

**Nomination of Robert Wier to the
United States District Court for the
Eastern District of Kentucky
Questions for the Record
Submitted November 22, 2017**

QUESTIONS FROM SENATOR WHITEHOUSE

1. During his confirmation hearing, Chief Justice Roberts likened the judicial role to that of a baseball umpire, saying “[m]y job is to call balls and strikes and not to pitch or bat.”

- a. Do you agree with Justice Roberts’ metaphor? Why or why not?

I agree with the depiction of a neutral and dispassionate arbiter. Decisions usually are not nearly as fixed or defined as the dimensions of the strike zone, but the umpire does not compete for a result and participates with no stake or interest in the game decisions or outcome, which is certainly accurate and useful in terms of explaining the judicial role.

- b. What role, if any, should the practical consequences of a particular ruling play in a judge’s rendering of a decision?

In terms of following precedent or discerning the law, practical consequences, which tend to implicate policy questions or values, do not play a role. Of course, there are many discrete judging contexts where practical consequences explicitly matter—*e.g.*, deciding proportionality in a discovery dispute, weighing the equities and assessing the status quo on or harm relative to an injunction, determining whether to grant a continuance or to allow (or to require) replacement of counsel in a criminal case, or predicting deterrent value in sentencing. If the law tells a judge to consider practical consequences in determining an issue, the judge must do so. Defining the law, however, does not properly involve practical or policy-type analyses.

- c. Federal Rule of Civil Procedure 56 provides that a court “shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact” in a case. Do you agree that determining whether there is a “genuine dispute as to any material fact” in a case requires a judge to make a subjective determination?

I disagree. The Rule 56 standard is objective, not subjective. As the Sixth Circuit clearly has explained, based on the Supreme Court summary judgment trilogy:

A dispute of material fact is genuine so long as “the evidence is such that a reasonable jury could return a verdict for the non-moving party.” *Ford v. Gen. Motors Corp.*, 305 F.3d 545, 551 (6th Cir. 2002) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). “The district court, and this Court in its review of the district court, must view the facts and any inferences reasonably drawn from them in the light most favorable to the party against whom judgment was entered.” *Kalamazoo Acquisitions, L.L.C. v.*

Westfield Ins. Co., Inc., 395 F.3d 338, 342 (6th Cir. 2005)
(citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475
U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986)). *Tyson v.*
Sterling Rental, Inc., 836 F.3d 571, 576 (6th Cir. 2016).

As this language shows, the Rule 56 rubric, at trial and on appeal, goes forth under a reasonable (objective) perspective.

2. During Justice Sotomayor's confirmation proceedings, President Obama expressed his view that a judge benefits from having a sense of empathy, for instance "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."

- a. What role, if any, should empathy play in a judge's decision-making process?

A federal judge must vow to make faithful and impartial decisions, acting equally toward poor and rich and without respect to persons. This calls for the resolution of concrete cases, based only on the law and facts of record.

That said, judging often includes the assessment of persons and their circumstances. Many legal contexts involve examination of a litigant's individual intent, weighing of subjective belief, and evaluation of a person's reaction or decisions relative to a good faith and/or reasonable standard. Understanding diverse and varied people and being able to appreciate the circumstances and life experiences of others is a facet of common sense and shared humanity. Empathy is not a factor in deciding cases, and certainly not in defining the law, but I'd hope that any judge has the self-awareness and discipline to know that his or her perspective is not the only one and the ability to, when properly called for, attempt to see an issue or circumstance from the viewpoint of another.

- b. What role, if any, should a judge's personal life experience play in his or her decision-making process?

Life experience has no direct role in the process. A judge must take care to ensure that he or she can fulfill the oath to "impartially discharge and perform" all judicial duties. A court must reach decisions fairly and dispassionately based only on the law and facts applicable to a concrete dispute. That said, judges face many questions requiring discretion and line-drawing, in sum, judgment. A trustworthy judge should have common sense, a seasoned life, and insight, all of which contribute to sound judging by contributing to the make-up of a sound decision maker.

- c. Do you believe you can empathize with "a young teenage mom," or understand what it is like to be "poor or African-American or gay or disabled or old"? If so, which life experiences lead you to that sense of empathy? Will you bring those life experiences to bear in exercising your judicial role?

I would not presume to be able to walk credibly in anyone else's exact shoes. I do care deeply about and declare the equal worth and dignity of all people. I also believe that,

with thought and consideration, a judge can understand and gain insight into the particular history and characteristics of a litigant, witness, or victim before the court, where relevant to a specific case issue, even if the judge has not experienced a like background.

Ultimately, I would act as the § 453 oath requires and judge with fairness, impartiality, and equal treatment, rendering any decision dispassionately and solely on the law and record before the court.

3. In your view, is it ever appropriate for a judge to ignore, disregard, refuse to implement, or issue an order that is contrary to an order from a superior court?

It would never be appropriate to ignore or disobey an order from a higher court. The rule of law requires that a lower court abide by the Article III hierarchy. As such, and to fulfill the judicial oath, a judge must always abide by the orders and mandates of a superior court. The remedy for relief from a superior court order lies in the opportunities and mechanics for appeal; without exception, an inferior court must obey a superior court.