

**Responses of Josephine Staton Tucker
Nominee to the U.S. District Court for the Central District of California
to the Written Questions of Senator Jeff Sessions**

1. In the questionnaire that you submitted to the Committee, you indicated that only one percent of the cases you handled while in private practice involved criminal law. You also noted that as a judge on the California Superior Court, only 20 percent of your current docket consists of criminal cases. Criminal cases account for a substantial portion of the federal district court docket.

a. What steps will you take to prepare yourself for the transition to the federal district court if confirmed?

Response: To clarify, my current docket as a judge of the California Superior Court consists entirely of civil matters. From November, 2002 through July, 2005, my judicial assignment consisted entirely of criminal matters, including trials, arraignments, pretrial motions, preliminary hearings, and sentencing. As a state court judge, I have presided over approximately 100 trials, approximately 20 of which were criminal cases. If confirmed, to prepare myself, I would take advantage of educational materials and courses offered to new judges, including those available through the Federal Judicial Center. I would review applicable federal statutes and case law, and I would confer with other experienced federal district court judges in the Central District of California.

b. If confirmed, how do you plan to educate yourself with respect to federal criminal law and the federal sentencing guidelines?

Response: If confirmed, I would study carefully the Federal Sentencing Guidelines Manual, the Federal Rules of Criminal Procedure, and relevant criminal statutes and case law. I would avail myself of the resources of the Federal Judicial Center, including publications and courses regarding issues arising in criminal cases. I would also seek guidance from experienced federal district court judges in the Central District of California.

i. Now that the guidelines are advisory rather than mandatory, a judge may impose any sentence ranging from probation to the statutory maximum. What are your views of the guidelines?

Response: The guidelines were the result of an extended and bipartisan effort to ensure fairness and consistency in sentencing so that similarly situated offenders are not subject to widely disparate sentences. For that reason, if confirmed, I intend to rely on the guidelines.

ii. Do you commit to follow the guidelines?

Response: Although in *United States v. Booker*, the Supreme Court held that the guidelines are advisory, if confirmed, I intend to follow the guidelines.

iii. 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.

2. 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. I recognize that you do not know 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: I believe that, because of my varied work and life experiences, I possess empathy in that I have the ability to understand a broad range of perspectives.

b. What role do you believe that empathy should play in a judge’s consideration of a case?

Response: None. I believe that empathy is a character trait that may cause a judge to be more courteous and respectful in interacting with attorneys, litigants, jurors, witnesses, and staff. Empathy also may allow a judge to fully understand the facts presented by all parties. However, if empathy infects the judicial decisionmaking process, then the judge has failed to meet his or her responsibility of serving as a neutral, unbiased arbiter. Cases should be decided based solely on an objective consideration of the facts and an analysis of applicable law, unclouded by a sense of empathy.

c. 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: Please see my previous answer.

ii. Please provide an example of a case in which you have done so.

Response: I have not done so.

iii. Please provide an example of a case in which you had to set aside your own subjective sense of empathy and rule solely based on the law.

Response: I presided over a case in which an individual lost his home to foreclosure and brought suit against his lender. While the loss of a home is a traumatic event, and I felt empathy for his unfortunate circumstances, he did not have a viable claim under the law, and I dismissed the action.

3. Supreme Court precedents are binding on all lower federal courts and Circuit Court precedents are binding on the district courts within the particular circuit.

a. Are you committed to following the precedents of higher courts faithfully and giving them full force and effect, even if you personally disagree with such precedents?

Response: Yes.

b. How would you rule if you believed the Supreme Court or the Court of Appeals had seriously erred in rendering a decision? Would you nevertheless apply that decision to the facts presented before you?

Response: As a district court judge, I would be bound by applicable decisions of higher courts. Even if I believed that the Ninth Circuit or the Supreme Court had seriously erred, I would apply established precedent to the facts before me.

4. Do you think it is ever proper for judges to indulge their own values in determining what the law means?

Response: No.

a. If so, under what circumstances?

Response: Please see my previous answer.

b. Please provide an example of a case in which you have done so.

Response: I have not done so.

c. Please provide an example of a case in which you had to set aside your own values and rule solely based on the law.

Response: I cannot recall a specific case in which I had to set aside my values in order to rule based solely on the law. However, as a state superior court judge for over seven years, my decisionmaking record reflects my respect for the law and my ability to base my rulings solely on the applicable law.

5. Do you think it is ever proper for judges to indulge their own policy preferences in determining what the law means?

Response: No.

a. If so, under what circumstances?

Response: Please see my previous answer.

b. Please provide an example of a case in which you have done so.

Response: I have not done so.

c. Please provide an example of a case in which you had to set aside your own policy preferences and rule solely based on the law.

Response: I presided over many marital dissolution cases in which one of the parties had engaged in conduct during the marriage that caused significant emotional harm to the other party and to the family unit. While I might prefer that such conduct have negative financial consequences, California law generally requires an equal distribution of all property acquired during the marriage, and I scrupulously followed that law.

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

Response: On March 3, 2010, I received these questions from the Department of Justice. I reviewed the questions and drafted my responses. I then discussed the questions with a representative of the Department of Justice, finalized my responses, and forwarded my final responses to the Department of Justice. It is my understanding that the Department of Justice will send these responses to the Committee.

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

Response: Yes.

**Responses of Josephine Staton Tucker
Nominee to the U.S. District Court for the Central 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 have never referred to the Constitution as a “‘living’ document that is constantly evolving,” and I do not agree with that perspective. I believe that the Constitution is an immutable document establishing rights, principles, obligations and relationships, and that the courts must apply it to a changing society. The Constitution should be interpreted by a district court judge with reference to its language and to the decisions of higher courts.

- 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. Generally speaking, are *Lopez* and *Morrison* consistent with the Supreme Court’s earlier Commerce Clause decisions?**

Response: Yes.

- b. Why or why not?**

Response: In *Lopez*, the Supreme Court did not indicate that it intended to depart from earlier decisions. Rather, the Court held that the Act at issue could not “be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.” 514 U.S. at 561. Similarly, in *Gonzales v. Raich*, 545 U.S. 1 (2005), the Supreme Court made clear that its decisions in *Lopez* and *Morrison* were not inconsistent 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: *Roper v. Simmons* is binding precedent, and, if confirmed, I would follow it.

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

Response: As a district court judge, if confirmed, I would be constrained by prior higher court decisions that had already determined the constitutionality of capital

punishment in particular circumstances. If I were required to determine the “evolving standards of decency” in a case in which no such higher court guidance were available, I would be bound to use the analysis set forth by the Supreme Court. In *Roper*, the Court explained that its determination began with a review of objective indicia of national consensus, as expressed in particular by the enactments of legislatures, followed by its determination of the proportionality of the punishment. 543 U.S. at 564.

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: A district court judge is obligated to follow the decisions of higher courts. Those binding decisions would not permit a district court judge to find that the death penalty is unconstitutional in all cases.

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

Response: The most relevant factor in a district court judge’s analysis would be the prior, binding decisions of higher courts. For example, while the Supreme Court has articulated its method of determining the constitutionality of capital punishment based on the “evolving standards of decency,” to the extent that the Supreme Court has applied that analysis in a particular circumstance to uphold the death penalty, it is not within the province of a district court judge to ignore that precedent.

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.

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

Response: I cannot conceive of any circumstance in which I would consider foreign law when interpreting the Constitution, except if directed to do so by applicable Ninth Circuit or Supreme Court decisions.

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

Response: Please see my previous answer.