

**Nomination of John B. Nalbandian
to the United States Court of Appeals
for the Sixth Circuit
Questions for the Record Submitted March 14, 2018**

QUESTIONS FROM SENATOR WHITEHOUSE

1. During his confirmation hearing, Chief Justice Roberts likened the judicial role to that of a baseball umpire, saying “[m]y job is to call balls and strikes and not to pitch or bat.”

a. Do you agree with Justice Roberts’ metaphor? Why or why not?

Yes, I agree to the extent that Justice Roberts is saying that judges should resolve disputes without regard to their own policy, personal, or political preferences.

b. What role, if any, should the practical consequences of a particular ruling play in a judge’s rendering of a decision?

The practical consequences should play a role if the governing legal doctrine call for a judge to take such consequences into account. For example, the Sixth Circuit’s four-part analysis for the issuance of preliminary injunctions takes into account the effects of the absence of the injunction on the moving party and the harm to others if an injunction is granted. *See, e.g., Flight Options, LLC v. Int’l Bhd. Teamsters, Local 1108*, 863 F.3d 529, 539-40 (6th Cir. 2017).

2. During Justice Sotomayor’s confirmation proceedings, President Obama expressed his view that a judge benefits from having a sense of empathy, for instance “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.”

a. What role, if any, should empathy play in a judge’s decision-making process?

b. What role, if any, should a judge’s personal life experience play in his or her decision-making process?

With respect to these questions, judges are human and having empathy for the suffering of others is a natural human response. Judges, however, must be careful not to allow their personal feelings overcome their duty to apply faithfully the law and precedent without regard to certain characteristics of the litigants. Judges should strive to avoid bias whether implicit or explicit. The judicial oath requires a judge to “administer justice without respect to persons, and do equal right to the poor and the rich, and . . . [to] faithfully and impartially discharge and perform all the duties incumbent upon [the judge].” 28 U.S.C. §453. A judge cannot violate that oath. That said, compassion and empathy may have a role in some limited circumstances like in sentencing under 18 U.S.C. §3553(a). I would apply the precedent of the Supreme Court and the Sixth Circuit faithfully if such questions were to come before me.

3. In your view, is it ever appropriate for a judge to ignore, disregard, refuse to implement, or issue an order that is contrary to an order from a superior court?

No.

4. During your confirmation hearing, you testified that you believed *Loving v. Virginia* and *Brown v. Board of Education* were rightly decided Supreme Court cases. With respect to *Loving*, you said “I don’t think there’s any question about” whether the case was rightly decided. You described *Brown* “seminal decision in the Supreme Court’s history.” You refused, however, to state your view as to whether *Roe v. Wade* was likewise rightly decided.

a. Is *Roe v. Wade* a “seminal decision in the Supreme Court’s history”?

Roe v. Wade is a longstanding precedent of the Supreme Court and I would follow it fully and faithfully to the best of my ability.

b. Is there “any question about” whether *Roe* was correctly decided?

Please see my answer to Senator Feinstein’s question 5(a).

5. When speaking about originalist legal theory, you stated your view that a judge should look to the “values and principles” that a text embodied at the time it was adopted.

a. How should a judge evaluate the “values and principles” embodied in a piece of text?

As a lower court judge I would faithfully follow the precedent of the Supreme Court regarding how to interpret the text of the Constitution. Also, please see my answers to Senator Feinstein’s questions 2(a) and 2(b).

b. What should a judge do if, in his or her assessment, the “values and principles” of a text conflict with the text’s plain meaning?

Please see my answer to question 5(a) above. It is my understanding that in general, the Supreme Court and Sixth Circuit look to the plain meaning of the text before applying any tools of construction, I would follow that precedent faithfully.