Responses of Gerard E. Lynch
Nominee to the U.S. Court of Appeals for the Second Circuit
to the Written Questions of Senator Tom Coburn

1. **Judge Lynch, you have said that the U.S. v. Pabon-Cruz case—in which an 18-year-old defendant was convicted of "advertising to receive, exchange, or distribute child pornography…and receiving or distributing child pornography," subject to a 10-year mandatory minimum sentence — was "without question the worst case of [your] judicial career."**

   a. **Please explain why applying a mandatory minimum sentence in this case was so difficult for you.**

      Response: The defendant in that case was barely more than a minor himself. He was only 18 and emotionally underdeveloped. There was no evidence that he had ever had sexual contact with a child (or, indeed, with anyone). He had not created any pornography and was not involved in commercial distribution. He was remorseful and recognized that he was in need of treatment. I believed that he deserved punishment, including a prison term, but under the circumstances a ten-year term seemed unduly harsh. However, despite my personal opinion, I applied the mandatory minimum as I believed it was required by the law.

   b. **What was it that caused you to empathize with that defendant, who had hundreds of images of child pornography on his computer?**

      Response: My decision was based on the specific facts of the case, not on any feelings I did or did not have about the defendant.

   c. **Do you agree that purveyors and viewers of child pornography further contribute to the exploitation of children?**

      Response: Yes.

2. **With respect to mandatory minimums —**

   a. **Do you agree that it is within Congress's discretion and authority to legislate mandatory minimums for certain criminal offenses?**

      Response: Yes.

   b. **In your view, is it ever appropriate for judges to depart from those statutory sentences (in cases where guilt is not an issue)?**

      Response: No.

c. Please give examples of other cases in which you applied a mandatory minimum sentence.

Response: I have always complied with mandatory minimum sentences as passed by Congress and sentenced defendants to whom a mandatory sentence was applicable at or beyond the mandatory minimum. Indeed, in the Pabon-Cruz case itself, despite my misgivings about the severity of the sentence, I imposed a 10-year mandatory minimum sentence because I believed the law required it. (That sentence was reversed because the Second Circuit determined that the sentence was not in fact mandatory.) I have imposed mandatory sentences in scores of other cases. For example:
(a) In the only other child pornography case I have handled, the defendant faced a five-year mandatory sentence. I gave him 12½ years.
(b) I have sentenced at least five drug-gang murderers to mandatory life terms.
(c) Almost all narcotics offenders prosecuted in our district face mandatory five- or ten-year sentences, and/or mandatory consecutive five-year gun possession sentences, because smaller drug cases are generally left to state prosecution. I have sentenced scores of such offenders, and I have always imposed the required sentence (or a higher one, where such was warranted).

d. Will you commit to honoring mandatory minimum statutes — even those you do not like — if you are confirmed to the Second Circuit Court of Appeals?

Response: Yes.

3. You once said you believed that the Second Amendment was more of a "structural provision preserving state militias" than a "protection of a substantive right 'to keep and bear arms.'" (agreeing with Professor John Hart Ely, who stated his belief in the book "Democracy and Distrust")

a. In light of the landmark Heller decision, has your view of the Second Amendment changed? If so, how?

Response: As the Supreme Court ruled in *Heller*, the Second Amendment protects an individual right in the people to bear arms. In the book review from 1980 to which you refer, I argued that the text and history of the Bill of Rights did not support Professor Ely's position that the Second Amendment could be counted as a clear example of his non-individual rights theory of the Bill of Rights.

b. Do you believe the Supreme Court got the Heller decision right — that the Second Amendment protects an individual right to keep and bear arms?

Response: Yes, I agree with the Supreme Court's decision in *Heller* that the Second Amendment protects an individual right to keep and bear arms.

4. **President Obama has described the types of judges that he will select 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. **What role do you believe that empathy should play in a judge's consideration of a case?**

    Response: As I understand the word, "empathy" means the ability to understand another's state of mind and emotion. I believe that it is important for judges to make every effort to understand the experiences and arguments of *all* litigants who appear before them – defendants, crime victims and police officers; employers and employees; the rich and the poor – lest they find themselves limited by their own experiences and opinions.

    b. **Do you believe you fit President Obama's criteria?**

    Response: Yes.

5. **As a judge, you are charged with applying the law as it is written — removing personal opinion and bias from your work.**

    a. **In your experience, is it possible to divorce your personal opinion from your work as a judge?**

    Response: Yes. That is a judge's job.

    b. **What measures have you implemented in your chambers to help you honor this duty?**

    Response: In my chambers, I attempt to understand the arguments of the parties, to research the law, and then to apply the law impartially to the case at hand.