

**Responses of Albert Diaz
Nominee to the U.S. Court of Appeals for the Fourth Circuit
to the Written Questions of Senator Jeff Sessions**

- 1. At your hearing, you testified that you believe empathy has a role to play in the judicial process. 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: I cannot speak for the President, but I am honored that he believes me qualified to serve as a federal judge. If confirmed, I will abide strictly by the federal judicial oath to “administer justice without respect to persons, and do equal right to the poor and to the rich.”

- 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: Yes.

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

Response: Empathy for a litigant or a cause should play no role in deciding a case. As I define the term, however, an empathetic judge is one who (1) respects those who come before the court, (2) affords all parties a full and fair hearing, and (3) recognizes that the court’s decisions have substantial consequences for the parties and the public. Viewed in that light, empathy helps to promote public confidence in the decisions a judge makes.

- d. Do you think that it is proper for judges to consider their own subjective sense of empathy in determining what the law means?**

Response: No.

i. If so, under what circumstances?

Response: I do not think it proper for judges to consider their own subjective sense of empathy in determining what the law means.

ii. Please provide an example of a case in which you have considered your own subjective sense of empathy in determining what the law means.

Response: I have not done so.

iii. Please provide 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 on occasion been called upon to hear appeals of foreclosure orders entered by our Clerk of Court. There are few things more devastating to an individual's sense of self-worth than to lose his or her home. At the time I considered these appeals, North Carolina law required that I affirm the Clerk's order upon a finding that (1) the lender was the holder of a valid debt secured by the property, (2) the borrower was in default, (3) the debt instrument allowed for foreclosure, and (4) proper notice was provided. Although I felt great empathy for the homeowners, in each case where the lender made the required showing, I affirmed the Clerk's order.

2. At your hearing, you testified that, if confirmed, you will follow the law with respect to the U.S. Sentencing Guidelines. Under the Supreme Court's decision in *United States v. Booker*, the federal sentencing guidelines are advisory, rather than mandatory. It seems to me that as long as the sentencing judge (1) correctly calculates the guidelines, and (2) appropriately considers factors set forth therein, the judge may impose any sentence ranging from probation to the statutory maximum.

Following the Supreme Court's decision in *Gall v. United States*, appellate courts must apply the highly deferential "abuse of discretion" standard when reviewing these sentencing decisions. As a result, district court judges may impose virtually any sentence, and as long as the decision is procedurally sound, there is virtually no substantive review on appeal.

a. Do you agree that the sentence a defendant receives for a particular crime should not depend on the judge he or she happens to draw?

Response: Yes. My view is that general uniformity in sentencing best promotes confidence in our criminal justice system. As with any decision that involves

some level of discretion, however, there will be occasions where it may be appropriate for a sentencing judge to depart from this general principle.

b. Under what circumstances do you believe it appropriate for a district court judge to depart downward from the sentencing guidelines?

Response: *Gall* addresses this issue. A district court's sentencing decision begins by correctly calculating the applicable guidelines range. *Gall v. United States*, 552 U.S. 38, 49 (2007). From there, the court should consider the parties' respective proposals for an appropriate sentence, in light of the factors set out in 18 U. S. C. § 3353(a). If a district court elects to deviate from the applicable guideline, the court must explain its conclusion so as "to allow for meaningful appellate review and to promote the perception of fair sentencing." *Id.* at 50. If confirmed, I would apply *Gall* in reviewing a district court's sentencing decisions.

3. Please describe with particularity the process by which these questions were answered.

Response: I received the questions on December 24, 2009. I did some legal research and prepared my answers. I then discussed my answers briefly with lawyers at the Department of Justice on January 6, 2010, before submitting them in final form.

4. Do these answers reflect your true and personal views?

Response: Yes.