

**Responses of James A. Wynn , Jr.
Nominee to the U.S. Court of Appeals for the Fourth 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: I do not agree that the Constitution is a “living” document that constantly evolves as society sees fit.

- 2. What principles of constitutional interpretation help you to begin your analysis of whether a particular statute infringes upon some individual right?**

Response: First and foremost, in this type of analysis, a court must give the words of the Constitution their plain meaning to determine whether a particular statute infringes upon some individual right.

Second, the court must apply the presumption that the statute is constitutional. In some situations, the statutory language could be interpreted to have more than one meaning. In such cases, courts apply the interpretation that will render the statute constitutional, that is, one that would not infringe upon the individual right in question.

Third, if the statute infringes upon some individual right, then the court looks to existing case law and precedent to determine the nature and scope of the right at issue, and applies the proper standard of judicial review to weigh the asserted government interest against the individual right allegedly infringed.

- 3. As you know the Second Amendment right to bear arms is one that is very important to all Americans, but particularly those in my home state of Oklahoma. Do you believe that the Second Amendment is an individual right or a collective right? Please explain your answer.**

Response: The Supreme Court of the United States has held that the right to bear arms is an individual right. If confirmed to serve as a federal circuit court judge, I would apply that binding precedent without any reservation whatsoever.

- a. Do you believe an individual Second Amendment right exists outside the context of military service or hunting? If so, please explain.**

Response: The Supreme Court of the United States has held that an individual Second Amendment right exists outside the context of military service or hunting. If confirmed to serve as a federal circuit court judge, I would be bound by this precedent and would apply it without any reservation whatsoever.

b. Do you believe the right to bear arms is a fundamental right?

Response: I understand that the Supreme Court of the United States has not yet ruled on this issue. If confirmed to serve as a federal circuit court judge, I would adhere to Supreme Court precedent and apply it without any reservation whatsoever.

c. What constitutional analysis would you use to determine whether it is a fundamental right?

Response: If confirmed to serve as a federal circuit court judge, I would faithfully follow the constitutional analysis set forth by the Supreme Court of the United States.

d. Do you believe the right to self defense is a fundamental right?

Response: I understand that the Supreme Court of the United States has not yet ruled on this issue. If I am confirmed to serve as a federal circuit court judge, I will adhere to Supreme Court precedent and apply it without any reservation.

4. 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. Generally speaking, are *Lopez* and *Morrison* consistent with the Supreme Court's earlier Commerce Clause decisions?

Response: The Supreme Court, in *Gonzales v. Raich*, 545 U.S. 1 (2005), indicated that its decisions in *Lopez* and *Morrison* were consistent with its earlier Commerce Clause decisions.

b. Why or why not?

Response: The Supreme Court in *Raich* distinguished the circumstances presented in *Lopez* and *Morrison*, which challenged laws that were noneconomic in nature and thus outside of the Commerce Clause's scope.

c. 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: I do not agree that the Constitution is a "living" document that constantly evolves as society interprets it.

5. **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: If confirmed to serve as a federal circuit court judge, I would faithfully follow Supreme Court precedent and apply it without any reservation.

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

Response: If confirmed to serve as a federal circuit court judge, I will faithfully follow precedent and apply the analysis set forth by the Supreme Court of the United States.

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

Response: I am not aware of any circumstances under which it would be proper for judges to rely on contemporary foreign or international laws or decisions in determining the meaning of provisions of the United States Constitution.

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

Response: None. If confirmed as a federal circuit court judge, I would rely only on American law in determining the meaning of the United States Constitution.

- b. **Would you consider foreign law when interpreting the Eighth Amendment? Other amendments?**

Response: No. If confirmed as a federal circuit court judge, I would rely only on American law in determining the meaning of the United States Constitution.

7. **From 2005 to 2009, you served as Vice-Chair of the Board of Directors of Justice at Stake, a nonpartisan interest group founded to combat the impact of “special interests” on judges. According to press reports, Justice at Stake is funded substantially by George Soros’ Open Society Institute. The organization has been highly critical of national security reforms, such as the USA PATRIOT Act, and of the Obama Administration for not trying all terrorist detainees on American soil. Given that you were Vice-Chair of this organization for 5 years, it is only reasonable to assume that you agree with the organization’s views, and as a circuit court judge, these issues may come before you.**

a. Do you agree with the organization's views regarding the USA PATRIOT Act? Please explain your answer.

Response: As an active reserve military officer (Captain) in the United States Navy for 30 years with service as a certified military judge (Commanding Officer of the Navy Reserve Trial Judiciary Unit), I never expressed, endorsed, adopted, or joined in any view on the constitutionality of the USA PATRIOT Act. Nor have I ever expressed, adopted, or endorsed any criticism of any decision made by the President, who serves as the Commander-in-Chief of the Armed Forces, regarding where detainees are tried.

Regarding my former affiliation with Justice at Stake, that nonpartisan organization works with more than 50 national partners to keep state and federal courts fair and impartial. Its board of directors is comprised of diverse individuals, including the Chief Justice of the Supreme Court of Ohio, a former President of the National Center for State Courts, a Republican nominee for the U.S. Senate in 1982, a board member of the Institute for Legal Reform with the U.S. Chamber of Commerce and former General Counsel for General Motors, a federal judge, a former President of the National Hispanic Bar Association, a former Director of the League of Women Voters in Illinois, and the Vice-President of the Committee on Economic Development.

Although Justice at Stake staff and partner organizations may comment on various issues, those comments do not necessarily reflect the views of the Justice at Stake board members. Generally, comments by Justice at Stake partners, as well as the Justice at Stake blog, explicitly state that the views expressed are the commentators' own and do not necessarily reflect those of other Justice at Stake campaign partners, or Justice at Stake staff or board members.

b. Do you believe you can render fair and impartial judgment on matters involving the USA PATRIOT Act?

Response: Yes.

c. Do you share the organization's view that all detainees should be tried in American courts? Please explain your answer.

Response: Although Justice at Stake staff and partner organizations may comment on various issues, those comments do not necessarily reflect the views of the Justice at Stake board members. Moreover, as an active reserve military officer (Captain) in the United States Navy for 30 years

with service as a certified military judge (Commanding Officer of the Navy Reserve Trial Judiciary Unit), I never expressed, endorsed, adopted, or joined in any view on the constitutionality of the USA PATRIOT Act. Nor have I ever expressed, adopted, or endorsed any criticism of any decision made by the President, who serves as the Commander-in-Chief of the Armed Forces, regarding where detainees are tried.

- d. Do you believe that the Constitution requires the United States to try all detainees in United States courts? Please explain your answer.**

Response: I very respectfully submit that this question seeks an opinion on an issue that, if confirmed, I may be asked to address as a federal judge. Accordingly, I must respectfully decline to render an advisory opinion on this issue.

- e. As mentioned above, the organization is substantially funded by the George Soros' Open Society Institute. Do you know who the other persons or entities are who fund the organization?**

Response: Yes.

- i. If so, please list them.**

Response: My understanding is that Justice at Stake is funded almost entirely by foundations: the Carnegie Corporation, the Herbert Block Foundation, the Joyce Foundation, the Moriah Fund, the Open Society Institute, and the Public Welfare Foundation. It has received a small amount of support from some of its board members and from citizens. I have made no financial contributions to the organization.

- ii. Did you ever participate in the fund raising activities of this organization?**

Response: No. Canon 5 B(2) of the North Carolina Code of Judicial Conduct prohibits me, as a sitting judge, from actively assisting such an organization in raising funds.

- 1. If so, whom did you solicit for money?**

Response: Not applicable.

- 8. The Justice at Stake website recently had posted some comments attributed to you regarding the need for diversity on the courts: "The American judiciary is**

disproportionately white and male. These white men disproportionately make judgments affecting African-Americans, women, and other minorities This disparity between the judges and the judged creates a crisis of legitimacy.”

- a. Do you believe that there is a relationship between a judge’s race and the legitimacy of his rulings?**

Response: No. To the contrary, as a result of my personal experiences growing up in the era of legally-enforced segregation in North Carolina, I believe that no citizen, including a judge, should be treated or viewed differently on account of his or her race, gender, ethnic origin, religion or other traits. My personal experiences reinforce my commitment to unbiased judging based on the law.

If not, what did you mean by this statement?

Response: The three statements in the question appear in a 2004 *Albany Law Review* article that I co-authored (*Judicial Diversity: Where Independence and Accountability Meet*, 67 *Albany Law Review* 775 (2004)).

The first and second sentences are statements of fact as we understood such facts to be at the time of writing our article. Footnotes 24 and 25 in our article provide the sources on which these statements of fact were based.

Regarding the third statement, it may be useful to provide the full context in which that statement appears in our article. The complete statement was,

“Scholars have detailed how this disparity between the judges and the judged creates a crisis of legitimacy because our courts are perceived by much of the public as biased ‘instruments of oppression.’”

Thus, the statement is simply an attribution to the research findings of scholars regarding the *perception* by the public of our courts. Footnote 26 of our article provides the sources on which the attribution is based.

- b. You use the phrase “crisis of legitimacy” to describe the current state of the American judiciary. Please explain what you meant by this phrase.**

Response: Our article focused on the issue of diversity in the context of electing judges. In that context, we used this phrase in the same manner that it was used by Justice Kennedy in an interview with Bill Moyers in November of 1999, in which he stated: "If there is the perception or the

reality that courts are influenced in their decisions based upon campaign funding sources, we will have a crisis of legitimacy, a crisis of belief, a crisis of confidence." (available at <http://www.pbs.org/wgbh/pages/frontline/shows/justice/etc/synopsis.html>) Our 2004 article used Justice Kennedy's analogy to indicate that if there is the perception that courts are influenced in their decisions based upon a lack of diversity, then, as the research findings of scholars suggest, an analogous crisis could develop. Our article applied Justice Kennedy's phrase "crisis of legitimacy" to another context; it was not my description of "the current state of the American judiciary."

Additionally, in his 2006 Year-End Report on the Federal Judiciary, Chief Justice Roberts addressed the categorical exclusion of nonwealthy persons from the judiciary arising from "the failure to raise judicial pay." He characterized this issue as having "reached the level of a constitutional crisis that threatens to undermine the strength and independence of the federal Judiciary." As in our article, Chief Justice Roberts' reference to a "constitutional crisis" highlights the necessity of diversity in the judiciary, not only in regards to race, gender and religion, but also in regards to wealth, legal experience, and background.

- c. **Do you believe that African American defendants are currently being discriminated against by white judges?**

Response: No.

Please explain your answer.

Response: I have no personal knowledge that any sitting judge has unlawfully discriminated against any defendant. Indeed, various state and federal laws prohibit such discrimination including the North Carolina Code of Judicial Conduct and the American Bar Association Model Code of Judicial Conduct. If I knew of any such discrimination, I would report it to the appropriate authority.

- d. **If justice is blind, why do you believe it matter if a white judge or an African-American judge is ruling in a case affecting a minority?**

Response: I very respectfully submit that I have neither stated nor held any such belief. As I stated in an earlier response, as a result of my personal experiences growing up during the era of legally-enforced segregation in North Carolina, I have devoted my life to promoting my belief that no citizen, including a judge, should be treated or viewed differently on account of his or her race, gender, ethnic origin, religion or other traits. Indeed, I explicitly expressed this life-long belief in a published opinion, *Johnson v. Amethyst Corp.*, 120 N.C. App. 529, 463 S.E.2d 397 (1995).

In *Johnson*, counsel argued to a jury that it should disregard defendant's plea of guilty to prior counts of sexual harassment because the female judge would not have given him probation if the sexual harassment charges had merit. I rejected this argument as offensive and inappropriate, stating:

Finally and most egregious are counsel's disparaging statements that because District Court Judge Jane Harper is a female judge, she would not have accepted a plea bargain giving Bartolotta "no active time if there was believable evidence that any of the [allegations] were true." This argument is not only insulting to the judicial system as a whole, it further calls into question the fairness of female judges who preside over trials involving sexual misconduct. It is no more than a blatant attack on the integrity of judges who may share diverse qualities with a particular litigant. This court will neither condone nor permit practicing attorneys to take leave of their responsibilities to uphold the respectability of the judicial system.

Id. at 537, 463 S.E.2d at 402 (emphasis added).

- e. Do you believe that African-American defendants are being subjected to unconstitutional conditions when white judges hear their cases? Please explain your answer.**

Response: Of course not. My judicial career has been devoted to ensuring that judges are fair and impartial. The North Carolina Code of Judicial Conduct and the American Bar Association Model Code of Judicial Conduct, of which I was one of the drafters, affirmatively require judges to be fair and impartial.

- f. How would you correct the "crisis" you describe?**

Response: I very respectfully submit that, as I stated in response to an earlier question, the word "crisis" is not my word but is one that arose from Justice Kennedy's analogy in his interview with Bill Moyers. Our article attributed the analogy to the research findings of scholars on diversity. I believe, however, that to alleviate any potential "crisis" that the scholars indicate arises from the public's perception of the judiciary, we must work to promote and enhance the public's confidence and trust in the integrity of the judicial system.

- g. Do you believe presidents should employ affirmative action principles in the selection of federal judges?**

Response: No. While a diverse judiciary broadens the variety of voices and experiences informing the deliberative process, I believe a president's primary focus should be on selecting qualified judges who will be fair and impartial.

- 9. In *State v. Turnage*, you held that the state did not provide sufficient evidence to support the defendant's conviction for first-degree burglary. At four o'clock in the morning, a homeowner heard breaking glass and called the police. The police found the defendant behind the house carrying tool. His hand was bloody and his fingerprints were found on the front door of the house. After noting that neither the defendant's fingerprints nor his blood were not found inside the house and that no glass was found on the defendant, you held that the evidence only gave rise to "mere speculation" that the defendant carried out the burglary. The North Carolina Supreme Court reversed noting that, in ruling on a motion to dismiss for lack of evidence, a court must consider evidence in the light most favorable to the State.**

- a. Please explain your reasoning in this case.**

Response: In *State v. Turnage*, the Supreme Court of North Carolina did not decide the issue of whether the state proffered sufficient evidence to support the defendant's conviction for first-degree burglary. Instead, the Supreme Court considered "the only issue before this Court on the State's appeal of right, namely, the sufficiency of the evidence as to defendant's identity as the perpetrator of the offense *if a burglary occurred*." *State v. Turnage*, 362 N.C. 491, 496, 666 S.E.2d 753, 757 (2008) (emphasis added). Thereafter, the Supreme Court remanded the case to the Court of Appeals to decide the issue of "the sufficiency of the evidence on the element of entry for purposes of first-degree burglary...." The Supreme Court left undisturbed the Court of Appeals' holding that affirmed the defendant's convictions for possession of housebreaking implements and habitual felon status which did not involve the issue of the defendant's identity.

Because the issue of whether the state presented sufficient evidence to establish the element of entry for purposes of obtaining a conviction on first-degree burglary remains pending on remand before the North Carolina Court of Appeals, I must respectfully decline to offer an opinion on the issue.

- b. Do you agree with the North Carolina Supreme Court that "the evidence was sufficient to support a reasonable inference that**

defendant was the perpetrator of the crime and to withstand a motion to dismiss”?

Response: Yes. As a North Carolina appellate judge for over nineteen years, I faithfully follow without any reservation whatsoever the precedent set by the Supreme Court of North Carolina, including but not limited to *State v. Turnage*.

- 10. In *Parker v. Union Camp Corp.*, you argued in dissent that an individual confined in jail could continue to collect worker’s compensation because being confined in jail was not the kind of “change of condition” that allowed for the modification of a compensation award.**

- a. Please explain your reasoning in this case.**

Response: As the majority opinion stated, “The only issue on appeal is whether imprisonment of a person already receiving worker's compensation disability payments cuts off the employer's duty to make payments during the period of confinement.” *Parker v. Union Camp Corp.*, 108 N.C. App. 85, 86, 422 S.E.2d 585, 587 (1992). At the time of the *Parker* decision, other states did not statutorily cut off an employer’s duty to make workers’ compensation payments if the worker was already receiving benefits before imprisonment. See, e.g., OKLA. STAT. ANN. tit. 57, § 549(B) (West 1996) (providing that workers compensation benefits shall be placed into an inmate account, from which the Oklahoma State Board of Corrections may charge up to 50% of any deposits to cover costs of incarceration).

In *Parker*, I stated in my dissent that “[i]f a different result is desired by the legislature, then it is up to that body of government, not this Court, to enact laws to that effect.” *Id.* at 89, 422 S.E.2d at 587.

- b. Do you accept the majority’s decision in this case that the individual could not continue to collect worker’s compensation?**

Response: Yes. In North Carolina, the decisions of one North Carolina Court of Appeals panel binds all subsequent panels. *In re Civil Penalty*, 324 N.C. 373, 379 S.E.2d 30 (1989). As a North Carolina appellate judge for over nineteen years, I faithfully follow without any reservation whatsoever all binding precedent, including but not limited to *Parker v. Union Camp Corp.*

- 11. In *Arp v. Parkdale Mills*, you affirmed the grant of worker’s compensation for an employee who was injured after he attempted to climb a locked gate leading out of the employer’s facility. As Judge Tyson noted in dissent, the employee “climbed a**

seven and one-half foot chain link and barbwire gate to leave work when another safe route was provided by defendant.” Clearly, the plaintiff’s injuries did not ‘arise out of’ and ‘in the course of’ his employment.” The North Carolina Supreme Court unanimously reversed your ruling in a one-sentence *per curiam* opinion.

- a. **In this case, you were willing to grant worker’s compensation to an individual whose actions contributed to his disability. Under your ruling, when would an individual’s actions bar him from receiving worker’s compensation?**

Response: Because the Supreme Court of North Carolina reversed our Court of Appeals decision in *Arp v. Parkdale Mills*, our Court of Appeals decision cannot serve as the basis for a worker’s compensation benefits determination. If faced with this question again, I would faithfully follow the Supreme Court’s ruling in *Arp*.

Additionally, the North Carolina Workers’ Compensation Act vests the Industrial Commission with the exclusive jurisdiction to hear evidence from the parties, find the relevant facts, and make initial determinations as to the compensability of injuries. If there is any competent evidence in the record to support those facts – regardless of the weight of the evidence, or the quantum of evidence with which it conflicts – North Carolina statutory law and precedent bind an appellate court to those findings of fact. Thus, without being presented with an opinion and award from the Commission, I am not in a position to state, under North Carolina law, when an individual’s actions might bar him or her from receiving worker’s compensation.

- b. **Do you accept the North Carolina Supreme Court’s reversal of your opinion?**

Response: Yes. As a North Carolina appellate judge for over nineteen years, I faithfully follow without any reservation whatsoever the precedent set by the Supreme Court of North Carolina, including but not limited to *Arp v. Parkdale Mills*.

- c. **Do you agree with it? Why or why not?**

Response: Yes. I appreciate the clarification and additional guidance that the Supreme Court of North Carolina provided on its earlier holding, which stated that “[t]he only ground set out in the statute upon which compensation may be denied on account of the fault of the employee is

when the injury is occasioned by his intoxication or willful intention to injure himself or another.” *Hartley v. North Carolina Prison Dept.*, 258 N.C. 287, 290, 128 S.E.2d 598, 600 (1962) (holding that the employee’s injury while using a shortcut (climbing a fence) was compensable). As *Arp* is the more recent pronouncement by the Supreme Court of North Carolina on this issue, it is the current binding and controlling precedent. I faithfully follow that precedent without any reservation.

12. **In *Whitt v. Harris Teeter Inc.*, you held that a former employee could pursue a state wrongful discharge claim based on a “constructive discharge” theory. That is, even though the employee was not fired from her job, she could pursue her claim as if she had been terminated. This was a novel theory that had not been recognized previously by the North Carolina Supreme Court. Indeed, the state Supreme Court unanimously reversed your ruling in a one-sentence *per curiam* opinion.**

a. **Why did you decide to recognize a novel cause of action?**

Response: I very respectfully submit that I did not recognize a “novel” cause of action in *Whitt v. Harris Teeter*. The law in North Carolina regarding constructive discharge was, at the time of the *Whitt* opinion, not fully settled. My understanding of binding North Carolina precedent, at that time, specifically *Coman v. Thomas Mfg. Co.*, 325 N.C. 172, 381 S.E.2d 445 (1989) and *Garner v. Rentenbach Constructors Inc.*, 350 N.C. 567, 515 S.E.2d 43 (1999), the latter of which expressly used the term “constructive discharge” in referring to the former, indicated that North Carolina, like a number of other states, recognized constructive discharge. *See, e.g., Collier v. Insignia Financial Group*, 981 P.2d 321, 326 (Okla., 1999) (holding that a victim of quid pro quo sexual harassment may maintain a tort claim against her employer based on her constructive discharge).

Further, several North Carolina Court of Appeals decisions alluded to constructive discharge claims. *See, e.g., Doyle v. Asheville Orthopaedic Assocs., P.A.*, 148 N.C. App. 173, 177, 557 S.E.2d 577, 579 (2001) (“We recognize the viability of [the plaintiff’s claim for constructive discharge] in the context of interpreting whether constructive termination by her employer triggered the termination payment provision of the employment contract.”), *disc. review denied*, 355 N.C. 348, 562 S.E.2d 278 (2002); *Wagoner v. Elkin City Schools’ Bd. of Education*, 113 N.C. App. 579, 588, 440 S.E.2d 119, 125 (“Assuming that plaintiff was wrongfully constructively discharged, she is nonetheless not entitled to assert the tort of wrongful discharge because the tort of wrongful discharge arises only in the context of employees at will.”), *disc. review denied*, 336 N.C. 615, 447 S.E.2d 414 (1994).

- b. What led you to believe that the plaintiff could pursue this particular claim?**

Response: As stated above, I understood binding North Carolina precedent to allow the plaintiff to pursue this claim.

- c. In recognizing this theory, were you influenced by the equities at stake and the outcome of your decision?**

Response: No, I was not influenced by the equities or outcome.

- d. Did you rely on a particular judicial philosophy or approach in recognizing this constructive discharge theory?**

Response: No. In *Whitt*, as in all cases in which I participate, I faithfully followed North Carolina binding precedent as I understood it at the time and applied it neutrally and impartially to the facts of the case.

- e. Do you accept the North Carolina Supreme Court's reversal of your opinion?**

Response: Yes. As a North Carolina appellate judge for over nineteen years, I faithfully follow without any reservation whatsoever the precedent set by the Supreme Court of North Carolina, including but not limited to *Whitt v. Harris Teeter*.

- f. Do you agree with the North Carolina Supreme Court's decision?**

Response: Yes. I faithfully follow without any reservation whatsoever the precedent set by the Supreme Court of North Carolina, including but not limited to *Whitt v. Harris Teeter*.