

Responses of Alison J. Nathan
Nominee to be United States District Judge for the Southern District of New York
to the Written Questions of Senator Chuck Grassley

- 1. You have been very critical of the lethal injection method used by the vast majority of states to impose the death penalty. You filed an amicus brief in *Baze v. Rees* and published a number of articles in staunch opposition to the three-drug protocol. You have argued the three-drug protocol is unconstitutional because, “the Eighth Amendment is a limitation on the states’ ability to impose punishments that may inflict severe pain. An unnecessarily painful procedure is still unconstitutional, even if states gave this procedure thoughtful consideration.”**

In a blog post for the American Constitution Society, you concluded by writing: “It is now the responsibility of the judiciary, including the Supreme Court, to scrutinize a practice that needlessly risks severe and unnecessary pain. Only then can the public make informed democratic decisions as to whether the punishment remains acceptable, or violates our ‘evolving standards of decency that mark the progress of a maturing society.’”

At your hearing, you told Senator Franken that you would follow the Court’s holding in *Baze*. However, I am interested in your analysis and reasoning of Eighth Amendment jurisprudence.

- a. Under your analysis of the Eighth Amendment, how should a judge determine whether a particular method risks unnecessary pain?**

Response: In an amicus brief and in other commentary that I wrote prior to the Supreme Court’s decision in *Baze*, I argued that the three-drug lethal injection protocol and procedures in issue in that case should be analyzed by the Supreme Court to determine whether the protocol and procedures needlessly risk severe and unnecessary pain. I also wrote about the history of the development of the three-drug protocol in issue in *Baze* and I generally argued for greater transparency in this area.

Subsequently, the Supreme Court decided *Baze* and Chief Justice Roberts’ opinion in that case provides the standard by which a judge should analyze the Eighth Amendment question if the issue were to arise in litigation. Chief Justice Roberts’ opinion states: “Our cases recognize that subjecting individuals to a risk of future harm—not simply actually inflicting pain—can qualify as cruel and unusual punishment. To establish that such exposure violates the Eighth Amendment, however, the conditions presenting the risk must be ‘*sure or very likely* to cause serious illness and needless suffering,’ and give rise to ‘sufficiently *imminent* dangers.’ We have explained that to prevail on such a claim there must be a ‘substantial risk of serious harm,’ an ‘objectively intolerable risk of harm’ that prevents prison officials from pleading that they were ‘subjectively blameless for purposes of the Eighth Amendment.’” *Baze v. Rees*, 553 U.S. 35, 49-50

(2008) (citations omitted). If I were confirmed as a United States District Court Judge and a case presenting this issue were to come before me, I would faithfully apply the standard articulated by Chief Justice Roberts in his opinion for the Supreme Court.

- b. I recognize that the very end of your blog post quoted from a Supreme Court case. I'm interested in hearing how you understand that standard should operate. In your opinion, how should a judge assess the "evolving standards of decency that mark the process of a maturing society"?**

Response: With respect to an Eighth Amendment challenge in this area, a judge must follow the standard articulated by the Supreme Court in *Baze*, which I describe above in Question 1(a). Chief Justice Roberts' opinion for the Court does not cite or quote from *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958), which I quoted at the end of my blog post.

- 2. In a chapter of a book, you analyzed the Supreme Court's decision in *Roper v. Simmons*. You explained that the change in Justice Kennedy's position between *Stanford* and *Roper* was a change "that can be attributed to the international human rights advocacy and scholarship that had taken place outside the courtroom walls."**

In that same chapter, you wrote that "*Roper* elaborated upon relevant international and foreign law sources and defended the relevance of the Court's consideration of those sources."

- a. Under what circumstances do you believe foreign law is relevant when interpreting the United States Constitution?**

Response: If I were confirmed as a United States District Court Judge, foreign law would have no relevance to my interpretation of the United States Constitution. In this area, as in all others, I would follow binding Supreme Court precedent.

- b. In *Stanford*, Justice Scalia said "[w]e emphasize that it is *American conceptions* of decency that are dispositive..." Please take this opportunity to review Justice Scalia's understanding on the use of foreign law in constitutional interpretation. Is he correct?**

Response: As you note, in *Stanford v. Kentucky*, 492 U.S. 361 (1989), Justice Scalia, writing for a majority of the Supreme Court, said that "[w]e emphasize that it is *American conceptions* of decency that are dispositive." 492 U.S. at 369 n. 1. Writing for a majority of the Supreme Court in *Roper v. Simmons*, 543 U.S. 551 (2005), Justice Kennedy stated: "Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty. This reality does not become controlling, for the task of interpreting the Eighth Amendment remains

our responsibility.” 543 U.S. at 575. In his dissent in *Roper*, Justice Scalia, repeating what he had said in *Stanford*, voiced strong disapproval of Justice Kennedy’s reference to foreign law. For example, in *Roper*, Justice Scalia said: “The Court’s parting attempt to downplay the significance of its extensive discussion of foreign law is unconvincing. ‘Acknowledgment’ of foreign approval has no place in the legal opinion of this Court *unless it is part of the basis for the Court’s judgment*—which is surely what it parades as today.” 543 U.S. at 628.

As someone who wrote a book chapter on the *Roper* case, I recognize that there is an important debate in this area regarding what role the Supreme Court’s reference to foreign law is playing in the Court’s decision and, regardless of the role, whether any reference by the Supreme Court to foreign law is appropriate. In the chapter I wrote on *Roper*, I noted that “[s]everal scholars of diverse views have criticized the Court for essentially failing to provide a theoretical justification for reference to international and foreign law.” Page 346, n. 204.

If confirmed, I would follow binding Supreme Court precedent in this and all areas. As I stated in Question 2(a), if I were confirmed as a United States District Court Judge, foreign law would have no relevance to my interpretation of the United States Constitution.

3. What is the most important attribute of a judge, and do you possess it?

Response: I believe that impartiality, fairness, and a commitment to the rule of law are the most important attributes of a judge. I believe I possess these attributes.

4. Please explain your view of the appropriate temperament of a judge. What elements of judicial temperament do you consider the most important, and do you meet that standard?

Response: I believe that a judge must always be fair, respectful, humble, and diligent. In particular, a judge must be steadfastly impartial, must listen carefully to the arguments presented, and must never prejudge an issue. A judge must also show respect for all parties—litigants, counsel, witnesses, and jurors—who come before him or her. I believe that a judge must also demonstrate humility. In the context of judicial temperament, humility includes: deciding only issues that must be decided to adjudicate a particular matter, faithfully applying controlling precedent, and showing appropriate deference to the democratically accountable branches of government. Finally, I believe that a judge must always be cognizant of the importance of the issues that come before him or her, and a judge must work diligently in docket management and issue and case resolution. If I am confirmed as a United States District Court Judge, I believe I will meet this standard.

5. In general, Supreme Court precedents are binding on all lower federal courts and Circuit Court precedents are binding on the district courts within the particular

circuit. 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.

- 6. At times, judges are faced with cases of first impression. If there were no controlling precedent that dispositively concluded an issue with which you were presented, to what sources would you turn for persuasive authority? What principles will guide you, or what methods will you employ, in deciding cases of first impression?**

Response: If I were confirmed as a United States District Judge and faced an issue of first impression, I would look to relevant Supreme Court or Second Circuit precedent for guidance and applicable reasoning. I would also look to the precedent of other Circuits and other District Courts for persuasive authority. If faced with a statutory interpretation question of first impression, I would begin with careful analysis of the text of the provision. If the text provides an answer to the question in issue, that would be the end of the matter, and I would faithfully apply the text. If there were ambiguity or a gap in the provision in issue, I would look, in addition to the persuasive authority noted above, to the structure, purpose, and history of the provision.

- 7. What would you do if you believed the Supreme Court or the Court of Appeals had seriously erred in rendering a decision? Would you apply that decision or would you use your own judgment of the merits, or your best judgment of the merits?**

Response: If I were confirmed as a United States District Court Judge, I would always apply relevant Supreme Court and Second Circuit precedent. I would not substitute my judgment or views for binding precedent.

- 8. As you know, the federal courts are facing enormous pressures as their caseload mounts. If confirmed, how do you intend to manage your caseload?**

Response: I believe that it is vitally important that judges efficiently manage their caseload. If I were confirmed as a United States District Court Judge, I would seek guidance from my colleagues as to best practices for the management of my caseload. If confirmed, I intend to set clear and firm deadlines with counsel; to work diligently to resolve disputes that come before me; and to make productive use of the talented magistrate judges in the Southern District of New York.

- 9. Do you believe that judges have a role in controlling the pace and conduct of litigation and, if confirmed, what specific steps would you take to control your docket?**

Response: Yes. I believe that litigants are entitled to a fair and efficient resolution of their cases and disputes and that judges have a critical role in controlling the pace and conduct of litigation. If confirmed, I would remain aware of and engaged with the

progress of matters in my docket; encourage mediation or settlement when possible; set and enforce clear deadlines; rule promptly on all motions; and move cases forward in a fair and efficient manner.

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

Response: I received these questions on June 15, 2011. Over the course of the following two days, I drafted responses to these questions. I then discussed my responses with an official at the Department of Justice and finalized my responses on June 20, 2011. I then authorized the Department of Justice to transmit my final responses to the Committee.

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

Response: Yes.