

**Responses of Leslie E. Kobayashi**  
**Nominee to be United States District Judge for the District of Hawaii**  
**to the Written Questions of Senator Jeff Sessions**

1. **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: Due to President Obama’s nomination of me, I assume that I meet his criteria for federal judges based upon my legal, judicial and personal experiences during my 27 years as a prosecutor, civil litigator, and United States magistrate judge.

- 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: Yes.

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

Response: Empathy is an important component of good judicial temperament. In deciding a case, however, empathy plays no role. A judge must apply the law to the facts dispassionately and without bias toward or against any person or party.

- 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: No.

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

Response: None.

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

Response: None.

- 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: The parties in a civil case consented to have me, as a United States magistrate judge, serve as the trial judge. The plaintiff was the mother of a disabled child who sued the State of Hawaii's Department of Education for intentionally discriminating against her and her son, and for retaliating against her for advocating for her child's special education services. Her testimony was compelling but the evidence presented did not meet what the law requires. As a result, I granted judgment as a matter of law in favor of the defendant, and against the plaintiff.

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

Response: The questions were forwarded to me by the Department of Justice. I reviewed the questions, did research, and prepared the responses. I had discussions with the Department of Justice, and sent my final responses to them with a request that they file my responses with the Senate Judiciary Committee.

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

Response: Yes.

**Responses of Leslie E. Kobayashi**  
**Nominee to be United States District Judge for the District of Hawaii**  
**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: The Constitution is a permanent framework for the principles of American law. I do not agree with the perspective that the Constitution evolves as society interprets it.

- 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: The Supreme Court addressed, in *Gonzales v. Raich*, 545 U.S. 1, 17-23 (2005), that *Lopez* and *Morrison* are consistent with its earlier Commerce Clause decisions.

- 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 opinion was the Supreme Court’s majority decision. Supreme Court decisions are binding upon all lower federal courts and I would follow Supreme Court precedent in my rulings and decisions.

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

Response: I would look to Supreme Court and Ninth Circuit decisions to make the determination.

- 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: The Supreme Court has consistently held otherwise. Judges in lower federal courts are bound to follow Supreme Court precedent and therefore I do not think that a judge could find under current Supreme Court decisions that the death penalty is unconstitutional in all cases.

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

Response: As directed by the Supreme Court in *Graham v. Florida*, \_\_\_ U.S. \_\_\_, 130 S.Ct. 2011, 2022 (2010), the factors to be considered in evaluating whether a state's death penalty law is constitutional would be the "objective indicia of society's standards, as expressed in legislative enactments and state practice' .... [and] the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose, ...." (citations omitted).

**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: No, unless the Supreme Court or the Ninth Circuit directs otherwise.

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

Response: In interpreting American law and the Constitution, it is presently not appropriate to look to foreign countries for solutions. It would only be appropriate if the Supreme Court directs that it be done.

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

Response: I cannot think of any circumstances in which I would consider foreign law to interpret the Constitution, unless directed to do so by the Supreme Court.

**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, unless the Supreme Court directs otherwise.

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

Response: No.