

Responses of Andre M. Davis
Nominee to the U.S. Court of Appeals for the Fourth Circuit
to the Written Questions of Senator Charles E. Grassley

1. In *U.S. v. Allen*, 450 F.3d 565 (4th Cir. 2006), the defendant pleaded guilty to being a felon in possession of a firearm, and his plea agreement stated that he would be subject to a 15-year mandatory minimum prison term if he was found to be an armed career criminal. He did not dispute that he qualified as such. You imposed a 63-month prison term (5.25 years), which was below the statutory minimum 15-year term required under the law. The Fourth Circuit unanimously reversed.

- a. Is it your view that sentencing guidelines are advisory in nature and that an appellate court should defer to the district court judge?

Response: In light of the Supreme Court's decision in *Booker*, the federal sentencing guidelines are advisory and not mandatory. The Supreme Court has now clarified that the proper standard of appellate review of criminal sentencing is abuse of discretion. If I am confirmed, that is the standard I would apply.

- b. In light of the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005) and *Blakely v. Washington*, 542 U.S. 296 (2004), what is your view on the future of federal sentencing guidelines and the U.S. Sentencing Commission?

Response: I believe the Sentencing Commission will continue to provide Congress and the courts with valuable services, e.g., empirical studies and data compilations. It will be for the Congress to determine what if any changes are appropriate to the Sentencing Reform Act, which created the guidelines. As a judge, I will follow whatever laws Congress implements.

2. In the case *In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305 (3d Cir. 2008), the Third Circuit unanimously held that when weighing class status in class action cases, district courts must resolve all related factual disputes and give equal attention to evidence presented by both sides. Specifically, the Third Circuit observed that the requirements set forth in Federal Rule of Procedure 23 are "not mere pleading rules," but rather frame how district courts should test the factual sufficiency of a class certification motion. The movant bears the burden of meeting those requirements by a preponderance of the evidence, and that burden will not be met by an assurance of how the movant intends to meet these requirements. Thus, the Third Circuit rejected the notion that a plaintiff can satisfy Rule 23 by making a "threshold showing." If all of the circuit courts adopt this standard, it will potentially greatly reduce the number of class action lawsuits.

- a. What is your position on this issue?

Response: As this is a legal issue that could actually come before me in an actual case if I am confirmed, I believe that to maintain both the appearance of impartiality as well as the actuality of impartiality, I must decline to express my views on this legal issue.