

Responses of Jesus G. Bernal
Nominee to be United States District Judge for the Central District of California
to the Written Questions of Senator Chuck Grassley

- 1. At your confirmation hearing, I gave you an opportunity to respond to the minority “not-qualified” rating given to you by the ABA Standing Committee on the Federal Judiciary. You responded in part by saying, “I would just say that my experience has qualified me for a position on the bench.” The ABA standing Committee on the Federal Judiciary undoubtedly was aware of your general experiences as an attorney in evaluating your qualifications. Is there anything you could share with the Judiciary Committee that the ABA may have overlooked or may be unaware of that would further demonstrate your qualifications to be a district court judge?**

Response: The ABA Standing Committee does not disclose the reasons for the ratings it gives judicial applicants, so I do not know what aspects of my record the Committee considered. I believe, however, that I possess the skill, intellect and experience necessary to be a successful district court judge. I have spent the majority of my career, including the last 16 years, litigating almost exclusively in federal court. During that time, I have appeared in federal court frequently, before many different judges, and have become familiar with court procedures and the role played by the judge, parties, lawyers, and juries in the courtroom. I have substantial experience in civil cases, having practiced complex civil litigation for almost five years and as a result of my two-year federal judicial clerkship. My vast experience in federal court and my skill and knowledge of both civil and criminal law and procedure have prepared me to be a federal judge.

- 2. In 2007, you wrote an article that speaks favorably of the Fourth Circuit Court of Appeals ruling *Al-Marri v. Wright*. In *Hamdi v. Rumsfeld*, a Supreme Court plurality ruled that while the executive has the authority to detain enemy combatants, detainees who are U.S. citizens are entitled to due process before a judge though this review did not have to meet the usual stringent standard applied in ordinary criminal matters. However, this was a plurality opinion and binding precedent is arguably unclear on the issue. Do you believe the government has the ability to detain non-citizen enemy combatants without trial? What about U.S. citizens captured overseas?**

Response: The plurality in *Hamdi v. Rumsfeld* held that the Authorization for Use of Military Force, (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (2001), allows for the detention of enemy combatants for the duration of the particular conflict in which they were captured. The plurality also concluded that a citizen who, like Hamdi, is captured abroad and detained in the United States as an enemy combatant must receive “a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker.” *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004). *Hamdi* itself did not involve application of the AUMF to non-citizens, but the plurality’s reasoning indicates that the statute also authorizes the detention of non-citizen enemy combatants captured under the same circumstances. See *id.*, at 518-519. If I am confirmed, I would carefully examine and apply the Supreme Court and Ninth Circuit precedent in that area of the law.

- a. In Justice Thomas' dissent in *Hamdi*, he argued the executive has vast power in certain circumstances to detain citizen enemy combatants without judicial review, "Because a decision to bomb a particular target might extinguish life interests, the plurality's analysis seems to require notice to potential targets." Do you find this view persuasive? If not, please explain

Response: If I were confirmed as a lower court judge, I would be obligated to follow binding majority decisions of the Supreme Court whether or not I found them persuasive. Because Justice Thomas's views did not command a majority in *Hamdi*, I do not believe it would be appropriate for me to comment on the persuasiveness of his criticism of the plurality's analysis.

3. In *Al-Marri*, by a 2 to 1 decision, a Fourth Circuit panel held that Al-Marri, an identified al Qaeda Associate connected to the 9/11 hijackers, could not be held as an enemy combatant and ordered him released from military custody. In coming to this decision, the Fourth Circuit panel distinguished *Al-Marri* from *Hamdi*. They reasoned that Hamidi met the definition of an enemy combatant because he was captured on the battlefield in Afghanistan, but Al-Marri did not because he was captured in the United States and was not demonstrated to have taken part in hostilities against the U.S. overseas. In your view, who qualifies as an enemy combatant under the AUMF? Please explain.

Response: The plurality in *Hamdi v. Rumsfeld* concluded that the AUMF authorizes the detention of individuals who are "part of or supporting forces hostile to the United States or coalition partners" in Afghanistan and who "engaged in an armed conflict against the United States" in that country. 542 U.S. at 516. The plurality made clear that it was addressing only the "narrow question before [the Court]: whether the detention of citizens falling within that definition is authorized." *Id.* If I were confirmed as a district court judge and presented with a question concerning the scope of detention authority under the AUMF, I would faithfully apply all binding precedents of the Supreme Court and the Ninth Circuit.

4. In your article you wrote the following quoting from the majority opinion of the Fourth Circuit in *Al-Marri*, "The court rejected the government's core assumption that 'persons lawfully within this country...lose their civilian status and become 'enemy combatants' if they have allegedly engaged in criminal conduct on behalf of an organization seeking to harm the United States. Of course, a person who commits a crime should be punished, but when a civilian protected by the Due Process Clause commits a crime he is subject to charge, trial, and punishment in a civilian court, not to seizure and confinement by military authorities.'" Is it your view that acts of terrorism conducted by those in league with groups we are at war with should be treated just as any other criminal?

Response: This article was an attempt to describe and explain the Fourth Circuit panel's decision in *Al-Marri*, which was later vacated by the full court sitting en banc. See *Al-*

Marri v. Pucciarelli, 534 F.3d 213 (4th Cir. 2008) (en banc). The *Hamdi v. Rumsfeld* plurality held that in the circumstances of that case, the government may detain persons who are part of or support forces that are hostile to the United States and who have engaged in armed conflict against the United States without criminal charges. In that sense, the *Hamdi v. Rumsfeld* plurality opinion allows for enemy combatants to be treated differently than other criminals. If I were confirmed as a district court judge and presented with a question in this area, I would faithfully apply all binding precedents of the Supreme Court and the Ninth Circuit.

5. What is the most important attribute of a judge, and do you possess it?

Response: The most important attribute of a judge is a commitment to resolve all matters impartially, fairly, and by faithfully applying the governing law to the facts. I believe I possess this attribute.

6. Please explain your view of the appropriate temperament of a judge. What elements of judicial temperament do you consider the most important, and do you meet that standard?

Response: A judge should be impartial, even-tempered, patient, and respectful of all those that come before the court. A judge should display elements of judicial temperament that reaffirm in the parties and the public a belief in the fairness of the judicial system. I meet these standards.

7. In general, Supreme Court precedents are binding on all lower federal courts and Circuit Court precedents are binding on the district courts within the particular circuit. Are you committed to following the precedents of higher courts faithfully and giving them full force and effect, even if you personally disagree with such precedents?

Response: Yes.

8. At times, judges are faced with cases of first impression. If there were no controlling precedent that was dispositive on an issue with which you were presented, to what sources would you turn for persuasive authority? What principles will guide you, or what methods will you employ, in deciding cases of first impression?

Response: If the issue involved a statute, I would begin by looking at its language. If the language of the statute provided the answer to the issue, I would apply the clear meaning of the statute. If the language of the statute proved ambiguous, I would look to other parts of the statute to attempt to discern its meaning. If the answer remained unclear, I would consult the legislative history. If the issue of first impression did not involve a statute or other text, I would look to analogous cases decided by the Supreme Court or within the Ninth Circuit Court of Appeals.

- 9. What would you do if you believed the Supreme Court or the Court of Appeals had seriously erred in rendering a decision? Would you apply that decision or would you use your best judgment of the merits to decide the case?**

Response: I would apply the decision of the Supreme Court or the Court of Appeals.

- 10. Under what circumstances do you believe it appropriate for a federal court to declare a statute enacted by Congress unconstitutional?**

Response: A federal court can appropriately declare a statute enacted by Congress unconstitutional only where the statute violates a provision of the Constitution or where Congress has exceeded its constitutional authority in enacting the statute.

- 11. In your view, is it ever proper for judges to rely on foreign law, or the views of the “world community”, in determining the meaning of the Constitution?**

Response: No.

- 12. As you know, the federal courts are facing enormous pressures as their caseload mounts. If confirmed, how do you intend to manage your caseload?**

Response: If confirmed, I would set reasonable but firm deadlines and issue scheduling orders. In civil matters, I would use the magistrate judges in my District to expedite the resolution of discovery disputes and to facilitate settlements. In addition, I would rule promptly on all motions and requests. In criminal cases, I would adhere to the Speedy Trial Act and prevent any undue delay in the resolution of cases. In addition, I would actively keep informed about the volume and nature of my caseload in order to better manage it.

- 13. Do you believe that judges have a role in controlling the pace and conduct of litigation and, if confirmed, what specific steps would you take to control your docket?**

Response: Yes, judges play a vital role in controlling the pace and conduct of litigation. If confirmed, I would implement the procedures outlined in response to Question 12.

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

Response: I received these questions from the Department of Justice on June 13, 2012. I drafted the responses on the same day. I then discussed the responses with an official from the Department of Justice on June 15, 2012. I then finalized my responses and sent them to the Department of Justice to be delivered to the Committee.

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

Response: Yes.