Responses of James K. Bredar
Nominee to be United States District Judge for the District of Maryland
to the Written Questions of Senator Jeff Sessions

1. In 1997, the *Maryland Church New Magazine* published an article entitled, "Why the Federal Public Defender Opposes an Impending Execution," which discussed your concerns about the death penalty for one of your clients who had shot and killed a police officer. The article stated that "when it comes to capital punishment, to executing murderers, [you are] usually opposed for any number of reasons, all traceable, when you get right down to it, to his Christian faith." According to the article, you questioned why we "perpetuate the culture of violence" by sentencing individuals to death and commented that "only the most primitive of societies, it seems to me, would validate the value of one life by taking another."

a. Do you still hold these views?

Response: When I granted this interview, my client's appeals had all been exhausted, execution was imminent, and as his court-appointed advocate I was discharging my professional responsibility by vigorously seeking clemency on his behalf. Part of that strategy included outreach to religious communities in Maryland that have traditionally opposed the death penalty. Nothing in my personal views and convictions would prevent me from faithfully following the law in a death penalty case, and I would impose the death penalty when required by the law.

b. Do you have a personal objection to the death penalty?

Response: A judge's personal views are not relevant in deciding a case. Nothing in my personal views and convictions would prevent me from faithfully following the law in a death penalty case, and I would impose the death penalty when required by the law.

c. Do you believe that the death penalty is an acceptable form of punishment?

Response: The United States Supreme Court has ruled that the death penalty is constitutional and acceptable and, as a U.S. District Judge, I would faithfully follow that precedent.

d. Do you believe that the death penalty constitutes cruel and unusual punishment under the Constitution?

Response: The United States Supreme Court has ruled that the death penalty does not constitute cruel and unusual punishment. As a U.S. District Judge, I would follow that precedent.

e. If confirmed, you will have to preside over capital cases. Do you have any reservations about imposing the death penalty where appropriate?

Response: No.

2. In 2004, you rejected the determination of an Administrative Law Judge (ALJ) that a disabled student's individualized education program was acceptable under the Individuals with Disabilities Act (IDEA). The Fourth Circuit reversed your ruling, finding that you substituted your "own views on educational policy . . . for the determinations of the local education officials charged with formulating the [education plan]." The court noted that you "consistently reached diametrically opposing conclusions" from the ALJ and that you "repudiated the findings of the ALJ and discarded the expertise of the [education officials] without reason or explanation." The court concluded that you ignored congressional preference, substituted your own views on education and the IDEA for that of Congress, and failed to show appropriate deference to the ALJ.

a. Do you think it is appropriate for a judge to decide cases based on his or her own personal beliefs?

Response: No.

b. What in your view is the role of a trial court judge?

Response: A trial court judge is obligated to research and determine the law applicable to the case before him, and then to faithfully apply that law to the facts.

c. If confirmed, can you assure the Committee that you will abide by binding precedent even when you disagree with the precedent?

Response: Yes.

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

Response: I received a copy of these questions via e-mail from Department of Justice staff on May 20, 2010. I prepared a draft of the answers and discussed the draft with staff on May 21, 2010. I then provided a final version of my answers to Department of Justice staff for transmission to the Committee.

4. Do these answers reflect your true and personal views?

Response: Yes.

Responses of James K. Bredar
Nominee to be United States District Judge for the District of Maryland
to the Written Questions of Senator Grassley

1. **During the 2008 presidential campaign, President Obama described the kind of judge that he would 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 the President's criteria for federal judges, as described in this quote?**

      Response: President Obama nominated me so I believe that I fit 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 agree with Justice Sotomayor's statements that judges properly apply law to facts, and not feelings to facts.

   c. **Do you believe that it is ever appropriate for judges to indulge their own subjective sense of empathy in determining what the Constitution and the laws mean? If so, under what circumstances?**

      Response: No.

   d. **Do you believe that it is ever appropriate for judges to indulge their empathy for particular groups or certain people? For example, do you believe that it is appropriate for judges to favor those who are poor? Do you believe that it is appropriate for judges to disfavor corporations?**

      Response: No.

   e. **After Justice Stevens announced his retirement, President Obama stated that he would select a Supreme Court nominee with "a keen understanding of how the law affects the daily lives of the American people." Do you believe that judges should base their decisions on a desired outcome?**

      Response: No.

2. **What, in your view, is the role of a judge? Please describe your judicial philosophy.**

   Response: A judge's role is to apply the law to the facts. It is not the judge's role to make the law. I believe that judges should conduct careful research to determine the applicable law and precedents, and then apply the law and governing precedents to the facts.

3. **How do you define "judicial activism"?**

   Response: "Judicial activism" is not a term that I use. I believe that a U.S. District Judge must follow the law as defined in the Constitution and statutes and must follow precedent as established in the rulings of the U.S. Supreme Court and the Courts of Appeals.

4. **Could you identify three recent Supreme Court cases that you believe are examples of "judicial activism"? Please explain why you believe these cases are examples of "judicial activism".**

   Response: "Judicial activism" is not a term that I use and, therefore, I am unable to define it. I am unable to identify any recent Supreme Court case that would be an example of what is commonly referred to as "judicial activism."

5. **How do you define "judicial restraint"?**

   Response: "Judicial restraint" is also not a term that I use. I believe that U.S. District Judges are constrained to follow the law as set out in the text of the Constitution and statutes and as established in precedents set in rulings of the U.S. Supreme Court and the Courts of Appeals.

6. **Could you identify three recent Supreme Court cases that you believe are examples of "judicial restraint"? Please explain why you believe these cases are examples of "judicial restraint".**

   Response: "Judicial restraint" is not a term that I use. I am unable to identify any recent Supreme Court case that is an example of "judicial restraint."

7. **Do you believe that it is ever appropriate for judges to indulge their own values and/or policy preferences in determining what the Constitution and the laws mean? If so, under what circumstances?**

   Response: No.

8. **Should the courts, rather than the elected branches of government, ever take the lead in creating a more "just" society?**

   Response: U.S. District Judges are to apply law to facts. The determination of policy is for the other, elected branches of government.

9. In your opinion, what is the proper role of foreign law in U.S. court decisions, and is citation to or reliance on foreign law ever appropriate when interpreting the U.S. Constitution and statutes?

Response: There is no proper role for foreign law in U.S. court decisions, nor may there be reliance on foreign law in interpreting the U.S Constitution and U.S. statutes, unless U.S. law or a precedent of the U.S. Supreme Court or a Court of Appeals so requires.

10. Does the silence of the U.S. Constitution on a legal issue allow a federal court to use foreign law as an authority for judicial decision-making? When is it not appropriate to look to foreign law for legal guidance or legal authority?

Response: I cannot think of a circumstance when it would be appropriate to rely on foreign law in the absence of language in the Constitution addressing an issue.

11. I would like to get a better understanding of how you would interpret statutes and what your judicial method would be if you were confirmed to be a judge on the District Court of Maryland.

a. In cases involving a close question of law, what would you look to when determining which way to rule?

Response: I would look first to the plain language of the applicable statute. I would also rely on the applicable precedents of the U.S. Supreme Court and the U.S. Court of Appeals for the Fourth Circuit.

b. Would you agree that the meaning of a statute is to be ascertained according to the understanding of the law when it was enacted?

Response: A statute should be given the meaning that flows from a plain reading of its words.

c. How would you use legislative history when interpreting a statute? What kind of weight would you give legislative history, if any, when interpreting a statute?

Response: I would use legislative history to assist in interpreting a statute only if the statute's meaning could not be determined from a plain reading, and only if there were no precedents from the U.S. Supreme Court and/or the Courts of Appeals explaining the meaning. I would give legislative history no weight unless a plain reading of the statute and the precedents of the Supreme Court and the Court of Appeals failed to establish the meaning of the provision.

Responses of James K. Bredar
Nominee to be United States District Judge for the District of Maryland
to the Written Questions of Senator Tom Coburn, M.D.

1. **In *Kennedy v. Louisiana*, 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.**

    a. **Given the heinousness of the crime, as well as the new information on the federal government's codification of capital punishment in child rape cases under the UCMJ, do you believe *Kennedy v. Louisiana* was wrongly decided? If not, why?**

    Response: As a U.S. District Judge, I would be obligated to follow the precedents established in rulings of the U.S. Supreme Court regardless of personal belief. I believe that judges are obligated to apply the law and controlling precedent faithfully regardless of personal views. Nothing in my personal views and convictions would prevent me from faithfully following the law in a death penalty case, and I would impose the death penalty when required by the law, which, of course, includes the precedents of the U.S. Supreme Court.

    b. **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 agree with that statement?**

    Response: I agree that rape of a child is an especially heinous offense. With respect to when the death penalty should be applied, if I am confirmed as a U.S. District Judge, I would faithfully follow the precedents established in rulings of the U.S. Supreme Court in the death penalty context as in all other contexts.

2. **In *Atkins v. Virginia*, the Supreme Court ruled that the imposition of the death penalty on mentally retarded defendants constituted cruel and unusual punishment. In its majority opinion, Justice Stevens stated that the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures," and that the majority first reviewed "the judgment of legislatures that have addressed the suitability of imposing the death penalty on the mentally retarded." The majority cited the fact that 18 States, less than half of the 38 States that permitted capital punishment, had recently enacted legislation barring execution of the mentally retarded as evidence that a "national consensus" existed about the propriety of executing the mentally retarded.**

a. Do you believe that the legislative acts of 47% of the country equates to a national consensus?

Response: I do not have a view on what constitutes a national consensus. I do believe that a U.S. District Judge is obligated to follow the precedents set in rulings of the U.S. Supreme Court, and if confirmed I would faithfully do so in the death penalty and all other contexts.

b. In its majority opinion, the Court stated: "Moreover, within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved. Brief for The European Union as *Amicus Curiae* in *McCarver* v. *North Carolina*, O. T. 2001, No. 00—8727, p. 4." Do you personally believe it was appropriate for the Court to consider the opinion of the "world community" when interpreting the Eighth Amendment?

Response: A judge's personal beliefs have no role in the resolution of a case before him, and my personal views as to whether the Supreme Court should have included a particular consideration in their resolution of the case is not relevant in my application of the precedent flowing from that case. If confirmed, I would faithfully follow the applicable law and binding precedent in the cases before me.

3. 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. The Constitution is a fixed text, except when lawfully amended pursuant to Article V.

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

Response: Yes.

b. Why or why not?

Response: I believe *Lopez* and *Morrison* are consistent with the Supreme Court's earlier Commerce Clause decisions because the decisions themselves indicate as much, and the Court, in *Gonzales v. Raich*, 545 U.S. 1 (2005), confirmed 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 U.S. District Judge, I would be obligated to follow the precedents set out in rulings of the U.S. Supreme Court and I would faithfully do so regardless of personal belief. The holding in *Roper* is binding precedent and I would follow it.

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

      Response: If I were in circumstances where it became necessary to determine "evolving standards of decency," I would do so in a manner that applied the controlling precedents of the U.S. Supreme Court and the Court of Appeals for the Fourth Circuit.

   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: Given that the U.S. Supreme Court has held that the death penalty is constitutional in some circumstances, a U.S. District Judge would be precluded from making such a finding.

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

      Response: Given that the U.S. Supreme Court has held that the death penalty is constitutional in some circumstances, no factors could cause a U.S. District Judge to conclude and rule otherwise.

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 the Constitution?**

   Response: No, unless the U.S. Supreme Court or the Court of Appeals for the Fourth Circuit hold otherwise.

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

      Response: I would not consider foreign law when interpreting the Constitution except if binding precedent required me to do so.

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

Response: In deciding a case, I do not believe it proper for a judge to consider "ideas and solutions" from any source other than those allowed by applicable law and binding precedent.

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

Response: No, unless directed to do so by applicable law or binding precedent from the U.S. Supreme Court or the U.S. Court of Appeals for the Fourth Circuit.

7. In a case captioned *A.B. v. Lawson*, the parent of a disabled student sued a school district challenging an Administrative Law Judge's (ALJ) determination that the student's individualized education programs complied with the Individuals with Disabilities Act. The ALJ determined that that the student's programs were reasonable and denied the request for reimbursement. On appeal, you reversed. The Fourth Circuit reversed your ruling stating: "The district court substituted its own views on educational policy … repudiated the findings of the ALJ [and] simply adopted the worldview of [the student's] experts and their perspectives on proper educational policy." The Fourth Circuit concluded: "In sum, the magistrate judge ignored the congressional preference for mainstreaming, clearly and strongly substituted its views on education and IDEA for that of Congress, and failed to accord the ALJ's factual findings the requisite degree of deference." Do you believe you substituted your own views for those of the ALJ? If not, please explain.

Response: The U.S. Court of Appeals for the Fourth Circuit reversed my opinion in this case – the only time it has done so in my twelve years on the bench – and I accept the Court's judgment. I approached this case, as I approach every case before me, by seeking to correctly apply the law to the facts. I do not believe that it is ever appropriate for a judge to decide a case based on his own policy views. It was not my intention to do so in this case.