

**Responses of Denny Chin
Nominee to the U.S. Court of Appeals for the Second Circuit
to the Written Questions of Senator Tom Coburn, M.D.**

- 1. Between 1996 and 2006, you three times invalidated portions of the state's "Megan's Law." I am concerned that you may have an extreme view of the law that places greater weight in favor of the perpetrators of sexual assault rather than their victims and the communities in which they may live.**

a. Are you uncomfortable with the idea of a Megan's Law?

Response: No.

b. Are you worried that such a law may violate the rights of a convicted sex offender?

Response: No.

c. Are you uncomfortable with the idea of requiring convicted sex offenders to register with the police?

Response: No.

d. Do you accept the Second Circuit's reversals?

Response: Yes.

e. Do you regret any of your opinions in the Megan's Law cases?

Response: No. These were difficult issues, and although it reversed me, the Second Circuit commented that I had written a "thoughtful decision," *Doe v. Pataki*, 120 F.3d 1263, 1271 (2d Cir. 1997), and that the issue of whether notification constituted "punishment" was "not free from doubt." 120 F.3d at 1265.

- 2. Another case that concerns me is the so-called "Candyman" case, *U.S. v. Perez*, in which you suppressed evidence seized from an individual's home as part of a child pornography investigation. As a result of the investigation into the web-based group, the FBI searched several homes across the country for images of child pornography. The *New York Times* noted that as a result of this nationwide operation, more than 1,800 people were investigated, more than 100 were arrested, and 60 were convicted, many as a result of guilty pleas.**

Although you noted that "a first-time visitor to the site certainly would have had some idea that the site provided access to child pornography," you nevertheless suppressed the evidence and held that the FBI acted with "reckless disregard for the truth" in its warrant application. You also held that, even if the affidavit was corrected to remove the incorrect information: "a magistrate judge could not

reasonably conclude . . . that the Candyman organization was engaged in criminal activity to such an extent that it could be considered ‘wholly illegitimate’ in the criminal sense.”

- a. If you believe that a first-time visitor “certainly” would have some idea that the site provided access to child pornography, then why do you believe a magistrate judge would not?**

Response: The defendant in *Perez* was suspected of unlawfully receiving or possessing child pornography transmitted in interstate commerce. The affidavit used to obtain the search warrant represented that all members of the egroup received all emails sent by members of the group; this was critical to the probable cause question because the emails transmitted child pornography. In fact, as the government later conceded, the representation was false, as the vast majority of members -- including Perez -- elected not to receive emails and thus did not receive any child pornography from the website. The fact that a visitor to the site would have had some idea that child pornography was accessible did not mean that they actually accessed child pornography, and indeed visitors to the site could engage in activities that were not illegal.

One of your fellow district judges in the Eastern District of New York reached a different conclusion than you, saying: “While it is technically possible that a person would register with Candyman and not proceed to receive child pornography from it, this hardly seems likely, as that was clearly the primary reason for the [egroup’s] existence.” How do you respond to this opinion?

Response: In fact, most people who registered on the website did not receive child pornography because most of them elected the "no email" option. Moreover, several other judges ruled the same way that I did. Although the Eastern District of New York decision was affirmed, four out of six judges on the Second Circuit who considered the issue agreed with me. In *U.S. v. Martin*, 426 F.3d 68 (2d Cir. Aug. 4, 2005), in a two-to-one decision, a panel of the Second Circuit affirmed the Eastern District decision. The dissenter agreed with my decision in *Perez*. In a subsequent unanimous decision, *U.S. v. Coreas*, 419 F.3d 151 (2d Cir. Aug. 18, 2005), the panel explicitly agreed with my decision in *Perez*, but held that it was bound by the panel's decision in *Martin*. Hence, four out of the six Second Circuit judges -- the dissenter in *Martin* and all three judges in *Coreas* -- agreed that the result I reached was the correct result. Nonetheless, I accept that the *Martin* decision is binding law in the Second Circuit.

- 3. In a January 9, 1994, profile published in *Newsday* that discussed your nomination to your district court position, you described your substantial legal**

career and then said: “So I offer the traditional progression of the white male, plus something more.”

a. What is the “traditional progression of the white male”?

Response: When I answered the question in 1994, I was referring to what I believed to be the traditional progression followed by many quality lawyers: a selective college; a selective law school; law review; editor of law review; federal clerkship; large law firm; and U.S. Attorney's office.

b. What is the “something more” that you offer?

Response: There was limited diversity in these settings. By "something more," I meant a non-traditional background: I was born in Hong Kong and immigrated to this country with my family. I had gone through the New York City public school system. My father was a cook in Chinese restaurants and my mother was a seamstress in Chinatown garment factories. I went to college and law school on scholarships. At the time, there were very few Asian-Americans in the law firms, in the U.S. Attorneys' offices; and on the bench.

b. Have you ever identified anything else as “white” or otherwise racial?

Response: In a speech I gave in Miami in 2007, I referred to "white males." In discussing the importance of diversity in the justice system, I described a Chinatown extortion case I had tried involving a commuter van service. The four defendants, the victims, and all the non-law enforcement witnesses were Chinese. All were poor and uneducated, and none spoke English. Several had been smuggled into this country. I noted that the four defense lawyers, two prosecutors, and three law enforcement agents on the case were all "white males." I said that I was not suggesting at all that a Chinese defendant should only be represented by a Chinese lawyer or a white defendant only by a white lawyer, but I felt it was problematic when so many important elements of our criminal justice system did not reflect, even remotely, the make-up of our population. I noted that at one point during the trial, for example, one of the driver witnesses -- testifying in Chinese -- identified one of the defendants, pointing to him and saying his name. One of the defense lawyers stood up to concede the identification, but he was mistaken -- it was not his client who had been identified but one of the other defendants. The difficulties in language, dialects, names, and culture presented challenges to the orderly administration of justice.

4. In describing the things you enjoy about serving as a judge, you have frequently stated: “I particularly enjoy having the freedom to do what I believe is right and

just.” Although you have said in other remarks that you enjoy having the freedom to do what is “right and just, under the law,” I am concerned whether you will put your personal views ahead of the law.

- a. When deciding what is “right and just,” what authorities do you consider?**

Response: By "right and just," I mean under the law -- the applicable statutes and case law. I have not, and will not, put my personal views ahead of the law. I made the quoted statement in the context of comparing what I do as a judge to what I did as an advocate. I was making the point that a lawyer represents a client, and must take positions accordingly, ethics permitting, regardless of what the "right" answer is. A judge is not limited by the interests of the client and does not merely advocate a position; rather, a judge has the freedom -- and the responsibility -- to determine the right and just answer. But he or she must do so under the law and not based on personal views.

- b. When deciding what is “right and “just,” do you take into account your personal views or preferences? If so, how?**

Response: I do not.

- c. Have you ever ruled in a case based on your personal view of what is “right” or “just”?**

Response: I have not. I have determined what is "right" and "just" based on the applicable law.

- 5. As you know, the Second Amendment right to bear arms is one that is very important to all Americans, but particularly to 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 has held that this is an individual right. I am bound by and, if presented with this issue, would apply Supreme Court law.

- 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 so held. I will apply Supreme Court law.

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

Response: The Supreme Court has not yet ruled on that issue, but may do so shortly. I am bound by and would apply Supreme Court law.

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

Response: I would follow the constitutional analysis applied by the Supreme Court.

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

Response: The Supreme Court has not yet ruled on this issue. When it does so, and if I am presented with the issue, I would apply Supreme Court and other binding Second Circuit law.

- 6. 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 believe that the Constitution constantly evolves as society sees fit. Absent a constitutional amendment, the words of the Constitution do not change. The words of the Constitution should be given their plain meaning, and where there is ambiguity, the intent of the framers should be given great weight. The framers, however, did not envision all the issues that confront us today, particularly, for example, issues presented by developments in technology. In these situations, I believe a judge should apply the words of the Constitution and constitutional principles, as construed by applicable Supreme Court case law.

- 7. 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: I am bound by the Supreme Court's rulings and I would apply Supreme Court law.

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

Response: I would follow Supreme Court law and apply the analysis that the Supreme Court has held should be applied.

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

Response: The meaning of the Constitution should be determined based on U.S. law, as interpreted by the United States Supreme Court. There may be limited occasions when it may be useful, for purposes of comparison, to see how other countries handle certain issues. For

example, the Supreme Court has looked to foreign law, on occasion, to a limited extent, for purposes of comparison, after it has first relied on American law.

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

Response: I would not interpret the Constitution based on foreign law. There may be limited occasions when it may be useful, for purposes of comparison, to see how other countries handle certain issues. For example, the Supreme Court has looked to foreign law, on occasion, to a limited extent, for purposes of comparison, after it has first relied on American law.

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

Response: I would not interpret the Constitution based on foreign law. There may be limited occasions when it may be useful, for purposes of comparison, to see how other countries handle certain issues. For example, the Supreme Court has looked to foreign law, on occasion, to a limited extent, for purposes of comparison, after it has first relied on American law.