

Responses of Paul A. Engelmayer
Nominee to be United States District Judge for the Southern District of New York
to the Written Questions of Senator Jeff Sessions

1. **You served as law clerk to Justice Thurgood Marshall, who was viewed as having a judicial philosophy far out of the mainstream and far to the left of the Court. For example, Justice Marshall believed that the death penalty was unconstitutional in every case.**

- a. **Do you identify yourself with the judicial philosophy of Justice Marshall? If so, what aspects of his judicial philosophy do you most identify with? Please explain your answer.**

Response: I have enormous admiration for Thurgood Marshall. His achievement in bringing, and winning, the series of litigations that led to *Brown v. Board of Education* is a signal achievement in American law. I also have great admiration for the physical courage he showed in his career, including in defending criminal cases in late 1930s and 1940s under circumstances under which both he and his client were at risk of lynching or other physical retaliation. I also respect Justice Marshall for his long tenure in public service – as a judge on the United States Court of Appeals for the Second Circuit, as Solicitor General of the United States, and, finally, as an Associate Justice of the United States Supreme Court. I will also always be grateful to him for the extraordinary honor he gave me in asking me to serve as his law clerk, and for the unforgettable experience of so serving. That said, I do not identify myself with Justice Marshall’s judicial philosophy, and I agree that, in various areas of doctrine, his opinions are out of step with the governing precedents of the United States Supreme Court and the United States Court of Appeals for the Second Circuit. As I have testified, if confirmed, I would faithfully follow those precedents.

- b. **Do you believe the death penalty is constitutional?**

Response: Yes. The Supreme Court has held that, except in certain discrete circumstances, the death penalty is constitutional. If confirmed as a United States District Judge, I would faithfully apply the Supreme Court’s precedents, and those of the United States Court of Appeals for the Second Circuit, relating to the death penalty.

- c. **If confirmed, would you have any philosophical or legal views that would prevent you from applying the death penalty?**

Response: No. I do not have any philosophical or legal views that would prevent me from applying the death penalty.

2. **Please provide copies of any briefs you submitted or participated in drafting at any stage of the proceedings in *Shields v. Madigan*, *Hernandez v. Robles*, and *Johnson v. Bush*.**

Response: I have attached copies of briefs that I submitted or participated in drafting in *Shields v. Madigan* and *Johnson v. Bush*. I did not submit or participate in drafting any briefs in *Hernandez v. Robles*.

3. **Now that the U.S. Sentencing Guidelines are advisory rather than mandatory, a judge may impose any sentence ranging from probation to the statutory maximum.**

- a. **What are your views of the guidelines?**

Response: I believe that the U.S. Sentencing Guidelines play a valuable role in ensuring that the sentence that a defendant receives for a particular crime does not depend on the judge he or she happens to draw. The Guidelines thereby help avoid the unacceptable injustice that comes when like defendants are sentenced differently. As a federal prosecutor in the years when the Guidelines were mandatory, I saw firsthand the constructive role that the Guidelines played in this respect.

- b. **If confirmed, how much deference will you afford the guidelines?**

Response: If confirmed as a United States District Judge, I will accord the Sentencing Guidelines substantial deference.

- c. **Do you agree that the sentence a defendant receives for a particular crime should not depend on the judge he or she happens to draw?**

Response: Yes.

- d. **Under what circumstances do you believe it appropriate for a district court judge to depart downward from the guidelines?**

Response: The Guidelines themselves provide the standards applicable for various departure bases. For example, under Section 5H1.4 of the Guidelines, a departure for a physical impairment may be made only where the impairment is “extraordinary,” and there is, by now, a substantial body of precedent applying that standard to various factual situations. These precedents would bind me (if from the Second Circuit) or guide me (if from other federal courts) in applying these departure bases to the facts at hand. Following the decision in *United States v. Booker*, 543 U.S. 220 (2005), the district court, after calculating the applicable guideline range and determining whether a ground for departure is lawfully available and if so whether to depart on that ground, must also, in fashioning a sentence, take into account the other sentencing factors set forth in

18 U.S.C. § 3553(a). If confirmed as a United States District Judge, I would faithfully apply the precedents in this area.

- e. **According to an October 28, 2010 article in the *Legal Intelligencer*, there is a recent trend among federal judges to reject the federal sentencing guidelines for child pornography crimes as “too harsh.” What are your views with respect to these particular guidelines?**

Response: I do not have any views with respect to these guidelines, as I have not had any experience handling child pornography cases, either as a prosecutor or in private practice, and am not familiar with these guidelines.