

**Responses of Thomas I. Vanaskie
Nominee to the U.S. Court of Appeals for the Third Circuit
to the Written Questions of Senator Jeff Sessions**

1. **At your hearing, I asked you about remarks you made in 2007 regarding the use of foreign law. You stated that your remarks were “from an academic perspective and was just suggesting a type of argument that may be made.”**

In *Khouzam v. Hogan*, 529 F. Supp. 2d 543 (M.D. Pa. 2008), the Secretary of State had received diplomatic assurances from the Egyptian government that an Egyptian man who had fled to the U.S. would not be tortured if returned. In your analysis of whether he had a due process right to challenge the assurances, you stated:

“[a]lthough the opinions of international tribunals and courts of other countries have no binding effect in the United States, they are nonetheless often viewed as relevant in determining whether certain actions in the United States violate fundamental interests.”

You then cited *Lawrence* and *Roper* as examples of this practice.

- a. **Can you explain how the opinions of foreign courts were “relevant in determining whether certain actions in the United States violate fundamental interests” in this case?**

Response: I believed that the opinions of foreign courts were relevant to the question of whether an opportunity to be heard on the reliability of diplomatic assurances would impair the foreign relations prerogative of the executive, and whether meaningful standards could be developed to assess such assurances. I considered the decisions of tribunals of other nations who, like the United States, had ratified the Convention Against Torture. Earlier in my opinion, I found that the postratification understanding of parties to the Convention Against Torture was helpful in determining that diplomatic assurances may be sufficient to enable a contracting State to return an alien to a country despite a recent record of human rights abuses. In support of the proposition that citation to such authority was appropriate, I followed the Supreme Court’s decision in *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 226 (1996), in which Justice Scalia, writing for the unanimous Court, observed:

Because a treaty ratified by the United States is not only the law of the land, see U.S. Const., Art. II, § 2, but also an agreement among sovereign powers, we have traditionally considered as aids to its interpretation the negotiating and drafting history (*travaux*

préparatoires) and poststratification understanding of the contracting parties.

I also observed in Khouzam that although opinions of international tribunals and foreign courts may be relevant in considering whether certain actions violate fundamental interests, they are never controlling. Consideration of such sources is extremely rare. To the best of my recollection, Khouzam is the only case in which I considered such sources in more than fifteen years on the federal bench. In Khouzam, the fundamental interest in not being tortured was at stake, and there was no precedent in the United States addressing the right to a hearing on the reliability of diplomatic assurances. It was in this unique context that I believed it appropriate to consider foreign precedents for the limited purpose of confirming my conclusion that the law of the United States made the “‘inalienable human right’ to be free from torture . . . worthy of protection under the Due Process Clause.” It should be noted that Judges Marjorie O. Rendell, D. Brooks Smith, and D. Michael Fisher of the Court of Appeals for the Third Circuit agreed unanimously with this conclusion.

- b. **In your speech, you stated that the Court reached its decision in *Roper* “because of the overwhelming international consensus prohibiting this practice.” Did you reach your decision in this case “because of the overwhelming international consensus” that persons subject to transfer have a right to challenge the diplomatic assurances?**

Response: I did not reach my decision in Khouzam because of any international consensus that persons subject to removal and who have shown that they are likely to be tortured are entitled to an opportunity to challenge the reliability and sufficiency of diplomatic assurances that torture will not occur. My decision was firmly rooted in the law of the United States, as confirmed by the unanimous ruling of the Court of Appeals that the Due Process Clause did require that the alien be accorded such an opportunity. Having reviewed anew the Roper decision, my notes for my lecture were plainly in error in stating that the Court reached its decision in Roper because of overwhelming international consensus. It is my understanding that the Supreme Court has cited foreign sources for the purpose of confirming a conclusion reached under the law of the United States, which was the purpose for which I cited foreign sources in Khouzam.

- c. **In a speech delivered this year, you stated: “I also propose that the rule of law is best preserved by a model of judicial restraint that the executive and legislative branches are in the best position to make policy judgments.” Do you believe your opinions in *Khouzam* embodied judicial restraint?**

Response: I do believe that the opinions were faithful to this model of judicial restraint. I concluded that Congress had intended to afford impartial review of

claims for relief under the Convention Against Torture, and that executive branch agencies could not override the congressional determination. I based my decision on a careful review of the applicable legislation and judicial precedents. With respect to the due process determination, I noted that ultimately it is the responsibility of the courts to decide whether the interests at stake are worthy of some opportunity to be heard. I cited an 1852 decision, in which the Supreme Court stated:

Public opinion ha[s] settled down to a firm resolve ... that so dangerous an engine of oppression as secret proceedings before the executive, and the issuing of secret warrants of arrest founded on them, ... and then, an extradition without an unbiased hearing before an independent judiciary, were highly dangerous to liberty and ought never to be allowed in this country.

In re Kaine, 55 U.S. 103, 113, 14 How. 103, 14 L.Ed. 345 (1852). I did not prescribe any particular process that was due, but left that matter for the executive branch agencies to decide.

2. **During your hearing, you testified: “I do think however that when it comes to treaty obligations, a common source of treaty obligations can be how other member nations have applied certain provisions.” You then cited your decision in *Khouzam* as an example.**

a. **Do you believe there is a distinction between your utilization of international law in *Khouzam* and the Supreme Court’s reliance on foreign law in *Lawrence* and *Roper* and, in your words, the “overwhelming international consensus” prohibiting a particular practice? If so, please explain the distinction.**

Response: I believe there is a distinction between my utilization of international law in Khouzam and the Supreme Court’s use of foreign law in Lawrence and Roper. In Khouzam, I cited international law to assist in interpreting and applying the Convention Against Torture. In particular, I considered the practice of other nations that had ratified the Convention Against Torture in determining that diplomatic assurances could be relied upon to return an alien to a country despite that country’s recent record of human rights abuses. I also considered the practice of other nations in determining that giving an alien, who had demonstrated a probability of torture, a right to challenge the reliability and sufficiency of diplomatic assurances before an impartial adjudicator was consistent with the Convention Against Torture. Neither Roper nor Lawrence involved the obligations of the United States under an international treaty ratified by the United States.

b. **During your hearing, I asked you whether a U.S. Federal judge was free to survey world opinion and foreign law as it examines domestic statutes.**

You answered: “no, I don’t think that if I feel a law is unjust that I could look around to see how that particular matter has been handled by other foreign nations.” Do you believe the Supreme Court considered foreign law in *Lawrence* and *Roper*?

Response: I believe the Court in Lawrence and Roper considered the view of foreign nations as expressed in their laws and judicial decisions.

c. If so, do you believe the Supreme Court’s consideration of foreign law in *Lawrence* and *Roper* was appropriate?

Response: I believe that foreign law is not controlling on any issue arising under the law of the United States. My understanding is that the Supreme Court did not give such effect to foreign laws in Lawrence or Roper.

3. 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, what is your opinion with respect to President Obama’s criteria for federal judges, as described in his quote?

Response: I believe that it is important to appoint impartial, competent, and fair judges, and that qualified nominees should be drawn from all cultural and socio-economic backgrounds.

b. In your opinion, do you fit President Obama’s criteria for federal judges, as described in the quote?

Response: Neither of my parents completed high school. My father was a bricklayer, and my mother was a factory worker. They raised seven children under tough economic circumstances. I do not know whether those circumstances played any role in my selection.

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.

- d. **What role do you believe that empathy should play in a judge's consideration of a case?**

Response: I believe that empathy should not play a role in judicial decisions.

- e. **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:

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

Response:

- 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: I sentenced a defendant to a mandatory minimum prison term after he refused to provide information that would have directly implicated his brother, even though he had provided substantial assistance that resulted in the prosecution of others, who were able to implicate his brother directly. I was bound to impose the mandatory prison term because the government did not file a motion for a departure under the appropriate statute.

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

Response: The role of a judge is to be an impartial adjudicator who provides a full and fair opportunity for the litigants to be heard, and then decides the case based on the facts and the law with a clearly reasoned explanation of the decision rooted in the text of the law, logic, and precedent.

5. **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:

- b. Please identify any cases in which you have done so.**

Response:

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

Response: I cannot cite such a case because personal values are not part of my decision making process.

- 6. 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:

- b. Please identify any cases in which you have done so.**

Response:

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

Response: Prior to Booker and Kimrough, I routinely sentenced defendants charged with crack cocaine offenses within the guidelines imprisonment range determined on the basis of a ratio of 1 gram of crack cocaine to 100 grams of powder cocaine, even though my policy preference would have been to abandon that particular ratio as recommended by the United States Sentencing Commission in several studies.

- 7. How would you define “judicial activism?”**

Response: I believe that a decision is a product of judicial activism when it does not give proper deference to the policy decisions of Congress and the Executive Branch, and is not made in accord with the discipline of judicial decision making, paying close attention to the language of the document under consideration, the evident purposes of the instrument, its structure and history, as well as relevant judicial precedents.

- 8. 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 do not agree with this perspective of constitutional interpretation. The words, purposes, and structure of the Constitution are fixed. The Constitution is to be interpreted as a document intended to be enduring, and that objective is met by paying careful attention to its text, purpose, structure, history, and Supreme Court interpretations of its provisions. If confirmed, I will continue to defend, obey, and bear true faith and allegiance to the Constitution, as I have endeavored to do as a District Judge, by adhering to controlling precedent and applying the Constitution's provisions to new contexts by careful attention to its text, structure, purpose, history, and analogous precedents of the Supreme Court.

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

Response: I pursued the same process I followed in preparation for the confirmation hearing. I reviewed my remarks and the opinions that are the subjects of questions. I undertook some research. I drafted the responses, and forwarded them to the Department of Justice. I discussed the draft responses with representatives of the Department of Justice. I then finalized my responses.

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

Response: Yes

**Responses of Thomas I. Vanaskie
Nominee to the U.S. Court of Appeals for the Third Circuit
to the Written Questions of Senator Orrin G. Hatch**

1. In a March 2009 speech, you advocated a judicial approach that, "by reason, attention to accumulated wisdom, and a sense of justice, the judiciary evolves the rules best suited to human needs and aspirations." This description is more suited to common law judges than federal judges. Each of the elements in that approach invite a judge to use his personal values, preferences, or opinions rather than the law. And the very notion that the judiciary evolves legal rules appears inconsistent with the role judges should play in our system of government. I understand that you made similar comments in other speeches dating back about a decade.

a. Does this describe your judicial approach?

Response: I do not subscribe to an approach in which a judge uses personal values, preferences or opinions to decide cases. I stated in the March 2009 remarks, and on other occasions as well, that the proper approach to case adjudication is "intended . . . to assure that decisions are not based upon personal values or preferences, but are instead made according to law." My judicial approach was expressed during these remarks as one of "judicial restraint that recognizes that the Executive and Legislative Branches are in the best position to make policy judgments, provided [these co-equal branches of government] act within the constraints established by the Constitution." As I also stated in my March 2009 remarks to a local chapter of the Junior Statesmen Club of America, it is the responsibility of the judge to decide cases "according to law." I expressed my firmly held opinion that if judges decided cases "in accordance with individual value preferences, the rule of law is threatened." Consistent with my view of judicial accountability, I observed that judges have an obligation "to decide [cases] in accordance with a continuing body of principles found in accepted sources of law."

b. Please explain how these subjective elements are consistent with the judicial oath of impartiality and the duty to follow the law.

Response: I am of the belief that personal values, preferences and opinions play no role in judicial decision making, and that it is inconsistent with the judicial oath of impartiality and the duty to follow the law to allow personal predilections to influence judicial decision making.

2. **In your pair of decisions in the *Khouzam v. Hogan* case, you appear to endorse the notion that judges may consider decisions of foreign courts or practices in foreign countries in making decisions. You said that such factors are not binding but are relevant.**

a. **Please explain the ways in which those foreign decisions or practices can be relevant to American judges deciding cases under American law.**

Response: As I indicated in the second of my opinions in the *Khouzam* case, courts in the United States may consider foreign decisions or practices as aids in interpreting a treaty ratified by the United States. In support of this proposition, I followed the Supreme Court's decision in *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 226 (1996), in which Justice Scalia, writing for the unanimous Court, observed:

Because a treaty ratified by the United States is not only the law of the land, see U.S. Const., Art. II, § 2, but also an agreement among sovereign powers, we have traditionally considered as aids to its interpretation the negotiating and drafting history (*travaux préparatoires*) and postratification understanding of the contracting parties.

In *Khouzam*, I found that the postratification understanding of parties to the Convention Against Torture (which has been ratified by the United States) was helpful in determining that diplomatic assurances may be sufficient to enable a contracting State to return an alien to a country despite a recent record of human rights abuses.

I also observed in *Khouzam* that although opinions of international tribunals and foreign courts may be relevant in considering whether certain actions violate fundamental interests, they are never controlling. Consideration of such sources is extremely rare. To the best of my recollection, *Khouzam* is the only case in which I considered such sources in more than fifteen years on the federal bench. In *Khouzam*, the fundamental interest in not being tortured was at stake, and there was no precedent in the United States addressing the right to a hearing on the reliability of diplomatic assurances. It was in this unique context that I believed it appropriate to consider foreign precedents for the limited purpose of confirming my conclusion that the law of the United States made the “inalienable human right” to be free from torture . . . worthy of protection under the Due Process Clause.” It should be noted that Judges Marjorie O. Rendell, D. Brooks Smith, and D. Michael Fisher of the Court of Appeals for the Third Circuit agreed unanimously with this conclusion.

b. Do you believe that judges may use such foreign sources to determine the meaning of statutory or constitutional provisions?

Response: I do not believe that judges may use foreign sources to determine the meaning of statutory or constitutional provisions. In the exceptional case where the Supreme Court has referenced non-U.S. law in a majority opinion, it has done so only to confirm conclusions reached under American law or to refute assertions made by a party, and those were the limited purposes for which I made reference to foreign law in Khouzam. Judges should follow the Supreme Court's restraint on this issue.

**Responses of Thomas I. Vanaskie
Nominee to the U.S. Court of Appeals for the Third Circuit
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 do not agree with this perspective of constitutional interpretation. The words, purposes, and structure of the Constitution are fixed. The Constitution is to be interpreted as a document intended to be enduring, and that objective is met by paying careful attention to its text, purposes, structure, history, and Supreme Court interpretations of its provisions. If confirmed, I will continue to defend, obey, and bear true faith and allegiance to the Constitution, as I have endeavored to do as a District Judge, by adhering to controlling precedent and applying the Constitution’s provisions to new contexts by careful attention to its text, structure, purpose, history, and analogous precedents of the Supreme Court.

- 2. 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: Because the opinion of Justice Kennedy was joined in by a majority of the Court, I will be obligated to follow it. Whether I agree with the analysis articulated by Justice Kennedy will not affect my duty to adhere to it.

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

Response: Both the majority opinion and Justice O’Connor’s dissenting opinion in *Roper* explained that the constitutional prohibition against “cruel and unusual punishments” must be assessed in the context of “the evolving standards of decency that mark the progress of a maturing society.” 543 U.S. at 561. The majority stated that “essential instruction” in ascertaining “evolving standards of decency” comes from “enactments of legislatures that have addressed the question.” *Id.* at 564. Justice O’Connor’s dissenting opinion also stated that to discern the “evolving standards of decency,” the court is to “look to ‘objective factors to the maximum possible extent,’” and that “laws enacted by the Nation’s legislatures provide the ‘clearest and most reliable objective evidence of contemporary values.’” *Id.* at 589. If confirmed, I would be bound to follow the approach for ascertaining “evolving standards of decency” prescribed by the Supreme Court.

3. Does the oft-quoted phrase “wall of separation of church and state” appear anywhere in the Constitution?

Response: The phrase does not appear anywhere in the Constitution.

a. To what extent does this phrase, authored by Thomas Jefferson in his letter to the Danbury Baptists, reflect your view of the proper understanding of the Constitution’s Establishment Clause?

Response: If confirmed, I will be obligated to follow the Supreme Court’s precedents applying the Constitution’s Establishment Clause. The First Amendment provides that “Congress shall make no law respecting an establishment of religion.” In Lemon v. Kurtzman, 403 U.S. 602, 612 (1971), the Court held that “[a] given law might not establish a state religion but nevertheless be one ‘respecting’ that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment.” It stated that to determine whether a law offends the Establishment Clause a court must assure that the law has “a secular legislative purpose,” that its “primary effect must be one that neither advances nor inhibits religion,” and that it does “not foster ‘an excessive government entanglement with religion.’” Id. at 612-13. The test prescribed by the Supreme Court, as explicated by more recent Supreme Court cases interpreting it, would govern my decision making.

b. Is the First Amendment right to freedom of religion a fundamental right?

Response: The Supreme Court has held that the freedom of religion expressed in the First Amendment is a fundamental right, holding that the First Amendment is made applicable to the states through the Fourteenth Amendment. The Court has stated that “[t]he fundamental concept of liberty embodied in that Amendment embraces the liberties guaranteed by the First Amendment.” Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).