Responses of Judge John G. Roberts, Jr.
to the Written Questions of Senator Sam Brownback

1. **Article IV, Section 1 provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other state. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof." Notwithstanding the Full Faith and Credit Clause, many states have established a so-called "public policy exception" which permits such states not to recognize "public acts, records, and judicial proceedings" of other states when contrary to such states' public policy.**

   A. **Does the public policy exception violate the Full Faith and Credit Clause?**

   B. **Do you believe the public policy exception may violate any other constitutional provision, and if so, which provision(s)?**

RESPONSE: The Court's precedents make clear that in certain cases, the public policy exception does not violate the Full Faith and Credit Clause. The clause itself has two aspects. First, it governs the extent to which a state may decline to apply the law of another state. In this area, the Court's precedents provide that the Full Faith and Credit Clause "does not require a State to apply another State's law in violation of its own legitimate public policy." Nevada v. Hall, 440 U.S. 410, 422 (1979). Second, the clause requires that states recognize the judgments of other states. The Supreme Court has declined to permit the application of the public policy exception to judgments. See Baker by Thomas v. General Motors Corp., 522 U.S. 222, 232-33 (1998). These decisions represent precedents of the Court, entitled to respect consistent with principles of stare decisis.

I have not had occasion to consider whether the public policy exception implicates any other constitutional provisions. If I am confirmed, and if a litigant were to raise such a claim before the Court, I would consider the matter in the context of the factual circumstances of a particular case and in light of the arguments presented by the parties.

2. **The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."**

   A. **Should the Eighth Amendment's prohibition on cruel and unusual punishment be evaluated based on contemporary understanding of what criminal sanctions are cruel and unusual?**

B. If your answer to (A) is yes, what factors or sources of law is it appropriate for a court to consider in discerning such a contemporary understanding?

C. What constitutes an "unusual" punishment for purposes of the Eighth Amendment?

D. Has any Supreme Court case finding a punishment to be cruel and unusual explicitly discussed why a certain form of punishment is in fact unusual, and/or explained the standard by which a punishment would found to be unusual?

RESPONSE: The extent to which the Court should draw on contemporary understanding to decide what constitutes "cruel and unusual punishment" is a matter of continuing controversy on the Court. The Court's decisions in this area regularly observe that what is cruel and unusual must be evaluated in light of "the evolving standards of decency that mark the progress of a maturing society." See Trop v. Dulles, 356 U.S. 86, 100-01 (1958). The application of this principle has been a source of deep disagreement on the Court — disagreement that can in part be traced to the language of the Eighth Amendment, which is susceptible to both broad and narrow interpretations.

The Court appropriately looks to "objective factors to the maximum extent possible" in discerning the contemporary understanding of what constitutes cruel and unusual punishment. Coker v. Georgia, 433 U.S. 584, 592 (1977). The actions of state legislatures represent the "clearest and most reliable objective evidence of contemporary values." Penry v. Lynaugh, 492 U.S. 302 (1989). It is important in this area, as elsewhere, that a judge be ever mindful of the limited role of the judge: "Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices." Coker, 433 U.S. at 592.

It is difficult to define "unusual" in the abstract, and I am not aware of a case where the Court has specifically explicated the meaning of "unusual." The Court decides whether a particular punishment is "unusual" by looking both to the kind of punishment and to the relation of the punishment to the crime. Under the Court's precedents, both inquiries take into account societal notions of the appropriateness of the punishment at issue.

As in other areas, I would apply the Eighth Amendment to the particular circumstances of cases that arise, guided by the meaning of the Constitution and the precedents of the Court, consistent with principles of stare decisis.

3. As you know, the Fourteenth Amendment provides in part that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

What vitality, if any, do you believe the Privileges and Immunities Clause of the Fourteenth Amendment has today?

RESPONSE: The Privileges and Immunities Clause was given a narrow construction by the Court in the Slaughterhouse Cases, 83 U.S. 36 (1872). The Court, however, did recently hold that the clause protects certain aspects of the right to travel. In Saenz v. Roe, 526 U.S. 489 (1999), the Court used the Privileges and Immunities Clause to strike down a California law restricting the welfare benefits of persons who had lived in California for less than one year, on the ground that the law penalized newly-arrived residents. Saenz represents a precedent of the Court as to the applicability of the Privileges and Immunities Clause, and is entitled to weight under principles of stare decisis.