

**Responses of O. Rogeriee Thompson  
Nominee to the U.S. Court of Appeals for the First Circuit  
to the Written Questions of Senator Jeff Sessions**

1. **At your hearing, Senator Franken asked you about “comments [you] made on the importance of diversity” and whether, if confirmed, you would judge based on the law. You answered:**

**“It would certainly be incumbent upon me as a Federal judge, just as it is incumbent on me as a State court judge, to view every single person who comes before the court with the utmost respect and afford them the utmost dignity. My job is to make sure that I don't have preconceived notions about persons or to come to any kind of proceeding with any kind of bias or prejudice towards any person. My job is to make sure that I examine the facts of a particular case without bias or prejudice, apply the law to those facts, and try to afford the litigants the justice which they deserve.”**

**While I appreciate your answer, I would like to ask you about another statement that you made in an interview prior to your appointment to the Rhode Island state judiciary. Specifically, you said that you would “bring a fresh perspective to the job because [you have] a different background and different experiences.”**

- a. **Do you believe that an individual’s race or gender affects the quality of his or her decisionmaking? Please explain your answer.**

Response: No, I do not believe that an individual’s race or gender has any bearing on the quality of one’s decisionmaking. Nonetheless, we all grow up with different life experiences and necessarily bring different perspectives to any discussion.

- b. **Please provide an example, if any, of a case in which your background and/or your experiences informed your decisionmaking as a judge.**

Response: Background and/or experience do not play a role in my decisionmaking. My judicial decisions are based upon the law. Nonetheless, I can think of one example wherein I relied upon my knowledge to assist jurors, the ultimate triers of fact. During a criminal jury trial one of the witnesses who was an African American testified several times, “I returned to my car to get my ‘Timmys’,” a term I have heard my children use with their friends. Because of my familiarity with the term, I understood his reference. I finally asked the all white jury if they understood the meaning of the word ‘Timmys.’ None of the 14 understood. I asked the witness to explain what he meant and he told the jury that the word ‘Timmys’ is street slang for

Timberland boots. After the trial the jurors told me they appreciated the explanation, particularly those who thought the witness was referring to a gun.

**2. You were quoted in an article in the *Sunday Journal Magazine* as saying that with respect to sentencing, you “always try to give folks a break.”**

**a. Please explain what you meant by this statement.**

Response: The 1990 Providence Journal Magazine article was written when I was a member of the District Court bench. In the article that particular quote was not referencing my sentencing practices. Rather, it was said relative to a defendant’s absence from a court proceeding. It reflects my realization that sometimes unforeseen emergencies do crop up in a person’s life that might interfere with a person’s ability to attend court, i.e., illness and family emergencies.

**b. Please explain your approach to sentencing as a state court judge.**

Response: When I was a member of the District Court bench my sentencing philosophy can be summarized as follows. The Rhode Island District Court has jurisdiction over misdemeanors which carry a maximum sentence of 1 year in jail and a \$1,000.00 fine. Within that sentencing range it was incumbent upon me to view the circumstances of each crime and fashion an appropriate sentence taking into consideration the traditional sentencing objectives of punishment, general and specific deterrence, retribution, rehabilitation, and restitution. The nature of the crime, its impact upon the victim, and the defendant’s prior criminal contacts were also sentencing factors. With due consideration for the aforementioned criteria I imposed the most appropriate sentence for the particular crime committed. The Rhode Island Superior Court where I now preside has original jurisdiction over all felonies which are defined as crimes carrying a maximum sentence of life in prison. Although sentencing is within the sound discretion of the judge, the Superior Court adopted Sentencing Benchmarks in 1981 as guidelines for the Court. I adhere to those guidelines. Our official sentencing policy is as follows:

“In order to eliminate, insofar as possible, disparity in the sentencing of defendants for crimes committed under the same or similar circumstances, the court may consider and utilize the sentencing benchmarks formulated by the Supreme Court Committee on Sentencing as guidelines.”

All Rhode Island Superior Court Judges utilize the periodically updated guidelines when sentencing. An upward or downward departure from a sentencing benchmark is made based upon substantial and compelling circumstances as listed in the guidelines.

Additionally RIGL 12-19.3-2 entitled Adoption of presumptive sentences reads as follows:

Each year the justices for the superior court shall by majority vote, and with the approval of the supreme court, adopt as a rule of court presumptive sentences to be imposed upon defendants who have been found guilty after a trial. The rule shall establish a presumptive sentence or sentencing range for each category of felony which constituted more than five percent (5%) of the criminal caseload in the superior court during the preceding year and for any additional categories of felonies that the justices deem appropriate. It shall also set forth the criteria for evaluation upon which the presumptive sentences are based...

As with the sentencing benchmarks, all Rhode Island Superior Court Judges, including me, reference the presumptive sentences when applicable and upward or downward departures are based upon substantial and compelling circumstances justifying an alternative sentence.

**c. Under the Supreme Court’s decision in *United States v. Booker*, the federal sentencing guidelines are advisory, rather than mandatory. Following the Supreme Court’s decision in *Gall v. United States*, appellate courts must apply the highly deferential “abuse of discretion” standard when reviewing these sentencing decisions. As a circuit court judge, you will be required to review sentences imposed by district courts.**

**i. How do you view the role of an appellate judge in the sentencing process?**

Response: In *Gall v. United States*, the Supreme Court stated that the Circuit Court does not do a de novo review of a sentence imposed by a District Court Judge. Instead the Circuit Court must review the sentence based upon a reasonableness standard and examine the judgment of the District Judge for abuse of discretion. If confirmed as a Circuit Court Judge I would comply with the ruling of the Supreme Court.

**ii. Under what circumstances do you think it is appropriate for a court to depart downward from the sentencing guidelines?**

Response: Federal Sentencing Guidelines do allow for downward departure. If confirmed as a Circuit Court Judge, I would review the District Court Judge’s reasoning for the downward departure and

determine if the articulated factors for departure are reasonable within the context of the totality of circumstances. I would further review the sentencing decision to determine whether the District Court Judge's actions complied with the exercise of discretion envisioned by section 5K of the U.S. Sentencing Guidelines Manual.

**3. 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. Without commenting on 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: It is impossible for me to answer this question without commenting upon what I believe the President may have meant by his statement since such are his criteria. By nominating me I can only assume the President has determined I meet his criteria for Federal Circuit Court Judges.

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

Response: The Merriam-Webster Pocket Dictionary defines empathy as “capacity for participating in the feelings or ideas of another.” Using that definition, empathy, or expressing it more euphemistically, ‘getting into another’s head’ has assisted me in assessing the credibility of witnesses and has enabled me on many occasions to flesh out bias, motive, and intent of witnesses who appear before the court in civil and criminal matters.

**c. Do you think that it is proper for judges to consider their own subjective sense of empathy in determining what the law means?**

Response: No.

**i. If so, please explain under what circumstances such a consideration would be proper.**

Response: See above response.

**ii. Please discuss any cases in which you have considered your own subjective sense of empathy in determining what the law means.**

Response: None.

- iii. Please discuss an example of a case where you have had to set aside your own subjective sense of empathy and rule based solely on the law.**

Response: All of my judicial rulings are based solely on the law. However I can give you an example of a situation where I feel empathy, but nonetheless base my decision upon the applicable law. I often hear cases on appeal from the district court involving landlord/tenant disputes. I sometimes have empathy for residential tenants who cannot pay rent due to unexpected loss of employment. Likewise, I may empathize with struggling landlords who are dependent upon rental income to make their monthly mortgage payments on the property. It is a lose/lose proposition for each litigant but my job as a judge is to make a decision based solely on Rhode Island's Residential Housing law. That is what I do.

**Responses of O. Rogeriee Thompson  
Nominee to the U.S. Court of Appeals for the First Circuit  
to the Written Questions of Senator Tom Coburn, M.D.**

**1. What is your view of the role of a judge?**

Response: A judge plays the key role in dispute resolution. In all disputes brought before the court it is the role of a judge to fairly and impartially apply the law to the facts consistent with due deference to the plain and ordinary meaning of legal text, and applicable case precedent.

**2. If confirmed, what strengths do you think you bring to this position?**

Response: I have 21 years of serving as a neutral judicial arbiter at the state court level. This extensive legal experience of hearing and deciding a myriad of civil and criminal cases has provided me with valuable skills and judgment which I would bring to the Federal Circuit Court should I be confirmed.

**a. What weaknesses do you think you bring to this position?**

Response: Although not a weakness, a new aspect of being a Federal Court Judge if confirmed would be working in collaboration with other judges to reach case resolution.

**3. The American Bar Association's Standing Committee on the Judiciary rated your nomination "Majority Qualified, Minority Not Qualified." Were you satisfied with the ABA's review of your record?**

Response: The ABA Committee review is a confidential process so I do not know the manner of its deliberations, nor the methodology of its ratings. Therefore, I am not in a position to evaluate it.

**a. Did the ABA explain why you received the "Not Qualified" rating?**

Response: No. I was not provided with an explanation of why a minority of the ABA Committee voted not qualified.

**b. Did you agree with their analysis of the factors that resulted in the "Not Qualified" rating?**

Response: Because I am not aware of the specific factors used by the ABA Committee in its analysis, I cannot respond. However, I agree with the majority vote which deemed me qualified and I do believe I am prepared and qualified to serve as a United States Circuit Court Judge if confirmed.

**c. Did you have an opportunity to provide contrary evidence to counter the findings that resulted in the "Not Qualified" rating?**

Response: I was not asked nor did I provide any additional information to the ABA Committee after it concluded its vote.

**4. Is ever proper for judges to indulge their own values in determining what the law means?**

Response: No.

**a. If so, under what circumstances?**

Response: See above response.

**b. Please identify any cases in which you have done so.**

Response: None.

**c. If not, please discuss an example of a case you have decided where you have had to set aside your own values and rule based solely on the law?**

Response: All of my decisions have been based solely upon the law. I cannot think of an example where my personal values have conflicted with my legal rulings.

**5. Is ever proper for judges to indulge their own policy preferences in determining what the law means?**

Response: No.

**a. If so, under what circumstances?**

Response: See above response.

**b. Please identify any cases in which you have done so.**

Response: None.

**c. If not, please discuss an example of a case you have decided where you have had to set aside your own policy preferences and rule based solely on the law.**

Response: I cannot think of an example where any personal policy preferences have been set aside in order to rule solely on the law.

**6. How do you define “judicial activism?”**

Response: I do not believe the term “judicial activism” has a commonly accepted meaning. I do not use the term and therefore have no definition for it.

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

Response: First, I would start with the text of the statute and then look to applicable U.S. Supreme Court and First Circuit precedent. If none exists, I would look for analogous holdings.

- 8. 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 United States Supreme Court in *District of Columbia vs. Heller* ruled the right to bear arms an individual right under the Second Amendment within federal enclaves. The decisions of the Supreme Court are binding precedent and if confirmed, I would follow that precedent.

- 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 has not ruled on this issue as applied to the states but I will follow the ruling of the Court once it has rendered a decision.

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

Response: The Supreme Court has granted certiorari in a case wherein it will rule if the right to bear arms is a fundamental right as applied to the states. If confirmed as a Circuit Court Judge, I will follow the holding of the Supreme Court.

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

Response: If confirmed I will follow the analytical framework dictated by the Supreme Court and First Circuit for determining if an individual right is fundamental.

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

Response: The Supreme Court has not ruled on this issue but if confirmed, I will follow any precedent it hands down.

- 9. 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: In *Gonzales v. Raich*, the Supreme Court indicated that its *Lopez* and *Morrison* decisions are consistent with earlier Supreme Court Commerce Clause decisions.

**b. Why or why not?**

Response: In *Gonzales v. Raich*, the Court rejected a reading of *Lopez* and *Morrison* as inconsistent with prior Commerce Clause precedent. 545 U.S. 1, 23 (2005). Specifically, the Court rejected the respondent's "myopic focus" on *Lopez* and *Morrison*, which "overlook the larger context of modern-era Commerce Clause jurisprudence preserved by those cases."

**10. 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. Society does not interpret the Constitution. The Supreme Court does. The words and structure of the Constitution change only when amended in accordance with Article 5. The Constitution is the philosophical underpinning of our governmental structure and is constructed to be enduring. Yet I think it is appropriate to acknowledge that new situations can and do arise which could not have been envisioned by the drafters, e.g., the creation of the internet and its impact upon first amendment rights. In such instances, constitutional interpretation must be grounded in the text of the document, its undergirding principles, historical analogies, and the Supreme Court's interpretation of it meaning.

**11. 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, I would accept the Supreme Court's analysis and would have no difficulty applying the holding of the Court

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

Response: If required to apply the evolving standards of decency test, I would follow the Supreme Court's analysis and apply same.

**12. 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: If confirmed I would rely solely on the wealth of existing American statutory and case law unless instructed to do otherwise by the Supreme Court.

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

Response: See above response.

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

Response: See above response.