

**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.

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.