

**Responses of Barbara Milano Keenan
Nominee to the U.S. Court of Appeals for the Fourth Circuit
to the Written Questions of Senator Jeff Sessions**

- 1. In the notes for a speech you gave to school-age children entitled “Should You Be a Judge?” you stated that “diversity in judic[ial] compos[ition]” is “essential to public confidence” in the judiciary.**

- a. Can you explain what you meant by this statement?**

Response: As is the case with other institutions of government, the public’s perception of the judiciary is important to maintaining confidence in that institution. The perception of equal justice under the law is enhanced when the public can observe that judicial officers are drawn from many different backgrounds that reflect the richness and diversity of our great nation.

- b. Does this statement accurately reflect your judicial philosophy?**

Response: The above statement reflects my personal opinion. I would not characterize this opinion as a judicial philosophy.

- c. Do you believe that an individual’s race or gender affects the quality of his or her decisionmaking?**

Response: No.

- 2. At your confirmation hearing, I asked you about *Virginia College Building Authority v. Lynn*, 260 Va. 608 (Va. 2000), in which the Virginia Supreme Court considered whether Regent University, a sectarian private school in Virginia, could participate in a state-run bond program. The majority found that the bond program did not violate the Establishment Clause, the State Constitution, or Virginia law. The dissent that you joined concluded that Regent’s primary overall purpose was to provide religious training, and as a result, the Virginia statute governing the program prohibited Regent’s participation in the bond program, even though the University taught secular subjects. At your hearing, you stated that there was not an Establishment Clause issue before the Court. In fact, there was an Establishment Clause issue in the case, but the dissent focused only on the Virginia statute at issue. You also stated that the dissent’s reasoning focused solely on the fact that the bond funds would have been used for the Divinity School; however, both the majority and dissent recognized that the Divinity school issue required a different analysis.**

- a. Although your dissent did not reach the issue, please provide your analysis of the Establishment Clause issue in that case.**

Response: An appellate court speaks only through its written opinions and orders, including its dissents. Therefore, while I am able to provide an explanation of the reasoning that I employed in any opinion that I joined or wrote, I am unable to provide an analysis of an issue that was not addressed substantively in the portion of the opinion that I joined or wrote. Accordingly, because the dissent that I joined in the VCBA case conducted a statutory analysis and review of the lower court record that I thought fully resolved the issue before the Court, it is not appropriate for me to provide an advisory opinion on an issue not reached by the dissent.

- b. Your dissent did not address an argument raised by the VCBA that the statute, if interpreted to bar Regent from participating in the bond program, was “viewpoint discriminatory.” The statute defined “institute of higher education” as “a nonprofit educational institution within the Commonwealth whose primary purpose is to provide collegiate or graduate education and not to provide religious training or theological education.” Your dissent essentially defined “religious training” to include teaching standard graduate school courses from a religious perspective and then declined to address the viewpoint discrimination claim, stating that it was waived because the VCBA raised the issue for the first time on appeal.**

- i. Do you believe that the statute at issue is viewpoint discriminatory?**

Response: As I indicated above, because an appellate court speaks only through its opinions and orders, I am unable to provide an analysis of any issue that was not addressed substantively in the portion of an opinion that I joined or wrote. Therefore, because the issue of “viewpoint discrimination” was not addressed substantively in the dissent that I joined, it is not appropriate for me to provide an advisory opinion regarding that issue.

- ii. If not, at least under your interpretation of the statute, the statute appears to treat religious institutions less favorably than non-religious institutions. In other words, colleges that teach a standard college curriculum from any number of perspectives (for example economic or political) can participate in the bond program, but colleges that teach from a religious perspective cannot. Do you agree that that is the essence of viewpoint discrimination?**

Response: As I indicated above, it is not appropriate for me to provide an advisory opinion on this issue that was not addressed substantively in the dissenting opinion that I joined.

iii. What is the rationale for treating religious institutions less favorably?

Response: I am unable to answer this general question because it does not address an issue that was part of an opinion that I joined or wrote.

c. Would your opinion have prevented a university such as Georgetown or Notre Dame, assuming they were present in Virginia, from participating in this bond program?

Response: I am unable to answer this question because it seeks an advisory opinion on a hypothetical case that was not before the Supreme Court of Virginia.

d. In *Rosenberger v. Rector and Visitors of the University of Virginia*, the U.S. Supreme Court held that the University of Virginia violated the First Amendment when it withheld funds provided to student publications from a magazine that had a religious perspective.

i. Do you agree that *Rosenberger* is still the law of the land?

Response: Unless overturned by a later United States Supreme Court decision or by an act of Congress, all United States Supreme Court decisions are the law of the land.

ii. If confirmed, will you commit to following *Rosenberger* and other applicable precedent on this issue?

Response: If confirmed, I will follow all applicable precedent, including the decision in *Rosenberger*.

e. To what extent does the Establishment Clause limit the government's ability to include churches, religious schools, or other religious organizations in neutral government aid programs?

Response: I am unable to answer this question because it seeks an advisory opinion and is unrelated to a particular case that was decided by the Supreme Court of Virginia.

3. What in your view is the role of a judge?

Response: The role of a judge is to consider fully all evidence presented and arguments posed by the parties to a case, to ascertain the applicable precedent governing those issues, and to render a clear and precise decision that follows the governing precedent.

- a. Do you think it is ever proper for judges to indulge their own values in determining what the law means?**

Response: No.

- i. If so, under what circumstances?**
- ii. Please identify any cases in which you have done so.**

Response: There are no cases in which I have done so.

- iii. If not, please discuss an example of a case where you have had to set aside your own values and rule based solely on the law.**

Response: I have never been required to set aside my own values in deciding a case, because personal values are not part of my thought process as a judge. My process of deciding a case is based solely on the law and the record before the court.

- b. Do you think it is ever proper for judges to indulge their own policy preferences in determining what the law means?**

Response: No.

- i. If so, under what circumstances?**
- ii. Please identify any cases in which you have done so.**

Response: There are no cases in which I have done so.

- iii. If not, please discuss an example of a case where you have had to set aside your own policy preferences and rule based solely on the law.**

Response: In *Chandler v. Graffo*, 268 Va. 673, 604 S.E.2d 1 (2004), the majority opinion held that Virginia Code § 8.01-581.20, which sets forth qualifications for testifying as an expert witness in a medical malpractice case, did not permit either party the right to retain a former malpractice panel member as an expert in the case. *Id.* at 680, 604 S.E.2d at 4. I joined Justice Agee's dissent, which stated that while such a prohibition might be "preferred public policy," a prohibition did not appear within the written statute and, thus, the inclusion of such a prohibition in the statute was a matter for future legislative action, not for "judicial amendment" by the Court. *Id.* at 684, 604 S.E.2d at 6.

4. How do you define “judicial activism?”

Response: There is no generally recognized definition of this term. I view this term as describing a situation in which a judge wrongly sets aside legal precedent and renders a decision based on personal preference and a desire to reach a predetermined result.

5. Some people refer to the Constitution as a “living” document that is constantly evolving as society interprets it. Do you agree with this perspective of constitutional interpretation?

Response: I do not think that the Constitution is “constantly evolving” based on interpretations or views of “society.” In each case when a court considers a constitutional issue, the court must examine the Constitution under existing precedent and render a decision based on that precedent.

6. Supreme Court precedents are binding on all lower federal courts and Circuit Court precedents are binding on the district courts within the particular circuit.

a. 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.

b. How would you rule if you believed the Supreme Court or the Court of Appeals had seriously erred in rendering a decision? Would you nevertheless apply that decision of your own best judgment of the merits?

Response: The decisions of the Supreme Court of the United States, and of the United States Court of Appeals for the Fourth Circuit, are binding precedent on a judge of the United States Court of Appeals for the Fourth Circuit. If confirmed as a Court of Appeals judge, I would honor that precedent.

7. As you may know, President Obama has described the types of judges that he will nominate to the federal bench 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.”

- a. **Do you believe that you fit President Obama's criteria for federal judges, as described in his quote?**

Response: As a judge, I try always to remain aware that parties, whether rich or poor, come before a court because of difficult issues that they are unable to resolve, and it is the court's job to decide those issues impartially based on the law. I cannot opine regarding President Obama's criteria for selecting judges.

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

Response: Empathy is not an analytical tool to be applied in a judge's consideration of a case. A judge must always, however, accord to all parties careful consideration of the issues presented and allow the parties to be heard fully on those issues.

- c. **Do you think that it's ever proper for judges to indulge their own subjective sense of empathy in determining what the law means?**

Response: No.

- i. **If so, under what circumstances?**

- ii. **Please identify any cases in which you've done so.**

Response: There are no cases in which I have done so.

- iii. **If not, please discuss an example of a case where you have had to set aside your own subjective sense of empathy and rule based solely on the law.**

Response: There are no such cases, because empathy is never a factor in the decisions that I reach as an appellate judge.