Responses of Raymond Joseph Lohier, Jr.
Nominee to be United States Circuit Judge for the Second Circuit
to the Written Questions of Senator Jeff Sessions

1. **You participated in the drafting of a report by the New York Gubernatorial Task Force on Judicial Diversity, which noted that diversity "actually helps improve the quality of judicial decision-making" because different backgrounds "keep the law rooted in the experience of our whole society."**

   Response: I participated in drafting the report that was ultimately issued by the New York Gubernatorial Task Force on Judicial Diversity based on comments from and views expressed by members of the Task Force. I was not a signatory to the report.

   a. **Do you agree with the report's conclusion that diversity "actually helps improve the quality of judicial decision-making"?**

      Response: Experiential, gender, racial, ethnic, religious and other categories of diversity is important to maintain and enhance public confidence in the judiciary. It neither improves nor degrades the quality of judicial decision-making itself, and it does not serve as a proxy for arriving at any particular result in a case.

      i. **If so, how does diversity help improve the quality of decision-making?**

         Response: Please see my response above.

      ii. **What role, if any, do you believe diversity plays or should play in judicial decision-making?**

         Response: Diversity in the judiciary plays an important role in enhancing the confidence of litigants, lawyers and members of the public of all backgrounds that everyone will be treated fairly and equally under the law, regardless of background.

   b. **How can litigants know that they are being treated fairly if a judge's background, rather than the application of the law to the facts, affects his or her legal decisions?**

      Response: A judge's application of the law to the facts alone should affect his or her legal decisions.

2. **The report offered several suggestions on ways to improve judicial diversity within the New York court system, including that judicial screening panels should "consider any lack of diversity in the appointments already made by others and, if several persons are to make appointments at the same time, those persons confer with regard to adequate diversity prior to making appointments."**

Response: I participated in drafting the report that was ultimately issued by the New York Gubernatorial Task Force on Judicial Diversity based on comments from and views expressed by members of the Task Force. I was not a signatory to the report.

a. Do you personally agree that selection panels should consider whether a particular appointment would improve judicial diversity?

Response: Yes. I personally believe that diversity in the judiciary plays a role in enhancing the confidence of litigants, lawyers and members of the public of all backgrounds that everyone will be treated fairly and equally under the law, regardless of background.

b. If so, what weight should diversity be given during that selection process?

Response: The preeminent function of a selection panel is the selection of qualified judges. As long as diversity is also considered as a factor, what weight to give it rests with the selection panel.

3. 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: If confirmed, I would treat every litigant, regardless of background, fairly, without bias, and with respect. I also would work hard to understand and carefully consider the arguments and facts presented by every litigant.

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: I agree that judges should not apply feelings to facts and should apply the law to facts.

c. What role do you believe empathy should play in a judge's consideration of a case?

Response: If "empathy" in the judicial context means only the ability and willingness to understand the arguments and facts presented by litigants, as opposed to sharing their feelings, then I believe it is an important quality for a judge to have.

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: Please see my response above.

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: Judges should base their decisions solely on the law and facts presented in a case.

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

Response: I drafted these answers, and they are mine.

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

Response: Yes.

Responses of Raymond Joseph Lohier, Jr.
Nominee to be United States Circuit Judge for the Second 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.

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: The Supreme Court has more recently addressed this issue in *Gonzales v. Raich*, which squared the holdings in *Lopez* and *Morrison* with the Court's Commerce Clause precedent. If confirmed, I would follow that precedent.

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: In *Roper*, the Supreme Court relied in part on evolving standards of decency, and, if confirmed, I would faithfully apply that Supreme Court precedent.

a. Do you believe evolving standards of decency are relevant to a court's evaluation of the text of the Constitution or Bill of Rights?

Response: According to the Supreme Court's binding decision in *Roper*, evolving standards of decency are relevant to assessing the proportionality of punishments for capital offenses under the Eighth Amendment.

b. How would you determine what the evolving standards of decency are?

Response: In assessing the proportionality of punishments for capital cases under the Eighth Amendment, I would, if confirmed, apply and follow the analysis set forth by

the Supreme Court in *Roper*, which directs lower courts to begin with a review of objective indicia of consensus, as expressed by legislative enactments.

c. 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: The Supreme Court has ruled that the death penalty is not unconstitutional in all cases, and, if confirmed, I would be bound by that precedent.

d. What factors do you believe would be relevant to the judge's analysis?

Response: Please see my response above.

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: In some very limited circumstances involving the interpretation of international contracts or the obligations of the United States under an international treaty ratified by the United States, it may be necessary to consider international law. The foreign law of foreign nations, by contrast, should have no bearing on the meaning of the Constitution. If confirmed, I would interpret the Constitution according to its text, history, and binding Supreme Court and Second Circuit precedent, not according to the foreign laws of other nations.

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

Response: Please see my response above.

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

Response: Outside of the obligations of the United States under an international treaty ratified by the United States, no.

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

Response: Please see my response above.

5. The American Bar Association's Standing Committee on the Judiciary rated your nomination "Substantial Majority Qualified, Minority Not Qualified." Were you satisfied with the ABA's review of your record?

Response: The ABA did not provide me with any specific information about the scope or nature of its review.

a. Do you believe you deserved the rating you received, specifically the "Minority Not Qualified"?

Response: Although the ABA's official rating was "Qualified," I do not agree with the insubstantial minority of the ABA's Standing Committee on the Judiciary that voted to rate my nomination as "Not Qualified."

b. Did the ABA explain why you received the "Minority Not Qualified" rating?

Response: The ABA did not explain, and I did not ask, why some member(s) of the ABA's Standing Committee on the Judiciary disagreed with the substantial majority of the Committee, which determined I was qualified.

c. Did you agree with their analysis of the factors that resulted in the "Minority Not Qualified" rating?

Response: Please see my response above.

d. Did you have an opportunity to provide contrary evidence prior to the Committee's vote to counter the findings that resulted in the "Minority Not Qualified" rating?

Response: I was not asked to provide and did not volunteer any additional information after I learned about the vote of the ABA's Standing Committee on the Judiciary.

6. Prior to hear Supreme Court hearing, Justice Sonia Sotomayor asserted that "personal experiences affect the facts that judges choose to see." Do you agree with Justice Sotomayor's statement?

Response: I am not familiar with the context in which Justice Sotomayor made that statement, but if confirmed I will objectively and impartially consider all relevant facts. That is the job of a judge.