

Responses of Edward Milton Chen
Nominee to the U.S. District Court for the Northern District of California
to the Written Questions of Senator Jeff Sessions

1. At your confirmation hearing, I asked you about the following statement that you have made in several speeches and that was published in the *California Law Review*:

“diversity enhances the quality of decision-making. In addition to analyzing and applying the law, judges have to make determinations that draw not so much upon legal acumen, but on an understanding of people and of human experiences. Such experiences inform assumptions that affect legal decisions. At trial and in evidentiary hearings, judges have to assess the credibility of witnesses. A witness’ testimony may seem more credible if it is consistent with the judge’s knowledge or experience, and, conversely, less credible if it remains outside the judge’s experience. . . .

Simply put, a judge’s life experiences affect the willingness to credit testimony or understand the human impact of legal rules upon which the judge must decide. These determinations require a judge to draw upon something that is not found in the case reports that line the walls of our chambers. Rather judges draw upon the breadth and depth of their own life experience, upon the knowledge and understanding of people, and of human nature. And inevitably, one’s ethnic and racial background contributes to those life experiences.”

When I asked whether this accurately reflected your judicial philosophy, you responded that there is a benefit to having a diverse judiciary. I am unclear as to what you mean by that statement, as well as the above quote.

- a. **Please explain your statement that there is a benefit to having a diverse judiciary.**

Response: In the *California Law Review* article from which the quote is taken, I tried to explain the various benefits of a diverse judiciary. Among them are the establishment of judicial role models for students and attorneys; helping to dispel stereotypes that certain demographic groups, because of their prior absence from the field, are not capable or are less capable of being judges; and the message of inclusion sent to historically under-represented communities which could help break down barriers to access to justice and engender confidence and trust in the courts. I do not believe that race or gender should affect a judge’s interpretation of the law.

- b. **Do these statements accurately reflect your judicial philosophy?**

Response: The quoted statement was not intended as a reflection of any judicial philosophy.

It was intended as an empirical (albeit not scientific) observation that the nature and breadth of a judge's life experience can affect his or her perceptions and hence decision-making process. Thus, diversity facilitates an interchange of ideas, experiences, and perspectives among judges -- much the way it does in a classroom, private business, or other public institution. That observation does not change my fundamental philosophy that a judge, particularly at the district court level, must apply the law as determined by binding authorities (the Supreme Court and the applicable Court of Appeals) to the facts free from personal philosophies and preferences. To do otherwise corrodes the integrity of the courts and ultimately the rule of law itself.

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

Response: I do not believe that the quality of decision-making is affected by one's gender or race. An individual's race or gender should not drive one's decisions as a judge. Judges should do everything humanly possible to uphold their oath to apply the law without regard to the person's status.

d. Can you give me an example of an "experience" that "informed" one of your "assumptions" that "affected one of your legal decisions?"

Response: I am not aware of any particular experience that informed one of my own assumptions which affected a legal decision I have made. I have made a conscious effort to check any personal feelings or intuitive notions I might possess, and have applied the law as I best understand it to facts based on objective criteria.

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

Response: The role of a judge is to be fair, neutral, and evenhanded in applying the law and finding facts (when called to do so) without regard to personal preferences.

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

i. If so, under what circumstances?

ii. Please identify any cases in which you 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: It is never proper for judges to indulge their own values in determining what the law means. I have never indulged my own values in determining what the law means. I have set aside my prior positions as an advocate and made the transition to the role of a neutral judge when I took the bench as a magistrate judge eight years ago. For instance, although I litigated cases challenging random drug testing as a lawyer, I now, as a magistrate judge, routinely impose

mandatory drug testing as a condition on pretrial releasees and probationers. Although it is my understanding that the ACLU either has or does oppose preventive detention, I routinely detain criminal defendants without bail when I find they pose a flight risk or danger to the community pursuant to the Bail Reform Act of 1984. Although I sought recovery of attorney's fees in numerous civil rights cases as a lawyer on behalf of plaintiffs, as a magistrate judge, I cut a requested fee award in a Title VII case, and was ultimately reversed by the Ninth Circuit for being too stringent.

- b. Do you think it is ever proper for judges to indulge their own policy preferences in determining what the law means?**
- i. If so, under what circumstances?**
 - ii. Please identify any cases in which you 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: It is never proper for judges to indulge their own policy preference in determining what the law means. I have never done so. As illustrations of where I have made rulings based solely on the law free from any prior positions I had taken as a lawyer, see my answer to Question 2.a.

3. How would you define “judicial activism?”

Response: I do not use the phrase “judicial activism.” There is no universal definition as “judicial activism” has taken on various meanings, which appear to depend in part upon the context. If, as applied to the district court, judicial activism means deciding issues broader than that necessary to adjudicating the case and allowing a judge's own values and policy preferences to influence the decision-making, rather than adhering to the law and finding facts on an objective basis, I am not a judicial activist.

4. 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 proper mode of constitutional interpretation appears to be a subject of debate within the Supreme Court. As a district court judge, if confirmed, I would apply the constitutional analysis as directed by precedents of the Supreme Court and the Ninth Circuit. It is for the higher courts, not the district court, to resolve and establish the proper mode of constitutional analysis.

5. 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: I am unconditionally committed to following the precedents of higher courts faithfully and giving them full effect, regardless of my personal agreement or disagreement with such precedents.

- 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: Even if I believed the Supreme Court or the Court of Appeals had seriously erred in rendering a decision, I nonetheless would be bound by that decision and would adhere to and apply that decision. It is not for the district court to second guess the higher courts.

6. **In remarks before the Berkeley School of Law chapter of the American Constitution Society, you stated that you find “most rewarding . . . [c]ontributing to the development of the law via published opinion, especially if it comports with my view of justice.”**

- a. **Please explain what you mean by your “view of justice.”**

Response: My reference to my “view of justice” was directed primarily at matters which improve the administration of justice. The vast majority of decisions at the magistrate judge level pertain to pretrial matters such as discovery, case management, and pretrial motions. Most of our published decisions appear in the Federal Rules Decisions. I was taught by former District Judge Charles Renfrew for whom I clerked that the most important rule of the Federal Rules of Civil Procedure is Rule 1 – which directs that the rules should be construed and administered to secure the “just, speedy, and inexpensive determination” of every action and proceeding. Toward that end I have issued numerous published opinions which have contributed to clarification of rules and procedures.

- b. **Please provide an example of a case in which the outcome comported with your view of justice.**

Response: In *Semitool, Inc. v. Tokyo Electron Am.*, 208 F.R.D. 273 (N.D. Cal. 2002), I issued an opinion which I believe clarified the otherwise confusing and conflicting law as to when early discovery is permissible. I concluded that whether there should be expedited discovery should turn on whether there is good cause for such discovery, and not upon whether the party seeking discovery has satisfied a standard akin to preliminary injunctive relief, as had been argued. I believe the ruling provided a fair balance of competing interests and was consistent with Federal Rule of Civil Procedure 26. The decision has been widely

cited. My ability to contribute to the efficient and just administration of justice has been gratifying.

- c. Please provide an example of a case in which you “contribute[d] to the development of the law via published opinion.”**

Response: Please see my answer to Question 6.b.

- d. Are you able and willing to “contribute to the development of the law via published opinion” even if it does not comport with your view of justice?**

Response: Yes.

- e. Have you “contribut[ed] to the development of the law via published opinion” in circumstances where it did not comport with your view of justice?**

Response: Yes. As an example, I presided over a case in which I felt that removal to federal court from state court was not consistent with general policy underlying the removal statute, but concluded that the strict language of the statute required me to sustain the removal.

- 7. In remarks given on September 22, 2001, you briefly mentioned the “horror and disbelief” you felt following the 9/11 attacks. You then stated that you**

“had a sickening feeling in [your] stomach about what might happen to race relations and religious tolerance on our own soil . . . [O]ne has to wonder whether the seemingly irresistible forces of racism, nativism and scapegoating which has recurred so often in our history can be effectively restrained.”

Similarly, in remarks at Stanford Law School on November 14, 2001, you seemed to draw a comparison between the conditions that led to the internment of Japanese Americans in World War II and the circumstances following the 9/11 attacks. Do you believe that it is appropriate for a sitting judge to comment publicly on policy matters, especially those in a national security context?

Response: No, I do not believe it is appropriate for a sitting judge to publicly comment on policy matters. My remarks at Stanford Law School were directed at students aspiring to public service. My intent was not to make a comment on policy matters, but to give the students illustrations of some of the issues that should warrant their thought and attention and inspire them to get involved in addressing some of the difficult and challenging legal questions that lay ahead. I also wanted to impress upon the students the importance of the rule of law. If my remarks were taken as a comment on policy, I regret that and will endeavor to safeguard against that in the future.

8. **You also have made comments regarding political matters, which is rather unusual for a judge. For example, in a November 11, 2001 speech before the National Asian Pacific American Law Student Association, you criticized Senator Fred Thompson for his work in trying to investigate campaign finance controversies involving John Huang and Charlie Trie, both of whom eventually pled guilty to felony campaign finance law violations. Similarly, in an October 2008 speech, you made a joke at the expense of the Republican Vice-Presidential nominee.**

- a. **Do you believe it is appropriate for a judge to publicly comment on political matters?**

Response: No, I do not believe it is appropriate for judges to publicly comment on political matters. In my speech before the National Asian Pacific American Law Student Association in 2001, I did not intend to comment on political matters. Rather, I was giving a number of examples of discriminatory attitudes against Asian Americans that continue in contemporary times, in order to urge students to think about the issues of bias and discrimination they could well face. I gave a host of examples both historically and currently, including a survey of attitudes towards Asian Americans, a skit at the American Society of Newspaper Editors, and unfair questions posed by the press to an Asian American Republican candidate for public office about divided loyalties. I also referenced the campaign finance controversy in the 1990's which many in the Asian American community know started with the Democratic National Committee's vetting policies directed at Asian American donors and grew to include more widely circulated inflammatory comments about John Huang and Charlie Trie by others. Seen in this context, these were a collection of anecdotes, not directed at any one political party or institution, but marshaled to make a more general point. In my October 2008 speech, I had joked about a number of things including a self-deprecating joke aimed at Asian Americans. That joke plus my inclusion of a joke about the Republican vice presidential nominee's involvement with the PTA was, in retrospect, in poor taste and should not have been made.

- b. **If a judge's role is to interpret and not make the law, doesn't it blur the line between the two when a judge comments on political matters, as you did?**

Response: As stated in my answer to Question 8.a., I did not intend to comment on political matters, as such would be improper because it could compromise the appearance of impartiality. I take my role as a judge to interpret and not make the law seriously, and I believe my record on the bench for the last eight years demonstrates that. If my remarks were taken as a comment on political matters, I regret that and will endeavor to avoid such in the future.

- c. **Rule 4.1 of the ABA code of Judicial Ethics states:**

"a judge plays a role different from that of a legislator or executive branch official. Rather than making decisions based upon the expressed views or

preferences of the electorate a judge makes decisions based upon the law and the facts of every case. Therefore, in furtherance of this interest, judges and judicial candidates must, to the greatest extent possible, be free and appear to be free from political influence and political pressure. ... Public confidence in the independence and impartiality of the judiciary is eroded if judges ... are perceived to be subject to political influence. .. [and are prohibited] from making speeches on behalf of political organizations or publicly endorsing or opposing candidates for public office ...”

- i. Do you believe your statements comported with the spirit of this rule?
- ii. Do you believe that “to the greatest extent possible” you attempted to appear “free from political influence”?

Response: I do not believe my comments, put in the context as I have explained above, violated Rule 4.1 of the ABA Code of Judicial Ethics. I do not believe my comments were perceived to be the subject of political influence or seen as made on behalf of political organizations or endorsing any candidate for public office. That certainly was not my intent.

9. **While a staff attorney for the ACLU of Northern California, you wrote a letter to the editor of the *New York Times* stating that English-only laws are “based on false, xenophobic assumptions.” In a 1987 issue of *East Wind* magazine, you co-authored an article that stated, among other things, that the English only movement “is anti-immigrant and xenophobic in character.”**

- a. **Do you believe that English-only laws are *per se* unconstitutional?**

Response: No. No court to my knowledge has held that English-only rules are *per se* unconstitutional.

- b. **Do you believe that they are always based on racist assumptions or perceptions?**

Response: No. English-only laws passed by the legislature or by initiative are presumptively constitutional. Absent presentation of specific evidence to the contrary, I do not believe there is any authority supporting a presumption that such laws are based on racist assumptions or perceptions.

- c. **Given your many statements and positions regarding this issue, what assurances can you give that you will rule fairly and impartially on any matter involving an English-only policy or practice?**

Response: I assure the Committee that, if the issue were to come before me, I would rule, if confirmed as a district judge, fairly and impartially. I have taken, and if confirmed, will again take the oath to do so. To do otherwise would not only violate my personal oath, but undermine the overarching value to which I

subscribe – adherence to the rule of law. As I noted in my answer to Question 2.a., I have issued numerous ruling as a judge which would appear contrary to positions I previously took as an advocate. I believe these rulings are the best evidence of my commitment to the rule of law.

10. **As an ACLU attorney, you frequently and strongly supported affirmative action programs. You litigated against efforts to invalidate anti-affirmative action initiatives. In 1996, you took part in the ACLU’s unsuccessful challenge to California’s Proposition 209, which outlawed preferential treatment to individuals on the basis of race, gender or ethnicity in state hiring, contracting and education. You also filed on behalf of the ACLU an *amicus* brief with the Supreme Court in *Richmond v. J.A. Croson Co.* in an unsuccessful effort to defend Richmond’s Minority Business Utilization Plan, an affirmative action program. If confirmed, will you commit to follow the precedent of the Ninth Circuit and Supreme Court and put aside your views regarding affirmative action?**

Response: Yes, I will commit to following precedent of the Ninth Circuit and Supreme Court in all areas including issues pertaining to affirmative action, regardless of my views or prior advocacy.

11. **According to the ACLU’s website, the ACLU believes that the death penalty inherently violates the constitutional ban on cruel and unusual punishment and the guarantees of due process and equal protection. At your hearing, I asked you whether you agreed with the ACLU’s position. You responded that you were never involved in the policymaking or broader efforts of the ACLU on this issue. However, I am still unclear as to whether you agree or disagree with the ACLU’s position on the death penalty.**

- a. **Do you agree with the ACLU’s position on the death penalty, as set forth on its website?**

Response: I am not familiar with the ACLU’s website statements on the death penalty. As phrased in your question, the law since *Gregg v. Georgia*, 428 U.S. 153 (1976), is now clearly established that the death penalty does not inherently violate the constitutional ban on cruel and unusual punishment and the guarantees of due process and equal protection. As a district judge, if confirmed, I would apply that precedent.

- b. **The ACLU Capital Punishment Project, which “challenges the unfairness and arbitrariness of capital punishment while working towards its ultimate repeal,” filed an *amicus* brief in the Supreme Court case *Kennedy v. Louisiana*, arguing that the Eighth Amendment’s rule against cruel and unusual punishment prohibited application of the death penalty for child rapists under “evolving standards of decency.” The Supreme Court held that the death penalty for the crime of child rape always violates the Eighth Amendment. Writing for a five-justice majority, Justice Kennedy based his**

opinion partly on the fact that 37 jurisdictions – 36 states and the federal government – did not allow for capital punishment in child rape cases. In reality, however, Congress and the President specifically authorized the use of capital punishment in cases of child rape under the Uniform Code of Military Justice (UCMJ) in the National Defense Authorization Act of 2006, as reported first by Col. Dwight H. Sullivan in his blog and later by the *New York Times*.

- i. Given the heinousness of the crime, as well as the new information on the federal government’s codification of capital punishment in child rape cases under the UCMJ, do you believe *Kennedy v. Louisiana* was wrongly decided? If not, why?**

Response: Because I have had no occasion to examine the issue raised in *Kennedy v. Louisiana* since taking the bench, I have not studied the opinions of the justices therein and have not formed an opinion on it. Most importantly, as a district judge, if confirmed, I would be bound by the Supreme Court’s decision in *Kennedy* and would apply it.

- ii. Following the Supreme Court’s decision, President Obama announced at a press conference: “I think that the death penalty should be applied in very narrow circumstances for the most egregious of crimes. I think that the rape of a small child, 6 or 8 years old, is a heinous crime.” Do you agree with that statement?**

Response: Yes. The circumstances in which the death penalty is to be applied is in the first instance the prerogative of Congress as to federal legislation. If called upon to adjudicate the constitutionality of such legislation, the district court would be bound to follow the precedent of the Supreme Court and the applicable circuit court.

- 12. In a 1990 *Hastings Communications and Entertainment Law Journal* article, you endorsed certain hate crimes legislation designed to address “racial harassment severe enough to inflict psychic injury.” You also filed an *amicus* brief in California state court that argued in favor of the constitutionality of a particular hate crimes statute.**

- a. As a general matter, do you believe that hate crimes statutes are Constitutional?**

Response: Hate crime statutes, like any other statute, are generally entitled to a presumption of constitutionality. The California Supreme Court has upheld California hate crime legislation against a generalized First Amendment challenge, rejecting the argument that punishing hate crimes more severely than an analogous general crime is tantamount to punishing speech or thought. I have not examined precedent in the federal courts other than noting the Supreme Court has addressed

specific challenges in such cases as *Virginia v. Black*, 538 U.S. 343 (2003), *Wisconsin v. Mitchell*, 508 U.S. 476 (1993), and *R. A. V. v. St. Paul*, 505 U.S. 377 (1992).

b. How should a hate crimes statute be drafted to avoid Constitutional difficulties?

Response: My understanding is that there are Supreme Court precedents, as noted above. Other than that, I do not have any views as to the proper drafting of hate crimes statutes.

c. If confirmed, will you put aside any personal views you have regarding hate crimes legislation, and impartially apply the law?

Response: Yes. As with all areas of the law, I would put aside any personal views regarding hate crimes legislation and impartially apply the law.

13. 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 agree with President Obama’s quote?

Response: I am a nominee and not a selector of nominees. It is the prerogative of the President to nominate the federal judges of his choosing, subject to the advice and consent of the Senate, and to employ the criteria he determines are appropriate in making those decisions.

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

Response: I have not personally lived all of the experiences the President described in the selected quote. I have, however, had diverse, sometimes opposing, experiences that deepen my understanding of the varying perspectives that litigants bring to court. For instance, while I have represented criminal defendants and alleged gang members, I have been the victim of gang violence and other crimes. While I have a developmentally disabled child and cared for my wheelchair-bound mother towards the end of her life, I have managed the family business and understand the financial burden of complying with disability access codes.

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

Response: Empathy should not drive the outcome of the judge's decision-making. Empathy can, however, make the judge sensitive to the litigants. Understanding the human needs and interests which underlie each case can serve as an important reminder that every case is important and can and will impact human lives. Empathy can also help insure that the judge treats all the parties with dignity and respect.

- 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?**
- i. If so, under what circumstances?**
 - ii. Please identify any cases in which you 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: It is never proper for judges to indulge their own subjective sense of empathy in determining what the law means. With respect to my own experience, I have ruled in favor of parties who were unsympathetic but nonetheless had the law and facts on their side. Likewise, I have detained individuals who appeared earnest but nonetheless posed a risk of flight or danger to community and thus had to be held without bail. I have mediated numerous individual cases where I believe the settlement did not properly reflect the value of the case (both too high and too low), but felt constrained in my role as a neutral.