

**Responses of Denise Jefferson Casper
Nominee to be United States District Judge for the District of Massachusetts
to the Written Questions of Senator Jeff Sessions**

- 1. You were part of task force formed to study ways to improve the Boston criminal justice system in 2008 and 2009. The Task Force recommended legislation that would allow “postconviction access to and testing of forensic evidence and biological material by defendants who claim factual innocence” and require the retention of biological material from criminal cases.**

- a. Do you believe individuals have a postconviction right to access and test forensic evidence and biological material relevant to their case?**

Response: No, as the Supreme Court in District Attorney’s Office for the Third Judicial District v. Osborne, 129 S. Ct. 2308 (2009) recognized, there is no freestanding right to post-conviction access or testing of biological evidence. Osborne, 129 S. Ct. at 2320-23 (rejecting that Osborne had “a freestanding and far-reaching constitutional right” to such access and testing, but noting that forty-six states and Congress have enacted statutes regarding access and testing to DNA evidence under certain circumstances). If confirmed, I will follow the precedent set by the Supreme Court.

- i. If so, do you believe this is a constitutional right?**

Response: No.

- ii. If so, from where in the Constitution does this right originate?**

Response: Not applicable.

- b. On June 18, 2009, the Supreme Court issued an opinion in *District Attorney’s Office for the Third Judicial District v. Osborne* (129 S. Ct. 2308). The petitioner, who had been charged with kidnapping and sexual assault, sought to compel release of biological evidence for testing. The Supreme Court, in an opinion by Chief Justice Roberts, held that *Brady* does not extend to postconviction relief and that there is no “freestanding right to access DNA evidence for testing.”**

- i. Do you believe this decision was wrongly decided?**

Response: No.

- ii. Will you be able to apply this precedent even though you may personally disagree with it?**

Response: Yes.

2. **As you know, now that the Sentencing Guidelines are advisory rather than mandatory, a judge may impose virtually any sentence ranging from probation to the statutory maximum.**

- a. **Given your experience as a prosecutor, what level of deference will you show to the guidelines now that they are only advisory?**

Response: The Sentencing Guidelines are an important tool in maintaining consistency in sentencing for similarly situated defendants convicted of similar crimes. Although the guidelines are now advisory after the Supreme Court's decision in United States v. Booker, 543 U.S. 220 (2005), they remain the "starting point and the initial benchmark" for a sentencing court. Gall v. United States, 552 U.S. 38, 49 (2007). If confirmed, I shall apply and follow the precedent established by the Supreme Court and the Court of Appeals for the First Circuit.

- b. **Do you commit to follow the guidelines?**

Response: I will do so within the framework established by the binding precedent of the Supreme Court and the Court of Appeals for the First Circuit.

- c. **Do you agree that the sentence a defendant receives for a particular crime should not depend on the judge he or she happens to draw?**

Response: Yes.

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: Given that the President nominated me for the U.S. District Court for the District of Massachusetts, I assume that I must have met his criteria for federal judges.

- b. **During her confirmation hearing, Justice Sotomayor rejected this so-called "empathy standard" stating, "We apply the law to facts. We don't apply feelings to facts." Do you agree with Justice Sotomayor?**

Response: I do.

- c. **What role do you believe empathy should play in a judge's consideration of a case?**

Response: I do not believe that empathy should play a role in a judge's consideration of a case. A judge must base his/her decisions on a fair and impartial application of law to the particular facts of the case and, if confirmed, I will do so.

- d. **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: I do not.

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

Response: None.

- ii. **Please identify any cases in which you've done so.**

Response: None, I have not served as a judge.

- iii. **If not, 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: None, I have not served as a judge.

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

Response: I received the questions on July 22, 2010. I reviewed the questions and the materials that the questions referenced and I drafted my responses. I then had discussion with an attorney from the Department of Justice. I finalized my responses and requested that the Department of Justice submit them on my behalf to the Senate Judiciary Committee on July 26, 2010.

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

Response: Yes.

Responses of Denise Jefferson Casper
Nominee to be United States District Judge for the District of Massachusetts
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 respectfully do not agree with this perspective. The Constitution, as interpreted by the Supreme Court, was written to withstand the course of time and, with amendments over time, it has done so.

- 2. 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. Do you believe *Lopez* and *Morrison* consistent with the Supreme Court’s earlier Commerce Clause decisions?**

Response: Yes.

- b. Why or why not?**

Response: In *Lopez* and *Morrison*, the Supreme Court noted that its rulings in those cases were consistent with its earlier Commerce Clause precedent and it noted the same in its later decision, *Gonzales v. Raich*, 545 U.S. 1, 23-25 (2005).

- 3. 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: Justice Kennedy’s analysis in *Roper v. Simmons* constituted the majority opinion in that case. If I am confirmed, I will be bound to follow Supreme Court precedent and will do so.

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

Response: The Supreme Court has ruled that “evolving standards of decency” are part of the legal framework for determining whether a criminal penalty rises to the level of cruel and unusual punishment under the 8th Amendment. If I am fortunate enough to be confirmed by the Senate, I will follow the precedent that the Supreme Court has set.

- b. Do you think that a judge could ever find that the “evolving standards of decency” dictated that the death penalty is unconstitutional in all cases?**

Response: No. The Supreme Court has held that the death penalty is constitutional except in certain, limited instances. Accordingly, a federal district court judge, bound to follow Supreme Court precedent, could not rule that the death penalty was unconstitutional in all cases.

c. What factors do you believe would be relevant to the judge's analysis?

Response: If I am confirmed and a constitutional challenge to the death penalty in a particular case was raised before me, I would apply and follow the applicable precedent of the Supreme Court and the Court of Appeals for the First Circuit.

4. 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: Contemporary foreign or international laws or decisions are not binding precedent for any court of the United States. I would not rely on such law unless the precedent of the Supreme Court or the Court of Appeals for the First Circuit required me to do so.

a. Is it appropriate for judges to look for foreign countries for "wise solutions" to legal problems?

Response: No. I would only look to foreign law if the precedent of the Supreme Court or the Court of Appeals for the First Circuit required me to do so.

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

Response: None, unless the Supreme Court or the Court of Appeals for the First Circuit said otherwise.

c. Do you believe foreign nations have ideas and solutions to legal problems that could contribute to the proper interpretation of our laws?

Response: No.

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

Response: No, except to the extent that the precedent of the Supreme Court or the Court of the Appeals for the First Circuit requires otherwise.