Responses of Mary H. Murguia
Nominee to be U.S. Circuit Judge for the Ninth Circuit
To the Written Questions of Senator Jeff Sessions

1. At a June 27, 2004 Conference event, you said:

> **"[i]t is very important that the bench reflect the people it judges, and we have more Latinos in positions on the bench, but still not enough. And I think it is very important to have the bench reflect the community, and it is also important for people like me to remember that it's obviously – your intellect and your character contribute in defining who you are, but I also think that your heritage and your culture is key, and that's what makes the person who is the judge, and who is invoking sentences or making decisions."[1]**

a. Do you believe it is proper to consider the ethnicity of a judge and the ethnic makeup of the community in selecting federal judges?

Response: I believe it is important that the public has confidence and trust in the judiciary. I believe a judiciary reflecting the people it serves inspires confidence in our system of justice. Everyone who appears before a judge should feel that they are a participant in a fair and just process, even when the judge rules against them. This is the notion I was trying to convey at the conference.

b. What role, if any, do you think diversity should play in the composition of the judiciary?

Response: I believe it is important that the federal bench reflect the American public, as this reinforces confidence in this nation's courts. I strongly believe that a judge's personal background should never influence his or her decisions.

c. How can litigants know that they are being treated fairly if a judge's heritage and culture is key to imposing sentences and making decisions, rather than the application of the law to the facts?

Response: A judge's heritage and culture should never play a role in a judge's determination of a case, and I did not intend to suggest it should. Judges should base their decisions solely on the law and the facts presented.

d. On July 17, 2007, President Obama made the following comment:

> **"You look at the case law, and most of the time the law is pretty clear -- 95% of the time. Justice Ginsburg, Justice Thomas, Justice Scalia -- they're all gonna agree on the outcome. But it's those 5% of the cases that really count.**

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[1] DVD Video: National Conference of La Raza, Annual Conference Latinas Brunch, Phoenix, AZ (Jun. 27, 2004) (43:00-44:00).

And in those 5% of the cases what you got to look at it is: What is in the justice's heart? What's their broader vision of what America should be? You know, Justice Roberts said he saw himself just as an umpire. But the issues that come before the court are not sport. They're life and death. And we need somebody who's got . . . the empathy to recognize what it's like to be a young, teenaged 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."

Considering your statement that your heritage and culture make "the person who is the judge, and who is invoking sentence or making decisions," do you agree that it is important that a judge have "the empathy to recognize what it's like to be a young, teenaged mom" or "the empathy to understand what it's like to be poor, or African American, or gay, or old?"

Response: A judge must be committed to the rule of law. As a district court judge, it is not uncommon for me to see human drama unfold in the courtroom. I recognize when victims of crime who appear before me have suffered devastating loss or injury. I also recognize when criminal defendants have had a profound lack of support, moral guidance, or opportunity. But as a judge, it is important that everyone who appears before me is treated fairly, and that my decisions are not based on sympathy or emotion. I decide cases based upon the facts presented by the parties and legal precedent that governs the dispute. My decisions are not based on empathy.

2. In *Center for Biological Diversity v. Kempthorne*, No. CV 07-0038-PHX-MHM, 2008 WL 659822 (D. Ariz. Mar. 6, 2008), you entered an order enjoining the U.S. Department of Fish and Wildlife's attempt to delist the Desert bald eagle as an endangered species along with all other bald eagles. You found the agency acted arbitrarily and capriciously in declining to undertake a full review of whether the Desert bald eagle should be treated separately,[2] and your decision was based on the fact that internal government scientists disagreed on the matter and that the agency had impermissibly consulted with the Arizona Game & Fish Department.[3] The decision is somewhat unusual in that you chose to enjoin the agency's action, rather than remand the matter for further administrative proceedings. In doing so, you acknowledged that "the ordinary remedy in finding an agency's action arbitrary and capricious is to remand for further administrative proceedings, and that [the court] can order equitable relief or remand with specific instructions only in rare circumstances." Nonetheless, you found the bald eagle case "was one of those rare circumstances" because "[t]he discrete population of Desert bald eagles, which the FWS acknowledges can be easily cordoned off and is still particularly vulnerable to habitat threats, should not face increased risks to its existence prior to a lawful

[2] *Id.* at *12.
[3] *Id.*

decision on Plaintiffs' petition to list the Desert Bald eagle [separately from other bald eagles]."[4]

a. **Please explain what standard you applied in this case to determine that equitable relief was warranted, rather than a remand of the matter to the agency for further administrative proceedings.**

Response: In *Center for Biological Diversity v. Kempthorne*, I determined that the U.S. Fish and Wildlife Service's August 2006 90-day finding that the Desert bald eagle population did not qualify as a distinct population segment was arbitrary and capricious under the Administrative Procedure Act ("APA"), 5 U.S.C. § 702 *et seq*. In their complaint, the plaintiffs requested the specific equitable relief that was ultimately awarded. In deciding to grant the requested relief, I applied relevant Ninth Circuit case law concerning the issuance of injunctive relief in environmental cases, specifically, *Idaho Watersheds Project v. Hahn*, 307 F.3d 815 (9th Cir. 2002), and *Earth Island Inst. v. Hogarth*, 494 F.3d 757 (9th Cir. 2007). After considering these binding Ninth Circuit precedents, along with several persuasive federal district court opinions, I determined that equitable relief was required to maintain the status quo with respect to the Desert bald eagle population at the time the U.S. Fish and Wildlife Service made its arbitrary and capricious 90-day finding. The status quo at the time was that the Desert bald eagle was listed as threatened under the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 *et seq*. Thus, I determined that it would be appropriate for the Desert bald eagle population to remain listed as threatened under the ESA until the U.S. Fish and Wildlife Service was able to engage in a status review. The parties did not request that I reconsider my ruling and did not attempt to appeal my decision. Because the case is currently ongoing, and because the U.S. Fish and Wildlife Service has filed a motion to dissolve the injunction after completing the status review and 12-month finding, it would be inappropriate for me to offer any additional comments on this matter.

b. **I understand that, in this case, you determined the agency had misapplied the standard prescribed for the determination in question, but do you generally believe that the determination of an administrative agency charged with regulating and administering a specialized area should be deferred to by Article III Courts?**

Response: I understand that the decisions of an administrative agency are entitled to deference so long as the agency is not acting outside the scope of its statutory authority or inappropriately within that scope.

c. **Do you believe any personal views you hold played a role in your decision that the case was a "one of those rare circumstances" where an injunction against agency action was warranted, rather than a reversal and remand for further administrative proceedings?**

[4] *Id.* at *11.

Response: No. My March 2008 decision in this case was guided solely by controlling Ninth Circuit precedent as applied to the facts presented by the parties. My personal views do not influence my decisions in my cases.

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

Response: I reviewed relevant materials, case law, and my previous orders, including the summary judgment order I issued in March 2008 in *Center for Biological Diversity v. Kempthorne*. I then drafted answers and had discussions with the United States Department of Justice. I finalized my answers and instructed the Department to submit them on my behalf to the Committee.

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

Response: Yes.

Responses of Mary H. Murguia
Nominee to be U.S. Circuit Judge for the Ninth Circuit
to the Written Questions of Senator Jon Kyl

1. A May 10, 1996 report of the television program 20/20 mentioned you in an investigatory report into then-U.S. Attorney Janet Napolitano's refusal to seek a search warrant in a child pornography case. This particular search warrant was related to an investigation called "Operation Special Delivery." In response to a written question Senator Grassley sent you following your confirmation hearing for the District Court, you described this operation as one "designed to target for prosecution those who possessed, produced and trafficked in child pornography." The search warrant in question concerned a man named James Norman Moore, who allegedly ordered child pornography from the undercover postal inspectors conducting Operation Special Delivery.[1] Mr. Moore's name arose in the investigation in connection with the Spartacus organization, which apparently was an organization that had distributed both child pornography and legal pornography involving adult males.

a. **At that time, you were the Deputy Chief of the Criminal Division of the U.S. Attorney's Office and supervised the violent crime section, which prosecuted child pornography offenses. Was it your responsibility to review requests for search warrants? If yes, did you review this particular request for a search warrant?**

Response: As Deputy Chief of the Criminal Division of the United States Attorney's Office for the District of Arizona, I supervised the Violent Crime Section, which prosecuted sexual crimes against children, including child pornography. I supervised the Assistant United States Attorney ("AUSA") assigned to Mr. Moore's case. As Deputy Chief, it was my role to review all search warrants in the Violent Crime Section and to provide guidance to AUSAs with respect to the issuance of search warrants. Along with the Criminal Chief and the line AUSA, I did review the specific request for a search warrant related to Mr. Moore.

b. **Please explain your decision about whether the search warrant sought in that case should have been approved.**

Response: It was my view, and that of the United States Attorney's Office for the District of Arizona, that the investigation had not yet developed sufficient information to support a search warrant that would lead to a successful prosecution resulting in Mr. Moore's conviction. My view at the time was that the prosecution of Mr. Moore would have been more likely to succeed if the case agents could have obtained additional evidence of guilt, and that further factual

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[1] Amy Silverman, *20/20 Out of Focus: News Report Critical of Arizona's U.S. Attorney Omitted Exculpatory Facts*, PHOENIX NEWS TIMES, May 23, 1996.

development in the case would have been prudent and important, especially in light of the prospect of an entrapment defense.

2. According to a post on the Wolters Kluwer "Judiciary Watch" website:

> **"Lawyers interviewed for the *Almanac of the Federal Judiciary* said the following about Murguia: 'She is a fast learner with excellent legal skills.' 'Her legal ability is much stronger on the criminal side than civil.' 'She is always polite and courteous to all.' 'She has an ever so slight leaning toward the underdog or the plaintiff [in civil cases].' 'The government gets most of the close calls in trial. She has a strong pro-government bias. She makes it tough for criminal defense lawyers.'"[2]**

Please respond.

Response: Bias or favoritism has no place in our judicial system, and I endeavor to provide all litigants that appear before me with equal consideration under the law. I believe that my record as a district court judge reflects my commitment to resolving legal questions by applying controlling precedent to the facts at issue.

Although my own personal experience as a litigator was in criminal law, during my ten years on the district court bench, I have presided over a wide range of civil matters, including multi-district litigation and other complex matters. I believe that my record reflects that I have the legal skills, ability and experience to preside over all types of cases, both civil and criminal, in a fair and just manner.

[2] Judge Mary H. Murguia Nominated to 9th Circuit Court of Appeals, http://www.judiciarywatch.com/2010/04/judge-mary-h-murguia-nominated-to-9th-circuit-court-of-appeals.html (last visited July 12, 2010).

Responses of Mary H. Murguia
Nominee to be U.S. Circuit Judge for the Ninth Circuit
to the Written Questions of Senator Tom Coburn, M.D.

1. **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: No. To the extent that by "living" document, you mean a Constitution that has an evolving interpretation unmoored from the text, I disagree with that perspective. I believe the Constitution is a fixed document whose text may be changed only through the amendment process.

2. **Since at least the 1930s, the Supreme Court has expansively interpreted Congress' power under the Commerce Clause. Recently, however, in the cases of *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000), the Supreme Court has imposed some limits on that power**.

   a. **Do you believe *Lopez* and *Morrison* consistent with the Supreme Court's earlier Commerce Clause decisions?**

      Response: Yes.

   b. **Why or why not?**

      Response: Because the Supreme Court has so held. In *Gonzales v. Raich*, 545 U.S. 1 (2005), the Court explained that *Lopez* and *Morrison* were consistent with prior Commerce Clause precedent because the statutes at issue in *Lopez* and *Morrison* did not regulate economic activity.

3. **In Roper v. Simmons, 543 U.S. 551 (2005), Justice Kennedy relied in part on the "evolving standards of decency" to hold that capital punishment for any murderer under age 18 was unconstitutional. I understand that the Supreme Court has ruled on this matter, but do you agree with Justice Kennedy's analysis?**

   Response: Justice Kennedy's majority opinion is accorded the weight of precedent. Therefore, it is a decision that I am bound to follow and do not think it would be appropriate for me to comment on Justice Kennedy's analysis.

   a. **How would you determine what the evolving standards of decency are?**

      Response: I would follow Supreme Court precedent and apply the analysis that the Supreme Court has held should be applied.

   b. **Do you think that a judge could ever find that the "evolving standards of decency" dictated that the death penalty is unconstitutional in all cases?**

Response: The Supreme Court has held that the death penalty is constitutional as a general matter. If confirmed, I would follow and apply that precedent.

c. **What factors do you believe would be relevant to the judge's analysis?**

Response: I would follow Supreme Court precedent to determine the relevant factors.

4. **In your view, is it ever proper for judges to rely on contemporary foreign or international laws or decisions in determining the meaning of the Constitution?**

Response: There may be instances in which international law, which involves the interpretation of international contracts or the obligations of the United States under a treaty, may be relied on to resolve disputes involving such matters. Foreign law of other countries, by contrast, should not be relied on to determine the meaning of the United States Constitution.

a. **Is it appropriate for judges to look for foreign countries for "wise solutions" to legal problems?**

Response: It is appropriate to look to foreign law only if our own domestic law requires that I do so.

b. **If so, under what circumstances would you consider foreign law when interpreting the Constitution?**

Response: I cannot currently envision any particular circumstance where I would consider foreign law when interpreting the Constitution, but certainly would do so if the Supreme Court requires me to do so.

c. **Do you believe foreign nations have ideas and solutions to legal problems that could contribute to the proper interpretation of our laws?**

Response: I cannot currently envision any particular circumstance where I would consider foreign law when interpreting statutes, but certainly would do so if the Supreme Court requires me to do so.

d. **Would you consider foreign law when interpreting the Eighth Amendment?**

Response: If confirmed to the Ninth Circuit, I would adhere to Supreme Court precedent in this and all other areas of the law, as I have done as a district judge.

e. **Other amendments?**

Response: If confirmed to the Ninth Circuit, I would adhere to Supreme Court precedent in all areas of the law, as I have done as a district judge.