

Responses of Robert N. Chatigny
Nominee to be U.S. Circuit Judge for the Second Circuit
to the Written Questions of Senator Grassley

- 1. At the hearing, Senator Coburn asked you about your speech at the Inaugural meeting of the American Constitution Society at the University of Connecticut School of Law, where you criticized mandatory minimums because “Empathy for individuals involved in a case inevitability comes into play, as it should.” I would like to get a little more information on this speech.**

- a. Could you please elaborate on what you meant by this statement on empathy?**

Response: When I used the term “empathy” in my speech, I meant respectful attention to, and careful consideration of, the legitimate interests of all concerned. I did not mean sympathy.

- b. Does empathy play a role in your decision-making process? Could you please explain how empathy factors into your decision making process?**

Response: No. Empathy plays no role in determining the applicable law, finding the relevant facts, or applying the law to the facts to reach a decision.

- 2. During the 2008 presidential campaign, President Obama described the kind of judge that he would 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. Without commenting on what President Obama may or may not have meant by this statement, do you believe that you fit the President’s criteria for federal judges, as described in this quote?**

Response: I do not know what the President meant by his statement. As I use the term “empathy,” it refers to paying respectful attention to, and carefully considering, the positions of all people who come before the court.

- b. During her confirmation hearing, Justice Sotomayor rejected this so-called “empathy standard” stating, “We apply the law to facts. We don’t apply feelings to facts.” Do you agree with Justice Sotomayor?**

Response: I agree that a judge must put aside all personal feelings and impartially apply the law to the facts.

- c. Do you believe that it is ever appropriate for judges to indulge their own subjective sense of empathy in determining what the Constitution and the laws mean? If so, under what circumstances?**

Response: No.

- d. **Do you believe that it is ever appropriate for judges to indulge their empathy for particular groups or certain people? For example, do you believe that it is appropriate for judges to favor those who are poor? Do you believe that it is appropriate for judges to disfavor corporations?**

Response: No. The judicial oath requires every judge to “administer justice without respect to persons,” “do equal right to the poor and to the rich,” and “impartially discharge and perform” “all the duties” of the judicial office. 28 U.S.C. § 453.

- e. **After Justice Stevens announced his retirement, President Obama stated that he would select a Supreme Court nominee with “a keen understanding of how the law affects the daily lives of the American people.” Do you believe that judges should base their decisions on a desired outcome?**

Response: No. A judge’s responsibility is to decide a case by impartially applying governing law to legally relevant facts determined through sound procedure.

3. **Following the *Ross* case, a news article reported that the “standard” you seemed to “cite most frequently” is “the Golden Rule.” The article stated that “in dealing with a criminal defendant from the margins of society, Chatigny will frequently discuss explicitly how he would want to be treated if he were in the defendant’s circumstances.” Your Golden Rule standard sounds very much like “empathy” to me and also very similar to Justice Sotomayor’s assertion that “personal experiences affect the facts that judges choose to see.” This empathy standard is at odds with the proper role of a judge because we expect a judge to be a neutral arbiter, and not to sympathize with one party over another. In fact, in that same article, a lawyer said that you “shape[] the issues more than the advocates” and “follow[] a ‘managerial’ model of judging rather than the ‘referee or umpire model.’” Given your statements and other attorneys’ statements about your courtroom manner, why shouldn’t I be concerned that you will permit your empathy for certain litigants to affect your decisions, rather than ruling simply on the law and facts?**

Response: Based on my overall record as a district judge for more than 15 years, my reputation among my colleagues on the federal and state bench, and my reputation among the Bar as a whole, I respectfully submit there is no cause for concern in this regard.

4. **What, in your view, is the role of a judge? Please describe your judicial philosophy.**

Response: Article III, section 2 of the Constitution extends the “judicial power” to “cases” and “controversies.” These words restrict the role of the judiciary to deciding questions presented in an adversary context and in a form historically deemed appropriate for judicial resolution. They also serve to define the role of the judiciary in a manner intended to ensure that the judiciary will not intrude into areas committed to the executive and legislative branches of government. When a case is properly brought before a federal court for adjudication, the role of the judge is to put aside any preconceptions and decide the issues in the case in accordance with the applicable law and evidence.

5. How do you define “judicial activism”?

Response: “Judicial activism” refers to exceeding the proper limits on the role of a judge in our system. The term encompasses a variety of actions across a broad spectrum. A “judicial activist” can overreach by invalidating legislation, reversing controlling precedent, creating new rights or imposing onerous obligations on governmental institutions through remedial decrees. Less dramatically, a “judicial activist” can simply fail to defer to relevant precedent, overlook material facts to reach a desired outcome or issue a broader decision than necessary to resolve the parties’ dispute.

6. Could you identify three recent Supreme Court cases that you believe are examples of “judicial activism”? Please explain why you believe these cases are examples of “judicial activism”.

Response: As a sitting district judge and nominee to the Second Circuit, I do not believe it would be appropriate for me to identify any recent Supreme Court decisions as examples of “judicial activism.” All Supreme Court precedents are binding on judges of lower courts.

7. How do you define “judicial restraint”?

Response: A judge displays “judicial restraint” when he or she engages in principled decision making with appropriate deference to the prerogatives of other branches and levels of government and issues holdings no broader than necessary to resolve the parties’ dispute .

8. Could you identify three Supreme Court cases that you believe are examples of “judicial restraint”? Please explain why you believe these cases are examples of “judicial restraint”.

Response: As a sitting district judge and nominee to the Second Circuit, I do not believe it would appropriate for me to identify any recent Supreme Court decisions as examples of “judicial restraint.” All Supreme Court precedents are binding on judges of lower courts.

9. Do you believe that it is ever appropriate for judges to indulge their own values and/or policy preferences in determining what the Constitution and the laws mean? If so, under what circumstances?

Response: No.

10. Should the courts, rather than the elected branches of government, ever take the lead in creating a more “just” society?

Response: No. The elected branches must be relied on to take the lead.

- 11. In your speech at the inaugural meeting of the American Constitution Society at the University of Connecticut School of Law, you stated, “We shouldn’t try to drastically reduce departures. Departures are essential.” Why do you believe that departures are “essential”? What factors do you consider in deciding whether or not a downward departure is appropriate?**

Response: Departures are essential in view of the overarching statutory requirement that a sentence be sufficient but not greater than necessary. In deciding whether to depart in a given case, I consider the parties’ presentations in light of departure authority provided by sentencing statutes and guidelines as construed by the Supreme Court and the Second Circuit.

- 12. I would like to get a better understanding of how you would interpret statutes and what your judicial method would be if you were confirmed to be a judge on the Second Circuit.**

- a. In cases involving a close question of law, what would you look to when determining which way to rule?**

Response: I would look first to the text of the statute, which provides the clearest evidence of legislative intent. If presented with an ambiguous statute (one whose meaning was not plain), I would apply conventional rules of statutory construction to help resolve the ambiguity. If proper application of these rules failed to resolve the ambiguity, I would look to legislative history for reliable evidence of legislative intent. If the meaning of the statute still remained uncertain, I would acknowledge the uncertainty and undertake to decide the case on the narrowest ground and in a manner most consistent with the apparent purpose of the statute.

- b. Would you agree that the meaning of a statute is to be ascertained according to the understanding of the law when it was enacted?**

Response: I agree that the meaning of a statute should be ascertained in accordance with the objective meaning of the words in the text of the statute at the time the statute was enacted.

- c. How would you use legislative history when interpreting a statute? What kind of weight would you give legislative history, if any, when interpreting a statute?**

Response: As discussed above, I would turn to legislative history only in the event an ambiguity in the text of the statute could not be resolved using conventional rules of statutory construction. In doing so, I would look for reliable evidence of legislative intent regarding the meaning of the ambiguous provision. If such evidence could not be found, I would look for reliable evidence of the legislature’s purpose in enacting the statute.