Responses of Kimberly J. Mueller
Nominee to the U.S. District Court for the Eastern District of California
to the Written Questions of Senator Jeff Sessions

1. **In *Riel v. Woodford* (2003), a habeas proceeding, you considered a death row inmate's discovery request for data maintained by the California attorney general in support of his challenge to the constitutionality of the death penalty as applied in California. The inmate had presented a study that he claimed showed the death penalty was unconstitutionally applied because only 11.4% of those eligible for the death penalty received it and, therefore, was "cruel and unusual punishment" under the Eighth Amendment. While I understand that you ultimately denied the motion on the grounds that there was not good cause for the discovery request, before doing so, you discussed the Supreme Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972), which held that several death sentences violated the Eighth Amendment based on statistics showing that only a small percentage of convicted murderers and rapists were sentenced to death. Assuming the inmate's study was correct and only 11.4% of convicted murderers eligible for the death penalty in California actually received that punishment, do you believe the California death penalty law would constitute cruel and unusual punishment under the Eighth Amendment? Please explain your answer.**

   Response: Even though I denied the petitioner's discovery motion in *Riel*, I was reversed. As a result, the discovery is proceeding and has not yet been completed. As the Magistrate Judge to whom the *Riel* matter is referred for pre-dispositive purposes, I must at this point assume the discovery may be before me with respect to petitioner's claim alleging that the death penalty in California is applied disproportionately. I cannot prejudge how I would resolve the claim. In resolving the claim, I would ascertain all applicable provisions of the Constitution, as well as Supreme Court and Ninth Circuit precedent, and develop a clear sense of the entire record on the claim. I would apply the law to the facts in reaching the result required by law.

2. **Justice Scalia, writing for himself and Justice Rehnquist in *Harmelin v. Michigan*, 501 U.S. 957 (1991), said the Cruel and Unusual Punishment Clause of the Eighth Amendment only "disables the Legislature from authorizing particular forms or 'modes' of punishment - specifically, cruel methods of punishment that are not regularly or customarily employed." The Clause does not, in his view, impose a requirement of proportionality of punishment to the severity and harm of the crime. I recognize that a majority of the Supreme Court has not adopted Justice Scalia's view. I also recognize that, if confirmed, you would be bound to apply the rule adopted by the majority of the Supreme Court.**

a. What are your personal views of the meaning of the Cruel and Unusual Punishment Clause?

Response: In performing my duties as a United States Magistrate Judge I do not consider what my personal views are of any provision of the Constitution. Nor would I consider such views if confirmed as a District Judge. In resolving any application of the Cruel and Unusual Punishment Clause, I would start with the Clause itself, and review all Supreme Court and appellate court cases interpreting and applying the Clause in identical and analogous circumstances. Based on a conscientious review of the applicable law, and careful consideration of the record and the parties' briefs and arguments, I would prepare a decision reflecting my application of the law to the facts of the case.

b. In the same opinion, Justice Scalia wrote that "appellate review of sentencing that includes a proportionality analysis merely substitutes judges' subjective views of the gravity of offenses for legislative determinations." Do you agree that the proportionality analysis, by its very definition, permits unelected judges to substitute their judgment regarding appropriate punishments for that of the elected legislatures?

Response: I do not believe judges should substitute their opinions for any policy judgments that are properly the province of elected legislatures. If I am required to consider a proportionality analysis in the future, I will ascertain the controlling precedent with respect to the question before me and apply that precedent faithfully, in a written decision that makes clear the method and reasons for my analysis.

3. In 1995, you joined a group of students and law professors who opposed California's Proposition 209, which amended the state constitution to prohibit the state from discriminating based on race, color, gender, or ethnicity. At the time, you were quoted as saying that proponents of the initiative wanted "to devour our society's main way of achieving equal opportunity . . . under the pretense that discrimination no longer exists."

a. Do you still agree with that statement?

Response: I believe the statement referenced is from a press release that I did not prepare or approve. While I do not have notes of my remarks and do not recall precisely what I said during the one press conference opposing Proposition 209 that I attended, I participated in my capacity as a law student. I did so without performing the type of equal protection analysis I would today as a Magistrate Judge, or if confirmed as a District Judge, if required to resolve a legal dispute arising from alleged discrimination.

b. Do you believe Proposition 209 violates the federal constitution?

Response: Proposition 209 was passed by the California electorate and amended the California Constitution. The Ninth Circuit Court of Appeals has rejected challenges to the proposition's constitutionality. If called upon to consider a new case challenging the proposition, I would take account of all applicable Supreme Court and appellate law in reaching the decision required by law.

c. As recently as a few months ago, there were legal challenges to Proposition 209. If confirmed and presented with such a challenge, are you prepared to set aside your own personal views and rule based solely on the law?

Response: Yes.

4. During the 2008 presidential campaign, President Obama 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: Because I have been nominated by President Obama, I have to assume I satisfy the criteria he is applying in selecting a nominee to fill the current vacancy for a District Judge in the Eastern District of California.

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 the two sentences attributed to Justice Sotomayor here.

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

Response: I do not believe empathy should play a role in a judge's determination of how the law applies to the facts of a case. I do believe a judge must be a good listener and reader in order to properly ascertain the factual record and fully comprehend the legal positions of all the parties to a given dispute. The one setting in which I believe a judge may at times properly display some degree of empathy is when acting not as a judge of the law, but as a settlement judge.

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

Response: No.

i. If so, under what circumstances?

Response: Not applicable.

ii. Please identify any cases in which you have done so.

Response: I have not indulged my own subjective sense of empathy in determining what the law means in any case.

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: In every case that comes before me as a judge of the law, I set aside any personal views or feelings in identifying and then applying the controlling law to the facts of the dispute I am called to resolve.

e. As you know, Justice Stevens recently announced his retirement. The President said that he will select a Supreme Court nominee with "a keen understanding of how the law affects the daily lives of the American people." Do you believe judges should base their decisions on a desired outcome, or solely on the law and facts presented?

Response: I believe a judge can be aware and communicate an awareness of the consequences for those affected by a decision. I do not believe such awareness should ever affect or dictate the outcome in any given decision. Any decision by a judge should reflect rigorous application of the law to the facts as established by the record in any given matter submitted for judicial determination.

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

Response: I received the questions on Friday, April 23rd. I worked on my responses over the weekend. I consulted briefly with representatives of the Department of Justice at one point regarding my responses, and then finalized them before authorizing their transmittal to the Committee.

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

Response: Yes.

Responses of Kimberly J. Mueller
Nominee to the U.S. District Court for the Eastern District of California
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 would not use the word "living" to describe the Constitution. I believe its text is established as written.

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: 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.

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: As a United States Magistrate Judge, I have not had occasion to consider the analysis referenced here. If confirmed and appointed as a District Judge, and called upon to reach this question in the future, I would undertake the analysis required to reach the result required by law.

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

      Response: If a dispute did require that I reach the question of what "evolving standards of decency" are, I would ascertain the holdings of the Supreme Court and relevant appellate court authority and apply that precedent to the facts of the case before me in a reasoned written decision.

   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: As the Supreme Court has determined that the death penalty itself is Constitutional, a finding that it is not Constitutional is precluded by law.

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

Response: The only factors that should be relevant to a judge performing any such analysis are those required by the Supreme Court and the appellate court with jurisdiction over the trial court conducting the analysis in the first instance. To the extent there is no controlling circuit authority, it may also be appropriate to consider the decisions of other circuit courts.

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: I would not consider foreign or international law in determining a Constitutional question unless the Supreme Court or controlling authority from the circuit court required as much. If I am confirmed as a District Judge for the Eastern District of California, I expect to be applying the laws of the United States day in and day out.

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

Response: If confirmed and appointed as a District Judge, I would not consider foreign law in interpreting the Constitution unless Supreme Court precedent or controlling appellate authority required it, and those precedents were implicated by a dispute before me.

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

Response: If presented with such an argument in a dispute before me, I would answer the question with reference to Supreme Court and controlling appellate court authority. As a United States Magistrate Judge, the only times I recall considering foreign law in any respect have been in the context of extradition proceedings or foreign governments' requests for assistance in carrying out criminal investigations.

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

Response: If confirmed and appointed as a District Judge, I would not consider foreign law in interpreting any Constitutional amendment unless the Supreme Court or controlling appellate court authority required me to do so.