

Responses of Henry F. Floyd
Nominee to be United States Circuit Judge for the Fourth Circuit
to the Written Questions of Senator Charles Grassley

1. **In your *Padilla* decision, you discussed your attempt to avoid judicial activism. How do you define that term?**

Response: Judicial activism occurs when judges venture outside of the applicable law and allow other factors, such as personal policy and political preferences, to influence their decisions.

2. **In that case, you discussed “other matters and concerns” which did not appear to be relevant to the case. You also seemed to modify the meaning of the Non-Detention Act by requiring a specific, rather than a general, authorization of detention.**

You wrote: “In clear and unambiguous language, the Non-Detention Act forbids any kind of detention of any United States citizen except that which is specifically allowed by Congress.” *Padilla*, 389 F. Supp. 2d at 688 (emphasis added). Although you claimed you were applying the plain language of the statute, when you described it, you inserted the words “that which is specifically.”

- a. **Would you consider your discussion of “other matters and concerns” an example of judicial activism? Why or why not?**

Response: No, I do not consider this discussion to be an example of judicial activism because I was addressing arguments made by the litigants and not imposing my own policy or political preferences. Under the section of the opinion titled “Other matters and concerns,” I addressed compelling arguments contained in the briefs that I had not earlier addressed because they did not fit organizationally. Nevertheless, I thought that it was important that I discuss the arguments so that it was obvious to the litigants and those reviewing my order that I had considered them. Inasmuch as I declared my holding in the sentence immediately preceding this section, and none of what I wrote in this section was a necessary part of the reason for my decision, this section is dicta.

- b. **Would you consider your description of the statute and your inclusion of the words “that which is specifically,” to be an example of judicial activism? Why or why not?**

Response: No, I do not consider this discussion to be an example of judicial activism because my statutory interpretation of the Non-Detention Act informed my decision, not my personal preferences. As I stated in *Padilla*, “This Court sits to interpret the law as it is and not as the Court might wish it to be.” *Padilla v. Hanft*, 389 F. Supp. 2d 678, 691 (D.S.C. 2005). Section 4001(a) of Title 18 of the United States Code states the following: “No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.”

When I wrote this opinion, it was my judgment that Respondent was asking me to go beyond what the statute allowed. Thus, my inclusion of the term “that which is specifically” to modify “an Act of Congress” was meant to elucidate that I was strictly construing what I interpreted the terms of the statute to be.

3. Do you believe that our federal government is one of limited and enumerated powers?

Response: Yes.

4. What does the concept of separation of powers mean for the federal courts? If confirmed, will this be a governing principle which you will follow?

Response: Federal courts are assigned a circumscribed role in our constitutional structure. Article III limits the power of the federal courts to resolving cases and controversies. The concept of separation of powers reflects this limited role of the federal courts. It requires that federal courts confine their decisions to resolving the narrow issues presented in the cases or controversies before them and not to exercise powers ascribed to another branch. If confirmed, I will follow this governing principle.

5. Do you believe it is proper for a judge, consistent with governing precedent, to strike down an act of Congress that it deems unconstitutional? If so, under what circumstances, and applying what factors?

Response: Yes. Judges, however, should presume that acts of Congress are valid and “invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds.” *United States v. Morrison*, 529 U.S. 598, 607 (2000). In determining whether to strike down a congressional statute as unconstitutional, judges must consider the applicable factors set forth in Supreme Court and other binding precedent.

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

Response: The most important attribute of a judge is independence. Independence allows a judge to resolve cases and controversies impartially and to apply the written law faithfully notwithstanding societal pressures. The independence of the judiciary is critical to the rule of law. I possess independence, which my record as a jurist reflects.

7. 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: Judges should be calm, patient, courteous, and respectful in their interactions with all litigants and attorneys. Such temperament is necessary to reflect the impartiality of the court and to allow for the effective resolution of cases. Judges must also exercise great discretion outside of the courtroom to protect society’s perception of the judiciary as an independent arbiter of disputes. I meet this standard.

8. **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.

9. **At times, judges are faced with cases of first impression. If there were no controlling precedent that dispositively concluded 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 confronted by a case of first impression, my starting point would be the text of the particular statute, regulation, or constitutional provision at issue. If the text is clear, I will simply apply the provision as written. If it is unclear and no binding precedent exists, I will look for guidance from nondispositive Supreme Court and Fourth Circuit precedent and decisions rendered by other circuit courts. The principles and methods gleaned from these decisions will guide me in deciding cases of first impression.

10. **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 own judgment of the merits, or your best judgment of the merits?**

Response: I would faithfully apply all binding precedent regardless of whether I personally disagreed with the decision.

11. **Under what circumstances, if any, do you believe an appellate court should overturn precedent within the circuit? What factors would you consider in reaching this decision?**

Response: In the Fourth Circuit, one panel lacks the authority to overturn or depart from the holding of another panel. *United States v. Guglielmi*, 819 F.2d 451, 457 (4th Cir. 1987). Only the court sitting en banc may do so. *Id.* Accordingly, I would decline to overturn or depart from a prior panel's decision unless the court was rehearing the case en banc. Furthermore, I will generally disfavor hearing a case en banc unless "en banc consideration is necessary to secure or maintain uniformity of the court's decisions" or the case involves a "question of exceptional importance." Fed. R. App. P. 35(a).

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

Response: I drafted the answers to these questions and asked the U.S. Department of Justice to submit them on my behalf.

13. Do these answers reflect your true and personal views?

Response: Yes.