

**Responses of Gerard E. Lynch
Nominee to the U.S. Court of Appeals for the Second Circuit
to the Written Questions of Senator Jeff Sessions**

- 1. During your courtesy visit to my office on May 11, 2009, I asked you how your sentencing departures compared to other district court judges in the Second Circuit. You said that based on a recent report, your departure rate was average in comparison. I am encouraged by this, and I am interested to see a copy of the report that you referenced. Please include a copy of the report with your answers to Questions for the Record.**

Response: The report is attached. (The markings were made when I received the report; it is the only copy I have.) As the table shows, my rate of non-Government-sponsored (i.e., non-cooperator) departures was 27.7%. The rate for the district as a whole was 28.6%.

- 2. 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. What role, if any, 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 person’s state of mind or emotion, despite not having had the same experiences as that person. 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 that a judge should be empathetic to a criminal defendant? What about a victim? Is it appropriate for a judge to identify with either party?**

Response: I believe that judges should do their best to understand the positions of all parties, the better to apply the law impartially. A judge should not identify with either side.

- c. Do you believe that empathy should play a part in sentencing?**

Response: A judge should attempt to understand the experience and history of both defendants and crime victims, in order to apply fairly and impartially the considerations mandated by 18 U.S.C. 3553(a), which encompass the impact of the crime on the victim and the history and circumstances of the defendant.

- d. **Did empathy play a role in your decision in *United States v. Pabon-Cruz* to give a jury instruction that would have invited jury nullification of what was believed at the time to be a ten-year mandatory minimum sentence?**

Response: I don't think that "empathy" was a factor. The rationale for this decision – which I fully accept, in light of the ruling of the Second Circuit, was erroneous – was that unlike most cases, in which the jury fully understands the seriousness of the crime charged, in that case the jury may have misperceived the relative seriousness of the two overlapping charges in the case.

3. **The Second Amendment states: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."**

- a. **Do you believe that the Second Amendment is an individual right or a collective right? Please explain your answer.**

Response: The Supreme Court held in *Heller* that the Second Amendment protects an individual right. I fully accept that holding, which I believe is consistent with the text and history of the provision and with the overall structure of the Bill of Rights.

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

Response: Yes. The reasoning of *Heller* is inconsistent with a limitation of the right to such a narrow context.

4. **In many of your opinions you cite and correctly apply Second Circuit precedent. In some cases (e.g., cases involving the *Miranda* rule), you seem to have done so reluctantly.**

- a. **In your view, what is the role of circuit court judges in interpreting and applying precedent?**

Response: The role of circuit judges in applying precedent is the same as that of district judges. Both are bound by Supreme Court and by prior circuit precedent, and their job is to apply, fairly and accurately, the holdings and reasoning of such precedents.

- b. **If you are elevated to the Second Circuit, in what areas do you believe you will have greater freedom than at the district court level?**

Response: Essentially none. The role of precedent is the same in both courts. I have sat by designation as a circuit judge in numerous cases, and I believe that my record in those cases reflects the same respect for precedent as my record as a district judge.

5. **In one case, you cited to your own law review article to support a statement you had made regarding RICO. In another case, you cited to your experience as a law professor. Do you believe it is appropriate to cite to works that include your own personal opinions or your own experience when issuing judicial opinions?**

Response: Articles by law professors are not, of course, sources of law. When they are cited by courts, they are usually cited for the research they contain. I do not find anything inappropriate in that. The RICO article to which you refer has been cited 12 times by courts, including the Supreme Court in *Reves v. Ernst & Young*, 507 U.S. 170, 180 (1993), generally for its survey of the legislative history of the statute.

The other case to which I believe you refer is *Katt v. City of New York*, 151 F. Supp. 2d 313, 357 (S.D.N.Y. 2001). Under the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 516 U.S. 869 (1995), the role of the trial judge in assessing proffered expert testimony is to determine, among other things, whether the expert's methodology was consistent with accepted professional standards. In admitting the testimony of a proffered expert in criminology, I noted that I had personal familiarity with the academic standards in that field. I do not find anything inappropriate about that reference. The Second Circuit affirmed the admission of the testimony summarily, "for substantially the same reasons as stated in the opinion of the District Court." *Krohn v. New York City Police Department*, 60 Fed. Appx. 357 (2d Cir. 2003).

6. **What role do you believe international law has in interpreting U.S. statutes and the U.S. Constitution? Do you agree with me that it was improper for Justice Kennedy to look to international law in *Roper v. Simmons*, 543 U.S. 551 (2005)?**

Response: International law has no direct bearing on the meaning of American statutes or of the Constitution. The Constitution and laws of the United States are to be interpreted according to their own texts and histories, and not according to the law of other nations. To the extent that Justice Kennedy, or any other judge, took international law as a binding source of authority for the meaning of the United States Constitution, I would disagree with that.

7. **In a symposium commentary entitled "Why Not a Miranda for Searches?," 5 OHIO STATE J. CRIM. LAW 1 (Fall 2007), you asserted that a Miranda-type rule that would invalidate consents to search unless the party whose consent is sought is first advised that he or she has a constitutional right to refuse such consent would be a "good thing." You advocated for this rule even though you acknowledge that "Miranda was not the product of inevitable judicial frustration, but of affirmative policy choice in a particular historical context."**

- a. **Why impose an additional procedural burden on the police when, as you concede in your article, there is no historical evidence of a demonstrable problem with consent searches as there was with confessions, which led to the adoption of the Miranda rule?**

Response: The argument for imposing such a burden is not to solve a social problem, but to respect the precedent established by *Miranda v. Arizona*, which was already established law when the Supreme Court decided the comparable question in the Fourth Amendment context in *Schneckloth v. Bustamonte*. Of course, whatever my academic views about the consistency of the two precedents, both are binding Supreme Court authority, and as a district judge I have applied both cases – *Miranda* and *Schneckloth* – in the cases to which each apply.

b. Wouldn't such a rule inevitably result in more evidence being excluded and thus more crimes going unpunished?

Response: The loss of evidence is always regrettable, but in these contexts it is the inevitable cost of respecting the decision of citizens who choose to invoke their rights. As in the case of *Miranda*, the loss of evidence results not from the warning, but from the citizen's right, guaranteed by the Constitution, to choose not to cooperate with a police investigation.