to execute an individual found to be mentally retarded. On remand, a new jury found that the defendant was not mentally retarded and reimposed the death penalty, but the Virginia Supreme Court ordered another hearing on the retardation issue.**

At this new hearing, your client, Judge Smiley, changed the sentence to life without parole after finding that prosecutors hid evidence. The prosecution then petitioned the Virginia Supreme Court for a writ of mandamus, arguing that Judge Smiley improperly considered this newly raised claim, and that he should be compelled to conduct proceedings that would allow for the imposition of the death penalty. In Judge Smiley's defense, you argued that he had the power to commute the death sentence and the Virginia Supreme Court agreed with you.

- a. Do you have any personal views on the death penalty?**

Response: My personal views on the death penalty would play no role in any decisions made by me if I am confirmed to be a judge. If confirmed, I would follow the applicable statutes and binding judicial precedents.

- b. Do you think that the death penalty is constitutional?**

Response: Yes.

- c. If confirmed, will you have any reservations about imposing the death penalty where appropriate?**

Response: No.

- 2. In 2009, you were disqualified as defense counsel from a case pursuant to Virginia State Bar Rule of Professional Conduct 1.7, which provides that "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest." At that time, you represented multiple defendants who were accused of violating a hospital patient's rights and causing his death. The judge disqualified you from representing all of the defendants after concluding that the conflicts presented "real risks of serious, adverse consequences for the rights of the litigants."¹ Specifically, the judge found that several positions you had taken in the case favored the interest of one client while presenting the prospect of real harm for others.**

¹ *Sanford v. Commonwealth*, 2009 WL 4430295, at *11 (E.D. Va. Dec. 2, 2009).

- a. **You said that you thought you could represent all the defendants because they had consented to your representation. In retrospect, do you still believe you could have represented all the defendants without violating the rules of professional conduct? Why or why not?**

Response: After long discussions with the police officers I represented about the facts in the case, I believed that I could represent them without a conflict. The court held otherwise, and I accept that decision.

- b. **In your questionnaire, you stated that if confirmed, you “will recuse [yourself] when necessary to resolve any real or apparent conflict of interest.” Can you assure the Committee that, if confirmed, you will abide by the pertinent rules regarding conflict of interest?**

Response: Yes.

3. **In the questionnaire that you submitted to the Committee, you indicated that only 20 percent of the cases you have handled involved criminal law. Criminal cases account for a substantial portion of the federal district court docket.**

- a. **How has your professional experience prepared you for the position to which you have been nominated?**

Response: I have tried cases for over thirty years, and this experience has prepared me for many issues encountered in criminal proceedings. In addition, although the majority of my cases have been civil, I have handled many criminal cases, dozens of them in federal court. I have a working familiarity with the Federal Rules of Criminal Procedure and with the Federal Sentencing Guidelines.

- b. **If confirmed, how do you plan to educate yourself with respect to federal criminal law and the federal sentencing guidelines?**

Response: I plan to make use of the extensive resources provided by the Administrative Office of the United States Courts. In addition, I will continue my practice of reading the advance sheets of the United States Court of Appeals for the Fourth Circuit. As specific issues arise under the guidelines, I will read the text of the guidelines, the commentary, and the relevant precedents.

- i. **Now that the guidelines are advisory rather than mandatory, a judge may impose any sentence ranging from probation to the statutory maximum. What are your views of the guidelines?**

Response: The guidelines are an important tool in assuring that sentences in all federal courts are consistent. Under Fourth Circuit precedent, the guidelines are considered presumptively reasonable and therefore are entitled to great deference.

ii. Do you commit to follow the guidelines?

Response: I commit to adhering to the guidelines as required by binding precedent from the Supreme Court and Fourth Circuit.

iii. 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.

4. During the 2008 presidential campaign, President Obama 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. Without commenting on what President Obama may or may not have meant by this statement, do you believe that you fit President Obama’s criteria for federal judges, as described in his quote?

Response: Given that President Obama has nominated me, I conclude that I fit his criteria for federal judges.

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 empathy should play in a judge’s consideration of a case?

Response: None.

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

Response: No.

i. If so, under what circumstances?

Response: None.

- e. **As you know, Justice Stevens recently announced his retirement. The President said that he will select a Supreme Court nominee with “a keen understanding of how the law affects the daily lives of the American people.” Do you believe judges should base their decisions on a desired outcome, or solely on the law and facts presented?**

Response: Judicial decisions should be based solely on the law and the facts in evidence.

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

Response: On May 5, 2010, a copy of the questions was sent to me by email. I drafted answers and discussed my answers with attorneys at the Department of Justice. I made revisions I deemed appropriate and asked the Department to submit them to the Committee on my behalf.

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

Response: Yes

**Responses of John A. Gibney
Nominee to be United States District Judge for the Eastern District of Virginia
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.

- 2. 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. Do you believe *Lopez* and *Morrison* consistent with the Supreme Court’s earlier Commerce Clause decisions?**

Response: Yes.

- b. Why or why not?**

Response: In *Gonzales v. Raich*, 545 U.S. 1, 3 (2005), the Supreme Court explained that *Lopez* and *Morrison* are consistent with earlier Commerce Clause decisions.

- 3. 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: I have not had occasion to consider the analysis referred to here. Justice Kennedy’s decision in *Roper* is binding precedent that district judges must follow.

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

Response: I would follow the applicable precedents of the Supreme Court and the United States Court of Appeals for the Fourth Circuit.

- b. Do you think that a judge could ever find that the “evolving standards of decency” dictated that the death penalty is unconstitutional in all cases?**

Response: No. The Supreme Court has held that the death penalty is a constitutional punishment, so a district judge could not find that capital punishment is unconstitutional in all cases.

c. What factors do you believe would be relevant to the judge’s analysis?

Response: The relevant factors are those set forth in controlling precedent of the Supreme Court and the United States Court of Appeals for the Fourth Circuit.

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

Response: No, unless the Supreme Court or Fourth Circuit ever say otherwise.

a. Is it appropriate for judges to look for foreign countries for “wise solutions” to legal problems?

Response: No.

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

Response: Unless instructed to do so by binding precedent, I would not do so.

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

Response: No. The customs and mores of other countries play no role in the interpretation of our laws.

d. Would you consider foreign law when interpreting the Eighth Amendment? Other amendments?

Response: No, unless the Supreme Court or Fourth Circuit ever instruct otherwise.