

**Responses of James E. Boasberg
Nominee to be United States District Judge for the District of Columbia
to the Written Questions of Senator Jeff Sessions**

1. As a D.C. Superior Court Judge, you have had to make sentencing decisions using the District of Columbia's Sentencing Guidelines, which are similar to the Federal Sentencing Guidelines, and are also advisory.

a. How much deference do you afford the D.C. Sentencing Guidelines?

Response: As a Superior Court judge, I give a great deal of deference to the D.C. Sentencing Guidelines. In fact, I have imposed sentences that are within the Guidelines in the vast majority of my felony cases.

b. If confirmed, do you anticipate affording the Federal Sentencing Guidelines the same level of deference?

Response: Yes, if confirmed, I expect to afford the Federal Sentencing Guidelines a great deal of deference.

c. Under what circumstances do you believe it is appropriate for a district court judge to depart downward from the sentencing guidelines?

Response: When the Federal Sentencing Guidelines were mandatory, the U.S. Sentencing Commission enumerated particular circumstances in which judges were permitted to depart upward or downward. Although the Guidelines are no longer mandatory, I would, if confirmed, expect to consult those departure criteria in deciding whether to depart upward or downward.

d. Given that you served as a federal prosecutor when the guidelines were mandatory, and you have served as a judge under a system where the guidelines are advisory, what is your view regarding whether the current federal scheme, where the Guidelines are advisory, is producing consistent and fair sentencing from one defendant to the next?

Response: As a judge on the D.C. Superior Court, I have found the D.C. Sentencing Guidelines immensely helpful. Instead of starting from scratch in fashioning an appropriate sentence, I can refer to a presumptive sentencing range that has been determined by looking at the heartland of historical sentences. I and other judges on the Superior Court have thus greatly benefited from the Sentencing Guidelines and follow them in the vast majority of our cases, even though they are not mandatory. I would expect similarly consistent and fair sentencing under the Federal Sentencing Guidelines, which are also advisory, not mandatory.

2. When Justice Stevens announced his retirement, the President said that he would select a Supreme Court nominee with “a keen understanding of how the law affects the daily lives of the American people.”

a. Do you believe judges should ever base their decisions on a desired outcome, or solely on the law and facts presented?

Response: Judges should not work from a desired outcome in assessing the law and facts. Instead, they should follow the law and facts to whatever outcome they dictate.

i. Please discuss an example of a case where you have had to set aside your own desired outcome and rule based solely on the law.

Response: I have not presided over cases in which my desired outcome was contrary to the law.

b. Do you believe a judge should consider his or her own values or policy preferences in determining what the law means?

Response: No.

i. If so, under what circumstances?

Response: N/A

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

Response: N/A

iii. If not, please discuss an example of a case where you have had to set aside your own values or policy preferences and rule based solely on the law.

Response: I have not presided over cases in which my preferences were contrary to the law.

c. During her confirmation hearings, Justice Sotomayor rejected President Obama’s 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, I agree with Justice Sotomayor.

3. Do you believe that the Second Amendment is an individual right or a collective right? Please explain your answer.

Response: The Supreme Court in *District of Columbia v. Heller*, 128 S.Ct. 2783 (2008), and *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), held that the Second Amendment bestows an individual right to bear arms. That is the law that I would follow if confirmed.

a. What standard of scrutiny do you believe is appropriate in a Second Amendment challenge against a Federal or State gun law?

Response: In *District of Columbia v. Heller*, 128 S.Ct.2783 (2008), and *McDonald v. City of Chicago, Illinois*, 130 S. Ct. 3020 (2010), the Supreme Court left open the question of what level of heightened scrutiny should apply to a Second Amendment challenge. When the Supreme Court or the D.C. Circuit determines the level of scrutiny, I will, if confirmed, follow that standard.

4. What is your view of the role of a judge?

Response: A judge should fairly and impartially uphold the law as it is written and apply it to the cases that appear before him or her.

5. Do you believe that the death penalty constitutes cruel and unusual punishment under the Constitution? Please explain your answer.

Response: With a few narrow exceptions, the Supreme Court has held that the death penalty does not constitute cruel and unusual punishment under the Eighth Amendment to the Constitution. I would, if confirmed, follow that determination.

6. Do you believe that the death penalty is an acceptable form of punishment? Please explain your answer.

Response: The Supreme Court has determined that the death penalty is a constitutional and acceptable form of punishment. I would, if confirmed, follow that determination.

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

Response: I received these questions on September 22, 2010, from the Department of Justice's Office of Legal Policy. I prepared a draft of these answers, which I sent to OLP on September 24. I then discussed this draft with OLP staff that same day and submitted my final draft on September 26 for transmission to the Committee.

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

Response: Yes.

**Responses of James E. Boasberg
Nominee to be United States District Judge for the District of Columbia
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: No, I do not agree with this perspective of constitutional interpretation.

- 2. Justice William Brennan once said: “Our Constitution was not intended to preserve a preexisting society but to make a new one, to put in place new principles that the prior political community had not sufficiently recognized.” Do you agree with him that constitutional interpretation today must take into account this supposed transformative purpose of the Constitution?**

Response: I believe that district judges must carefully follow constitutional interpretations articulated by the Supreme Court and their particular circuit. When faced with an issue of truly first impression, district judges should begin with the text of the Constitution and then use only those interpretive tools endorsed by the Supreme Court.

- 3. Do you believe judicial doctrine rightly incorporates the evolving understandings of the Constitution forged through social movements, legislation, and historical practice?**

Response: I believe that district judges must carefully follow constitutional interpretations articulated by the Supreme Court and their particular circuit. When faced with an issue of truly first impression, district judges should begin with the text of the Constitution and then use only those interpretive tools endorsed by the Supreme Court.

- 4. Do you believe empathy is an essential ingredient for arriving at just decisions and outcomes and should play a role in a judge’s consideration of a case?**

Response: If empathy means sympathizing with one party such that a judge fails to follow the law, then I believe it should not play a role in a judge’s consideration of a case.

- 5. Is any transaction involving the exchange of money subject to Congress’s Commerce Clause power?**

Response: The Supreme Court has held that the Commerce Clause is very broad; in some recent cases, however, such as *United States v. Morrison*, 120 S. Ct. 1740 (2000), and *United States v. Lopez*, 115 S. Ct. 1624 (1995), the Court has made clear that it is not unlimited. I would, if confirmed, apply that jurisprudence in evaluating any challenge brought to Congress’s power under the Commerce Clause.

6. What limitations remain on the individual Second Amendment right now that it has been incorporated against the States?

Response: In *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), the Supreme Court applied the Second Amendment's protections to the states. In so doing, it reiterated that the holding in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), "did not cast doubt on such longstanding regulatory measures as 'prohibitions on the possession of firearms by felons and the mentally ill,' 'laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.'" *Id.* at 3047.

a. Is it limited only to possession of a handgun for self-defense in the home, since both *Heller* and *McDonald* involved cases of handgun possession for self-defense in the home?

Response: As quoted above, *Heller* and *McDonald* recognized a number of limitations on individual gun possession, but they did not settle every question about the legality of possible restrictions on such possession. Those issues are currently being litigated all over the country, and, if confirmed, I would follow applicable precedent in determining the legality of any restrictions challenged before me.

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: Justice Kennedy's analysis is binding precedent, and, if confirmed as a district court judge, I would follow it.

a. Do you agree that the Constitution's prohibition on cruel and unusual punishment "embodies a principle whose application is appropriately informed by our society's understanding of cruelty and by what punishments have become unusual?"

Response: If confirmed as a district court judge, I would be required to follow the law as set forth by the Supreme Court. On Eighth Amendment questions, I would be guided by the framework articulated by the Supreme Court in *Roper v. Simmons*, 543 U.S. 551 (2005), and other cases in which the Court has analyzed what constitutes "cruel and unusual punishment."

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

Response: Making a determination about evolving standards of decency would fall to the Supreme Court. If confirmed and facing the issue, I would be guided

by the Supreme Court's decisions and any framework it has articulated for making such determinations.

- c. 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 repeatedly held that the death penalty is constitutional, I do not believe a district judge could find it unconstitutional in all cases.

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

Response: As I do not believe a district judge could find the death penalty unconstitutional in all cases, I would not engage in such analysis.

- 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: It is not proper for a district court judge to rely on contemporary foreign or international laws or decisions in determining the meaning of the Constitution, except in those very limited circumstances in which the Supreme Court has endorsed such reliance.

- a. Is it appropriate for judges to look for foreign countries for “wise solutions” and “good ideas” to legal and constitutional problems?**

Response: District courts should only do so in the very limited circumstances where the Supreme Court or their circuit has endorsed such an approach.

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

Response: If confirmed, I would consider foreign law only in those circumstances in which the Supreme Court has ruled it is appropriate to be considered.

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

Response: If confirmed, I would consider foreign law only in those circumstances in which the Supreme Court has ruled it is appropriate to be considered.

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

Response: If confirmed, I would consider foreign law only in those circumstances in which the Supreme Court has ruled it is appropriate to be considered.