

Responses of William Joseph Martínez
Nominee to the United States District Court for the District of Colorado
To the Written Questions of Senator Jeff Sessions

1. According to your questionnaire, you have served on the Legal Panel of the ACLU of Colorado since 2006. At your hearing, I asked you what your responsibilities are in this position. You answered:

“The function of the . . . panel is to review proposed litigation memos prepared by the staff attorneys of the local ACLU chapter, and the Legal Panel discusses them, analyzes the potential litigation, and votes either to recommend or not to recommend to the board of the local chapter whether to seek redress from settlement negotiations through litigation.”

- a. As a member of the Legal Panel, did you review proposed memos prepared by the ACLU staff attorneys and vote whether to recommend pursuing litigation?

Response: Yes.

- i. Please provide the Committee with a description of every matter that you considered while a member of the Legal Panel, including a citation for the case, if available, the minutes of the meetings, if available, a description of your participation in the matter, any memoranda or papers you or the Panel produced, and your reasons for recommending or not recommending that the chapter pursue litigation in each case.

Response: During the time (October 2006 to the present) I’ve been a member of the ACLU of Colorado Legal Panel (Legal Panel), the group has not prepared or kept any minutes of its meetings. In addition, during this time period no memoranda or any other papers have been produced by any member of the Legal Panel, including me.

1. Description and Citation of Matters Accepted For Representation and Possible Litigation by the ACLU of Colorado

Prefatory comment: The ACLU of Colorado has taken the position that some of the information sought by sub-question 1(a)(i)(1) is protected by the attorney-client privilege. The organization informs me the privilege is being asserted to prevent disclosure of the internal legal deliberations of the Legal Panel, including but not limited to the legal advice it has provided. I have included in my response to this sub-question a discussion of

information as to which no attorney-client privilege has been asserted.

Since the Fall of 2006 the Legal Panel has met approximately 6 to 7 times per year. I estimate I have attended less than half of these meetings. Summarized below are those disputes presented at Legal Panel meetings I attended and which were ultimately acted upon by the ACLU of Colorado. The organization also accepted for representation matters which were presented at Legal Panel meetings I did not attend or which were presented directly to the Board of Directors of the ALCU of Colorado by the Legal Director, due to their time-sensitive nature.

- a. *In re Search of Amalia's Translation and Tax Service*,
09-cv-100 (19th Judicial District Court)

In October of 2008 Weld County, Colo. Sheriff Deputies searched the offices of a tax preparation and translation service company. The Deputies took a voluminous amount of electronic and hard copy tax records owned by thousands of the company's primarily Latino clients. After reviewing nearly 5,000 such files, the Weld County District Attorney announced he would be investigating several hundred of these clients for criminal impersonation and identity theft. The case brought by the ACLU of Colorado challenged the validity of the search warrant obtained by the Weld County District Attorney, as well as the reasonableness of the subsequent search and seizure of these confidential tax records.

- b. *Benson v. Jefferson County, Colo. School District, et al.*

On the day before election day in November 2008, Michelle Obama appeared at a campaign rally held at Dakota Ridge High School in metropolitan Denver. Blake Benson, a junior at the high school, was standing at the entrance where event attendees were entering the school. Benson was wearing a t-shirt with the phrase "NOBAMA" across his chest. Benson was ordered by school officials to leave school grounds, and when he refused, he was arrested by the Jefferson County Sheriff's Department. Students with similar but pro-Obama clothing were not told to leave school property.

The ACLU settled this matter with Jefferson County officials prior to the filing of litigation.

- c. *Reina v. City of Craig*, 09-CV-65 (Moffat County, Colo. District Court)

The Craig, Colorado City Charter prohibits candidates for city offices from spending more than \$500 in an election campaign. The violation of this provision is a misdemeanor, punishable by a fine and up to 180 days in jail. Francisco Reina was an unsuccessful candidate for city council who spent \$1,500 of his own money on his campaign. He was prosecuted for violating this provision of the Craig City Charter.

- d. *Curious Theater Company v. Colo. Dep't of Public Health*, 08-SC-351 (Colo. Sp. Ct.)

Several non-profit theater companies challenged the Colorado ban on indoor smoking as it applies to theater productions in which the script requires a character to smoke. Other states have exceptions to their indoor smoking bans for such plays. At issue in the litigation was whether the Colorado constitution protected such theatrical indoor smoking on the basis of freedom of expression.

- e. *ACLU v. City and County of Denver*, 08-cv-910 (D. Colo.)

This suit was filed prior to the Democratic Party National Convention held in Denver in August 2008. On behalf of several organizations, the ACLU sought to protect the First Amendment rights of individuals and organizations that wished to express their views on matters of public concern during the convention. Specifically, the suit sought a court order requiring Denver to promptly process pending requests for permits for parades and demonstrations which were to take place on city streets.

- f. *ACLU v. LaCabe*, 08-cv-4231 (Denver District Court)

This suit was filed to seek disclosure of the Denver Police Department's (DPD) newly-revised policy and procedure manual for the downtown Denver city jail. The DPD had earlier refused to voluntarily produce the manual on the grounds that such disclosure would allegedly be "contrary to the public interest." The ACLU sought a copy of this manual given the importance of the police arrest and detention procedures the DPD had adopted for use during the upcoming Democratic Party National Convention.

- g. *Four Horn v. City and County of Denver*, 08-cv-1693 (D. Colo.)

This lawsuit was filed on behalf of five individuals who had been arrested and incarcerated for up to 26 days as a result of mistaken identities. The suit alleged that in each one of these cases the DPD had ignored facts which demonstrated the DPD was arresting the wrong person. The suit challenged the DPD's refusal to adopt and enforce supervision and training policies which could significantly reduce the risk that officers were arresting the wrong individuals.

- h. *People v. Cordaro et al.*, 07-M-12531 (Colo. Springs, Colo. Municipal Court)

The City of Colorado Springs prosecuted seven persons who marched in the St. Patrick's Day parade in that city in March 2007. These individuals wore t-shirts with peace signs and carried banners with peace messages. Although these persons had a permit to march in the privately-organized parade, they were instructed by city officials to leave the parade because parade organizers had banned messages relating to "social issues." The seven were then arrested and charged with failure to disperse. The ACLU successfully represented these individuals in their criminal trials. Parade organizers later abandoned their ban on "social issue" signs for the 2008 parade.

- i. *Search of students' text messages* (Non-litigation advocacy)

Administrators of Louisville High School in Louisville, Colo. were routinely seizing students' mobile phones, reading text messages, and transcribing messages the administrators deemed to be objectionable. Responding to requests from students and their parents, the ACLU sought an agreement from the local Board of Education to voluntarily cease these practices. After extensive pre-suit negotiations, the Board decided to terminate these phone seizures other than in the case of a true emergency.

- j. *Mahaney v. City of Englewood*, Colo., 07-cv-1373 (Arapahoe County District Court)

Mr. Mahaney owns a pipe and smoking accessories store in Englewood, Colo. Mr. Mahaney painted two murals on the side of the building in which his store is located. He was

subsequently charged by the City of Englewood with a violation of its sign code. In addition to defending Mr. Mahaney in the ordinance violation prosecution, the ACLU filed suit in state district court seeking a declaration that Englewood's sign code violated the First Amendment's guarantee of freedom of expression, both on its face and as applied to Mr. Mahaney and his business.

2. Description of Matters Not Accepted for Representation and Possible Litigation by the ACLU of Colorado

The ACLU of Colorado has taken the position that information sought by sub-question 1(a)(i)(2) is protected by the attorney-client privilege. The organization informs me the privilege is being asserted to prevent disclosure of the internal legal deliberations of the Legal Panel, including but not limited to the legal advice it has provided. In addition, I have no independent personal recollection of the information sought in this sub-question, and I have not retained any written materials which refer or relate to the matters sought herein. Respectfully, therefore, I will not be able to provide the information sought by this sub-question.

- b. **Have you ever acted as counsel in a matter on behalf of the ACLU? If so, please provide the Committee with a citation for each case, a description of the matter, and a description of your participation in that matter.**

Response: No.

2. **According to the ACLU Capital Punishment Project, "[t]he ACLU believes that, in all circumstances, the death penalty is unconstitutional under the Eighth Amendment," and that the "death penalty continues to be applied in an arbitrary and discriminatory manner in violation of the Fourteenth Amendment." The ACLU also takes the position that "capital punishment ought to be abolished now." At your hearing, I asked you whether you agreed with the ACLU's position. You responded:**

"Well, what I would agree with as a district judge is that the United States Supreme Court has ruled that capital punishment does not violate the Eighth Amendment except in narrow circumstances that have been carved out in recent years. So I think what is material and important is what is my view-- what my view would be as a sitting Federal district judge, something that would be quite different from my views as a personal citizen or an advocate or litigant and member of the ACLU."

When I asked you whether you personally think that the death penalty violates the Constitution and whether you have ever expressed such a view, you answered only that you had never expressed such a view. I am still unclear as to whether you personally believe that the death penalty violates the Constitution.

- a. Please answer whether you personally believe that the death penalty violates the Constitution.**

Response: It is clear under current Supreme Court jurisprudence that, with very limited exceptions, the death penalty does not violate the Eighth Amendment to the U.S. Constitution. *Gregg v. Georgia*, 428 U.S. 153 (1976); *Roper v. Simmons*, 543 U.S. 551 (2005); *Kennedy v. Louisiana*, 129 S.Ct. 1 (2008). Consistent with this precedent, I do not believe the death penalty is unconstitutional.

- b. The ACLU Capital Punishment Project filed an *amicus* brief in the Supreme Court case *Kennedy v. Louisiana*, arguing that the Eighth Amendment’s prohibition against cruel and unusual punishment mandated against the application of the death penalty for child rapists under “evolving standards of decency.” The Supreme Court held that the death penalty for the crime of child rape always violates the Eighth Amendment. Writing for a five-justice majority, Justice Kennedy based his opinion partly on the fact that 37 jurisdictions – 36 states and the federal government – did not allow for capital punishment in child rape cases.**

- i. Given the heinousness of the crime, do you personally believe *Kennedy v. Louisiana* was wrongly decided? If not, why?**

Response: The Supreme Court in *Kennedy v. Louisiana* carefully considered the heinousness of the crime of child rape. As the father of two daughters, it is difficult for me to imagine a crime that is more heinous. Nonetheless, if confirmed as a U.S. District Judge, I would be bound by my oath of office and by the doctrine of *stare decisis* to follow and apply the majority opinion in *Kennedy*.

- ii. Following the Supreme Court’s decision, President Obama announced at a press conference: “I think that the death penalty should be applied in very narrow circumstances for the most egregious of crimes. I think that the rape of a small child, 6 or 8 years old, is a heinous crime.” Do you personally agree with that statement?**

Response: I agree with both of the President’s statements. Nonetheless, if confirmed as a U.S. District Judge, I would be bound by the decision in *Kennedy*.

4. According to the ACLU, all legal protections limiting the distribution of obscene material are unconstitutional.¹

a. Do you personally agree with that position? Please explain your answer.

Response: In *Ashcroft v. ACLU*, 542 U.S. 656 (2004) and *U.S. v. American Library Ass’n*, 539 U.S. 194 (2003), the Supreme Court sought to clarify the extent of First Amendment protections for obscene materials. If confirmed as a U.S. District Judge, I would be bound by Supreme Court and Tenth Circuit precedent on this issue, including the decisions in *Ashcroft* and *American Library Ass’n*.

b. If you do not agree with the ACLU’s position, did you ever express your concern or opposition to their position? Please explain.

Response: As previously noted, the ACLU of Colorado has asserted the attorney-client privilege with respect to the internal deliberations of the Legal Panel. Outside the context of these deliberations, I have not had the opportunity to raise my personal views on the issue of the constitutionality of restrictions on the distribution of obscene materials.

5. The ACLU has argued that the First Amendment “protects” child pornography and there should be no governmental restriction on its distribution, reproduction, sale, or use, even when some of the producers of those materials are punishable under criminal law.²

a. Do you personally agree with that position? Please explain your answer.

Response: If confirmed as a U.S. District Judge, I would be bound by controlling Supreme Court and Tenth Circuit precedent on the issue of the legality of distribution of child pornography, including *U.S. v. Williams*, 553 U.S. 285 (2008) and *New York v. Ferber*, 458 U.S. 747 (1982).

b. If you do not agree with the ACLU’s position, did you ever express your concern or opposition to their position? Please explain.

Response: As previously noted, the ACLU of Colorado has asserted the attorney-client privilege with respect to the internal deliberations of the Legal Panel. Outside the context of these deliberations, I have not had the opportunity to raise my personal views on the issue of First Amendment protection for the distribution of child pornography.

¹ 1992 Policy Guide of the ACLU: 4d, 4g.

² *New York v. Ferber*, 458 U.S. 747 (1982).

6. **According to the ACLU, the Pledge of Allegiance is unconstitutional and should not be recited in schools because it includes the words “under God.”³**

- a. **Do you personally agree with that position? Please explain your answer.**

Response: This is an issue presently being litigated in the federal courts. The Supreme Court in *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1 (2004) and the Tenth Circuit in *Habecker v. Town of Estes Park*, 518 F.3d 1217 (10th Cir. 2008) have both declined to reach the issue based on standing issues. If I am confirmed as a U.S. District Judge, I would carefully examine all relevant federal appellate rulings, and I would be bound to follow and apply all binding Supreme Court and Tenth Circuit precedent on this issue.

- b. **If you do not agree with the ACLU’s position, did you ever express your concern or opposition to their position? Please explain.**

Response: As previously noted, the ACLU of Colorado has asserted the attorney-client privilege with respect to the internal deliberations of the Legal Panel. Outside the context of these deliberations, I have not had the opportunity to raise my personal views on the issue of the constitutionality of the Pledge of Allegiance.

7. **As a result of several lawsuits brought by the ACLU, communities must remove all vestiges of America’s history and heritage that include religious symbols on public lands or on city or county seals. This includes Ten Commandments monuments and crosses – even when those symbols honor those who died in service to their country.⁴**

- a. **Do you agree with that position? Please explain your answer.**

Response: The case law on Establishment Clause challenges to the use of religious symbols on government or public property and signage is heavily dependent on the specific facts of each case. Examples of the fact-specific nature of the legal analysis to be applied to these cases can be seen in the differing results which obtained in *Van Orden v. Perry*, 545 U.S. 677 (2005) (display of the Ten Commandments at the Texas State Capitol did not violate the Establishment Clause) and *McCreary County v. ACLU*, 545 U.S. 844 (2005) (ordering the removal of the Ten Commandments from Kentucky courthouse walls). If confirmed as U.S. District Judge, I would be bound by the applicable Supreme Court and Tenth Circuit cases on this issue, and I would carefully and impartially apply that precedent to the facts of the dispute before me.

³ ACLU Amicus Brief, *Elk Grove Unified School District v. Newdow*, 542 U.S. 1 (2004).

⁴See, e.g., ACLU Website: The Mt. Soledad Cross.

- b. If you do not agree with the ACLU's position, did you ever express your concern or opposition to their position? Please explain.**

Response: As previously noted, the ACLU of Colorado has asserted the attorney-client privilege with respect to the internal deliberations of the Legal Panel. Outside the context of these deliberations, I have not had the opportunity to raise my personal views on Establishment Clause issues.

- 8. In 2008, the ACLU of Northern California joined an amicus brief that argued that doctors could not refuse to give infertility treatment to gay or lesbian patients on the basis of the doctors' personal religious beliefs.⁵**

- a. Do you agree with that position? Please explain your answer.**

Response: If confirmed as U.S. District Judge, I would be bound by applicable Supreme Court and Tenth Circuit precedent with regard to the denial of medical procedures as a result of a physician's religious beliefs.

- b. If you do not agree with the ACLU's position, did you ever express your concern or opposition to their position? Please explain.**

Response: As previously noted, the ACLU of Colorado has asserted the attorney-client privilege with respect to the internal deliberations of the Legal Panel. Outside the context of these deliberations, I have not had the opportunity to raise my personal views on the issue of the denial of medical procedures as a result of a physician's religious beliefs.

**** Please note: No Question # 9 was received from Senator Sessions. ****

- 10. The ACLU has opposed tax exemptions for churches. For example, in 2008, the Alaskan arm of the ACLU argued that it was unconstitutional for the state Legislature to restrict taxing homes owned by a church.⁶**

- a. Do you personally agree with that position? Please explain your answer.**

Response: If confirmed as U.S. District Judge, I would be bound by applicable Supreme Court and Tenth Circuit precedent with regard to tax exemptions for churches, including *Walz v. Tax Comm'n*, 397 U.S. 664 (1970) (upholding as Constitutional tax exemptions for religious organizations).

⁵ "Court Rules Religion Can't Excuse Doctors Who Denied Treatment to Lesbian," ACLU of Northern California, Aug. 18, 2008.

⁶ "ACLU wants religious tax break thrown out," Anchorage Daily News, Feb. 29, 2008.

- b. If you do not agree with the ACLU's position, did you ever express your concern or opposition to their position? Please explain.**

Response: As previously noted, the ACLU of Colorado has asserted the attorney-client privilege with respect to the internal deliberations of the Legal Panel. Outside the context of these deliberations, I have not had the opportunity to raise my personal views on the issue of tax exemptions for churches.

- 11. According to the ACLU's website,⁷ "[t]he ACLU interprets the Second Amendment as a collective right. Therefore, we disagree with the Supreme Court's decision in *D.C. v. Heller*."**

- a. Do you personally agree with that position? Please explain your answer.**

Response: If confirmed as U.S. District Judge, I would be bound by applicable Supreme Court and Tenth Circuit precedent with regard to the scope and reach of the Second Amendment, including *District of Columbia v. Heller*, 554 U.S. ____; 128 S. Ct. 2783 (2008), and the upcoming decision of the Court in *McDonald v. Chicago*, No. 08-1521 (U.S., Argued Mar. 2, 2010).

- b. If you do not agree with the ACLU's position, did you ever express your concern or opposition to their position? Please explain.**

Response: As previously noted, the ACLU of Colorado has asserted the attorney-client privilege with respect to the internal deliberations of the Legal Panel. Outside the context of these deliberations, I have not had the opportunity to raise my personal views on the issue the scope and reach of the Second Amendment.

- 12. According to your questionnaire, you are a member of the following organizations: Amnesty International, Greenpeace, the Natural Resources Defense Council, and the Sierra Club.**

- a. What is your level of involvement with Amnesty International?**

Response: I have been a dues-paying member of Amnesty International USA for several years, and frequently make additional donations to that organization to support its activities. In addition, over the past 20-some years, on a handful of occasions and at the request of Amnesty International USA, I have written letters to political leaders of foreign countries seeking the release of individuals imprisoned as a result of their non-violent political speech.

⁷ <http://www.aclu.org/2008/07/01/heller-decision-and-the-second-amendment>.

- i. **Do you personally agree with the positions taken by that organization? Please explain your answer.**

Response: I am not aware of all positions ever taken or supported by Amnesty International USA, and thus I cannot state whether I agree or disagree with the organization on all issues. What I can do, however, is assure you my membership in Amnesty International USA will not affect or influence my decisions as a U.S. District Judge.

- b. **What is your level of involvement with Greenpeace?**

Response: I have been a dues-paying member of Greenpeace USA for many years, and frequently make additional donations to that organization to support its activities. In addition, while I do not recall the specific topics or issues involved, I have on infrequent occasions signed Greenpeace USA petitions or letters which have been delivered to federal and state officials in regards to matters affecting our environment.

- i. **Do you personally agree with the positions taken by that organization? Please explain your answer.**

Response: I am not aware of all positions ever taken or supported by Greenpeace USA, and thus I cannot state whether I agree or disagree with the organization on all issues. What I can do, however, is assure you my membership in Greenpeace USA will not affect or influence my decisions as a U.S. District Judge.

- c. **What is your level of involvement with the Natural Resources Defense Council?**

Response: I have been a dues-paying member of the Natural Resources Defense Council (NRDC) for many years, and frequently make additional donations to that organization to support its activities. In addition, while I do not recall the specific topics or issues involved, I have on infrequent occasions signed NRDC petitions or letters which have been delivered to federal and state officials in regards to matters affecting our environment.

- i. **Do you personally agree with the positions taken by that organization? Please explain your answer.**

Response: I am not aware of all positions ever taken or supported by the NRDC, and thus I cannot state whether I agree or disagree with the organization on all issues. What I can do, however, is assure you my membership in the NRDC will not affect or influence my decisions as a U.S. District Judge.

d. What is your level of involvement with the Sierra Club?

Response: I have been a dues-paying member of the Sierra Club for many years, and frequently make additional donations to that organization to support its activities. In addition, while I do not recall the specific topics or issues involved, I have on infrequent occasions signed Sierra Club petitions or letters which have been delivered to federal and state officials in regards to matters affecting our environment.

i. Do you personally agree with the positions taken by that organization? Please explain your answer.

Response: I am not aware of all positions ever taken or supported by the Sierra Club, and thus I cannot state whether I agree or disagree with the organization on all issues. What I can do, however, is assure you my membership in the Sierra Club will not affect or influence my decisions as a U.S. District Judge.

13. 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. I recognize that you do not know what President Obama may or may not have meant by this statement, do you believe that you fit President Obama’s criteria for federal judges, as described in his quote?

Response: Given the fact I was nominated by the President to be a U.S. District Judge, I have to assume I fit the criteria President Obama and his staff have established for the position.

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

Response: Empathy should never be the basis upon which a judge makes his or her decisions. Empathy can, however, provide a judge with additional insight and perspective into the intent and motivations of the parties appearing before the court.

- c. **Do you think that it's ever proper for judges to indulge their own subjective sense of empathy in determining what the law means?**

Response: No.

- i. **If so, under what circumstances?**

Response: See above.

14. **Do you think it is ever proper for judges to indulge their own values in determining what the law means? If so, under what circumstances?**

Response: No.

15. **Do you think it is ever proper for judges to indulge their own policy preferences in determining what the law means? If so, under what circumstances?**

Response: No.

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

Response: I drafted the responses to these questions, and finalized them after obtaining input from attorneys with the Department of Justice.

17. **Do these answers reflect your true and personal views?**

Response: Yes.