

Responses of Irene Cornelia Berger
Nominee to the U.S. District Court for the Southern District of West Virginia
to the Written Questions of Senator Jeff Sessions

1. **President Obama has described the types of judges 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 agree with President Obama’s quote?**

Response: I am not certain that I understand what the President intended by the quote. However, in terms of judges, it is my opinion that we need people who will work within ethical guidelines to apply the law, treat all parties respectfully, fairly and equally and issue timely rulings.

- b. **Do you believe that you fit President Obama’s standard as described in his quote?**

Response: As noted, I’m not sure I understand the intent of the quote. If it is intended as a standard, I think President Obama would be in a better position to answer this question. However, I do believe that selecting judges and judging are two very distinct issues.

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

Response: I do not believe that empathy should play a role in a judge’s consideration of a case. The judge should apply the law to the facts of the case without being influenced by sympathy or empathy.

- d. **Do you think that it is 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?**

Response: Not applicable given the answer above.

ii. Please identify any cases in which you have done so.

Response: Not applicable given the answer above.

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: I have no empathy that is inconsistent with applying the law. Therefore, I am unaware of any case in which I have had to set aside my own subjective sense of empathy.

I have, however, had the occasion to set aside sympathy and rule based solely on the law. Early on in my career as a judge, I presided over a case in which parents sued a property owner for the wrongful death of their son. Their son was decapitated as he rode a motorcycle and ran into a wire which was strung along the property line to keep trespassers off of the property. These parents had lost a child and wanted someone to be held responsible. As most people would, I felt sympathy for the parents but given our case law relative to trespass, at the time, I granted summary judgment in favor of the property owners.

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

Response: The role of a judge is to ascertain the relevant facts, apply the applicable law to the facts, without outside influence, in a timely manner and in keeping with ethical standards.

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

Response: Yes

i. If so, under what circumstances?

Response: Values such as honesty, integrity, strength and commitment serve a judge well in determining what the law means. Being honest about the status of existing law and having the integrity, strength and commitment to make the determination and apply it, within ethical parameters, without succumbing to outside influence, are assets for a judge.

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

Response: I use these values in every case.

- 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 no values which are inconsistent with applying the law and, therefore, have not had a case where I have had to set aside my own values and rule based solely on the law.

- 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?**

Response: Not applicable given the answer above.

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

Response: Not applicable given the answer above.

- 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: I presided over a case involving a young adult defendant convicted of robbery. Having given consideration to the sentencing factors, such as a lack of prior criminal record, his age, educational background, employment, psychological and other factors, and believing (based on these objective factors) that he could possibly be rehabilitated, it was my policy preference to impose an alternative sentence. However, by statute, a minimum sentence of ten (10) years in the penitentiary was required. I imposed the applicable sentence despite my policy preference.

3. How would you define “judicial activism?”

Response: This is not a term that I use. However, when I have seen it used and given consideration to the context in which it was used, I have interpreted it to mean ignoring existing statutory, case or other law and/or the reasonable interpretation of the same, to reach a predetermined result in a case.

a. 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: The Constitution is not constantly evolving but the body of constitutional law is ever evolving because the terms of the Constitution must be interpreted and applied in light of new factual scenarios (not previously decided) when the same are presented.

4. 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 or your own best judgment of the merits?

Response: My opinion or belief that the Supreme Court or the Court of Appeals had erred would not be relevant. I would apply the law as rendered by the Supreme Court or the Court of Appeals, if applicable to the facts of the case which I had under consideration.

5. Do you believe that a federal district court has the institutional expertise to set rules for and oversee the administration of the prisons, schools, or state agencies?

Response: I believe that these are functions of the other branches of government as opposed to the judicial branch.