

Responses of Andre M. Davis
Nominee to the U.S. Court of Appeals for the Fourth Circuit
to the Written Questions of Senator Tom Coburn, M.D.

- 1. 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.”**

- **What role do you believe that empathy should play in a judge’s consideration of a case?**

Response: I believe that empathy is an attribute of character that provides a judge with insight and understanding of the human condition of litigants whose cases the judge exercises authority to decide. Empathy is not a rule of decision or a basis for the decision in any legal matter.

- **Do you believe you fit President Obama’s criteria?**

Response: Yes.

- 2. Judge Davis, your record reflects quite a few reversals by the Fourth Circuit on evidentiary matters in criminal cases.**

- **Do you believe the Fourth Circuit was wrong to reverse any of these decisions? If so, in which cases? If not, do you accept that you were wrong in each of these reversals?**

Response: In every case that has ever come before me, I have done my best to determine the facts (where I have been the fact finder) and to apply the law to the facts impartially and fairly. I fully respect the role of appellate courts in our system and fully accept their decisions in all cases, including the cases in which they have reviewed my rulings.

- **What measures do you take in your chambers to ensure accurate interpretation of the relevant laws and precedents?**

Response: I give careful and individual attention to every matter of fact and law presented in every case on my docket.

- **Has your approach to suppression motions changed since you first became a judge? If so, how?**

Response: No.

3. **As a judge, you are charged with applying the law as it is written — removing personal opinion and bias from your work. This must be a challenging task**

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

Response: In the nearly 22 years I have been a trial judge, I have always followed the law as set forth in statutes and appellate precedents. No personal opinions or biases figure into my decisions of fact and law.

4. **In *U.S. v. Custis*, 150 Fed. Appx. 265 (4th Cir. 2005), you granted the defendant’s motion to suppress evidence discovered in a residential search on the grounds that the warrant was defective and insufficient. In a unanimous decision, the Fourth Circuit reversed and remanded, holding that probable cause supported the issuance of the search warrant. The court stated, “Reading the Supporting Affidavit in a commonsense, rather than a hypertechnical manner, as we are required to do, . . . we are convinced that the Maryland Judge had a substantial basis for concluding that probable cause existed to believe that the evidence of criminal activity identified in the warrant application would be found at [the residence].”**

- **Do you agree with the Fourth Circuit’s finding of probable cause?**

Response: I fully accept the appellate court’s ruling in this case, in which it rejected my assessment that the application did not provide a substantial basis for the belief in probable cause for a residential search warrant.

- **Do you agree that judges are required to read a warrant’s supporting affidavit in a commonsense manner?**

Response: Yes.

- **Do you agree with the circuit court’s characterization of your reading of the affidavit in *Custis* as being “hypertechnical”? If so, why did you read the warrant in such a manner?**

Response: I believe I read the affidavit in a commonsense manner.

5. **In *United States v. Bradley*, 455 F.3d 453, three defendants pleaded guilty to charges of conspiracy to distribute crack cocaine and of illegal use of firearms. They then appealed, arguing that their guilty pleas were not voluntary because you had impermissibly participated in plea negotiations, repeatedly encouraging them to plead guilty. The government conceded in the litigation that the record indisputably reflected your participation and encouragement. The Fourth Circuit struck down the plea and vacated the judgment. The court included the following rebuke of your handling of this case:**

“[A]fter careful review of the entire record in this case, we can only conclude that refusing to notice this plain error would seriously affect the fairness, integrity and public reputation of judicial proceedings. We have not found a single case in which the extent of judicial involvement in plea negotiations equaled that in the case at hand. The district court repeatedly appeared to be an advocate for the pleas rather than as a neutral arbiter, and any fair reading of the record reveals the substantial risk of coerced guilty pleas. Even if, as the Government claims, it could have presented uncontroverted evidence of the Defendants’ guilt if the trial had proceeded to verdict, we cannot refuse to notice the repeated judicial intervention in the plea negotiations. The fact is, the jury rendered no verdict in this case; there has been no ‘fair and reliable determination’ of the Defendants’ guilt.” (Id. at 464)

When the Fourth Circuit remanded the case, it assigned it to another district judge.

- Do you believe the Fourth Circuit’s criticism of your actions in this case was justified?**

Response: I believe with the benefit of hindsight that my involvement in facilitating the guilty pleas in this case was inappropriate and that the Fourth Circuit was correct to say so.

- Why did you choose to interfere with the plea process? Do you now regret doing so?**

Response: I became involved in, but I did not interfere with, the plea process, at the invitation and encouragement of defense counsel. I should not have gotten involved in that process at all.

- Do you believe judges should cast aside their roles as “neutral arbiters” if they believe strongly in a desired result?**

Response: No.

- If you were given the chance to handle this case again, would you have handled it differently? If so, how?**

Response: Yes. I would have permitted the case to proceed to verdict without any involvement whatsoever on my part in discussing with counsel a possible change of plea by any defendant.

- 6. In United States v. Kimbrough, the defendant was arrested by the police when they found him in the basement of his mother’s house cutting cocaine. As the police officer was trying to give the defendant the Miranda warning, the defendant’s mother asked the defendant if there was anything else in the basement. The defendant told his mother (and the officer) that there was a gun in the basement.**

You granted the suppression motion of his post-arrest statements *to his mother* that led to finding the gun, on the grounds that the Miranda warning was faulty.

The Fourth Circuit reversed. It noted that you had mischaracterized the Fifth Amendment right, calling your analysis at “best incomplete and, taken literally, . . . simply erroneous.” Indeed, since “Ms. Kimbrough is a private citizen, her spontaneous questioning of Appellee alone, independent of the actions of the police officers, could never implicate the Fifth Amendment. The Fifth Amendment is, as we have discussed, unconcerned with private, as opposed to state, interrogation.”

- **Judge Davis, did you get that suppression motion right? Should evidence obtained through a mother’s questioning be suppressed under Miranda?**

Response: I fully accept the appellate court’s ruling in this case, in which it rejected my legal conclusion that the police permitted the defendant’s mother to question him under circumstances in which the police could not have done so without first administering the customary warnings. I agree that warnings are required only when official interrogation takes place, but not when private interrogation takes place.