

Responses of Terrence G. Berg
Nominee to be United States District Judge for the Eastern District of Michigan
to the Written Questions of Senator Amy Klobuchar

- 1. If you had to describe it, how would you characterize your judicial philosophy? How do you see the role of the judge in our constitutional system?**

Response: My judicial philosophy is to adhere to the rule of law and act with integrity in all things. Integrity in this sense means being intellectually honest, open-minded and rigorous; applying the law fairly, impartially, and consistently; giving all parties a full opportunity to be heard; treating all who come before the court with dignity and courtesy; and having the courage to do the right thing. In our constitutional system, the role of the judge is to provide a neutral and open forum in which all sides will be heard, decisions will be rendered promptly, consistent with the rule of law, and narrowly tailored to address the case or controversy at issue.

- 2. What assurances can you give that litigants coming into your courtroom will be treated fairly regardless of their political beliefs or whether they are rich or poor, defendant or plaintiff?**

Response: I am committed to treating all persons who come before the court with fairness, impartiality, courtesy, and respect. I would give every party a full opportunity to be heard regardless of political belief, status, means, or affiliation.

- 3. In your opinion, how strongly should judges bind themselves to the doctrine of stare decisis? How does the commitment to stare decisis vary depending on the court?**

Response: All judges are duty-bound to apply legal precedent in resolving questions according to the doctrine of *stare decisis*. Regardless of the court, adherence to *stare decisis* is necessary because it promotes stability, predictability and respect for law.

**Senator Chuck Grassley
Additional Questions for the Record**

**Terrence G. Berg
Nominee, U.S. District Judge for the Eastern District of Michigan**

On July 19, 2008, the Detroit Free Press reported that then-Governor Granholm contacted you regarding “the strength of the government’s ongoing investigation of Bernard Kilpatrick.” According to their source, Governor Granholm contacted you in hopes of “achieving a ‘global resolution’ to the federal corruption probe in city government.” The source further claimed that you then spoke with U.S. Attorney Stephen Murphy concerning your discussion with Granholm.

- a. Were you ever approached by Governor Granholm or anyone in her office about this case?**

Response: I was never approached regarding “the strength of the government’s ongoing investigation of Bernard Kilpatrick” by Governor Granholm, as described in the article above. I was approached by Governor Granholm in May of 2008 concerning the then-pending state prosecution of Mayor Kwame Kilpatrick for perjury and whether a guilty plea and resignation by Mayor Kilpatrick in the state criminal prosecution would satisfy the federal interest in its separate, non-public federal investigation of Mayor Kilpatrick for public corruption. To provide context, in March 2008, the Wayne County Prosecutor filed felony criminal charges against then-Detroit Mayor Kwame Kilpatrick for perjury. As a result of these criminal charges, the Detroit City Council was considering bringing an action to remove Mayor Kilpatrick from office based on this conduct. Under Michigan law, the Governor would act as the deciding official in a quasi-judicial capacity in any removal proceeding. In addition, as of May of 2008, there had been published media reports concerning a federal criminal investigation regarding Mayor Kilpatrick and other City officials, but the details and progress of the investigation were not known to the public.

- b. If so, what did you discuss and with whom?**

Response: As indicated above, in May 2008, I recall being contacted by Governor Granholm, who asked whether, if Mayor Kilpatrick were to plead guilty, resign and be sentenced in the then-pending state prosecution for perjury, whether that would satisfy the federal government’s interest in its separate investigation, so that no separate federal charges would be necessary. At that time, I was not involved in supervising or working on the City of Detroit corruption investigation, and I had not been briefed in any detail on its status or progress. Governor Granholm did not ask any questions about the nature of the federal investigation, and I did not provide any information regarding the investigation. I then disclosed all of the details of this contact with the Governor to the U.S. Attorney, and the prosecution team handling the City of Detroit Investigation. After

conferring with the U.S. Attorney and the prosecution team, and acting at their direction, I responded that we did not have sufficient information at that time to make a judgment as to whether such a resolution would be appropriate or not.

- c. Did Governor Granholm or someone from her staff seek to elicit from you a specific result in the case? Please explain.**

Response: No. Governor Granholm did not “seek to elicit from [me] a specific result in the case,” in the sense of advocating for a specific result, but she did make the inquiries described above and below.

- d. Did you speak with the United States Attorney, or anyone else involved in the investigation of Bernard Kilpatrick and the federal corruption probe, about your conversation with Governor Granholm or her representative? If so, please indicate with whom you spoke, the nature of the conversation, and what, if any, decision was made as a result of this conversation.**

Response: As indicated above, I disclosed the contact by Governor Granholm immediately to the United States Attorney, Stephen J. Murphy, as well as to the prosecutors handling the Kilpatrick investigation, so they could also inform the investigating agents. I later described the contact directly to the investigating agents. After I conveyed to the Governor our office’s position that we did not have sufficient information in our investigation to make a determination as to whether a state plea would protect the federal interest, Governor Granholm responded with the question whether, if the Mayor resigned, pleaded guilty to the state case and were sentenced, our office would be open to agreeing not to bring any specific federal charges that might arise out of precisely the same conduct that supported the state conviction. In other words, federal charges relating to other conduct would not be limited. I reported this contact and question to the U.S. Attorney, and the prosecution team as well. After conferring with the U.S. Attorney and the Special Prosecutions supervisor, and at their direction, I responded by indicating that the case was still under investigation, and the potential resolution of the case, if any, would need to be pursued through negotiations with the attorneys for Mayor Kilpatrick, and any of the other targets, and the prosecution team, and that, as in all criminal cases we would take under advisement a proposed resolution if it were raised by their attorneys.

- e. Did you have any further conversations about the Kilpatrick case or the “global resolution” with Governor Granholm or any member of her staff?**

Response: No.

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to the Written Questions of Senator Chuck Grassley

- 1. During your hearing, both Senator Lee and I asked you about your report that concluded that the U.S. Attorneys involved in Senator Stevens' prosecution showed "poor judgment" rather than "reckless professional misconduct". You said you made that judgment after you "applied the standards that were contained within the OPR report for the definition of reckless misconduct and for poor judgment."**

a. Who drafted these definitions?

Response: The definitions are contained within the OPR Report, and were drafted by OPR. They are the standards that OPR applies in all its investigations.

b. Please provide the Committee with the definitions.

Response:

The OPR report defines "reckless misconduct" as follows:

An attorney acts in reckless disregard of an obligation or standard when:
(1) the attorney knows or should know, based on his or her experience and the unambiguous nature of the obligation or standard, of an obligation or standard;
(2) the attorney knows or should know, based on his or her experience and the unambiguous applicability of the obligation or standard, that the attorney's conduct involves a substantial likelihood that he or she will violate, or cause a violation of, the obligation or standard; and (3) the attorney nonetheless engages in the conduct, which is objectively unreasonable under all the circumstances. Thus, an attorney's disregard of an obligation is reckless when it represents a gross deviation from the standard of conduct that an objectively reasonable attorney would observe in the same situation.

The OPR Report defines "poor judgment" as follows:

An attorney exercises poor judgment when, faced with alternative courses of action, he or she chooses a course of action that is in marked contrast to the action that the Department may reasonably expect an attorney exercising good judgment to take. Poor judgment differs from professional misconduct in that an attorney may act inappropriately and thus exhibit poor judgment even though he or she may not have violated or acted in reckless disregard of a clear obligation or standard. In addition, an attorney may exhibit poor judgment even though an obligation or standard at issue is not sufficiently clear and unambiguous to support a professional misconduct finding. A mistake, on the other hand, results from an excusable human error despite an attorney's exercise of reasonable care under the circumstances.

- 2. During your hearing, we discussed the U.S. v. *Koubriti* case and the conduct of the AUSA, Mr. Convertino. The Department of Justice filed criminal indictments for obstruction of justice against Mr. Convertino in 2006 and I asked you if you thought these charges were proper. You said that you did not feel comfortable offering an opinion because you had not reviewed the relevant facts. After taking time to review the relevant facts, do you believe these charges were proper?**

Response: To make a considered determination of whether the charges against Mr. Convertino were properly drawn I would need to review the following kinds of materials: the Grand Jury testimony and all of the evidentiary exhibits that were presented to the Grand Jury to support the Indictment, the FBI memoranda of all relevant witness interviews, all of the documents, physical exhibits, and any other evidence that the government was relying on to prove its case, and the prosecution memo describing the government's theory of the case under the relevant federal criminal statutes. These materials are not and have never been available to me, but are part of a prosecution that was conducted by the Public Integrity Section, a component of the Criminal Division of the Department of Justice in Washington, D.C. Because I have had no access to any of these materials, I am unable to offer a fair and responsible judgment on the question of whether the charges against Mr. Convertino were properly filed.

When I spoke publicly to the Catholic Lawyers' Society of Detroit about the *Koubriti* case in February of 2009, and referenced the fact that "we," meaning my office, had dismissed this case after discovering serious discovery lapses, I was referring to the actions of my office collectively, and was pointing out our office's value of recognizing the importance of doing justice rather than winning a particular case. I did not intend to give the impression that I was personally involved in the decision to dismiss the *Koubriti* case in August of 2004, as that decision was made by the acting United States Attorney at the time.

- 3. Did Mr. Convertino's actions involve "intentional misconduct that would rise to the level of obstruction of justice"?**

Response: I would respectfully refer to my answer to question 2, above. I cannot make an assessment of whether Mr. Convertino's actions involved "intentional misconduct that would rise to the level of obstruction of justice" without reviewing all the relevant evidence, which is not available to me.

- 4. Do you believe it was proper to drop the case against Mr. *Koubriti*? Please explain your answer.**

Response: At the time the case was dismissed, I read the publicly available motion to dismiss filed by my office, and the court's order dismissing the case. I have reviewed these documents again in preparing this answer. Based on the information contained in those documents, I do believe it was proper to dismiss the case against Mr. *Koubriti*.

5. **Mr. Convertino testified before the Senate Finance Committee regarding the *Koubriti* case after being subpoenaed by the Committee. During the hearing you indicated that you did not have enough information to comment. Now that you have had time to review the relevant information, do you believe that any of the allegations leveled against him by the DOJ were made in retaliation for his testimony?**

Response: At the time when Mr. Convertino testified before the Senate Finance Committee, I was a line AUSA in the U.S. Attorney's Office in Detroit. I had no knowledge then, and have made no subsequent study, of Mr. Convertino's testimony before the Committee. Even if I were to review Mr. Convertino's testimony before the Committee, because I was not involved in the management of my office at that time, and did not participate in any decision to bring allegations against Mr. Convertino, I have no information that would allow me to form an opinion as to whether any allegations made against Mr. Convertino were in retaliation for his testimony.

- a. **Would you have scrutinized Mr. Convertino's actions more closely because of his testimony before the Senate?**

Response: If I had been in a position to scrutinize Mr. Convertino's conduct, I would not have considered his testimony before the Senate in any way because it had no bearing on his conduct before or during the *Koubriti* trial.

- b. **Do you believe that Mr. Convertino's decision to comply with a Congressional subpoena had anything to do with the decision to criminally charge him as opposed to seeking internal discipline?**

Response: Unless a case involves perjury before a Congressional Committee, I do not believe that a person's compliance with a Congressional subpoena should be considered as a relevant fact in considering whether that person has committed a crime. Because I played no role in the decision to bring criminal charges against Mr. Convertino, I have no knowledge as to whether Mr. Convertino's compliance with a Congressional subpoena was considered in any way by those who made the charging decision. Such a consideration would be completely inappropriate in my view.

6. **You told me that you do not believe that Mr. Convertino's supervisors had any responsibility for any misconduct that happened during the prosecution in the terror cases. However, you said that the supervisors were not responsible in this case while they were in the Stevens case because you did not have enough information to comment on the *Koubriti* case. Will you please elaborate on that?**

Response: I read and reflected on a great deal of information regarding the Stevens prosecution which was made available to me in connection with my role as an Attorney with the Professional Misconduct Review Unit. I explained my conclusions about that case in a lengthy memorandum which describes all of the materials that I considered and reviewed. In contrast, my knowledge of the *Koubriti* matter is very limited. The *Koubriti* trial took place

when I was working for the Michigan State Attorney General's Office. By the time the case was dismissed, I had returned to the U.S. Attorney's Office in Detroit as a line AUSA in the Economic Crimes Unit. My knowledge of the *Koubriti* matter is based on having read the government's motion to dismiss the case and the court's order of dismissal. In those documents, there is no suggestion that supervisors in my office were responsible or involved in any of the discovery violations that occurred.

7. **In 1999, you wrote an article criticizing the United States for treating suspected terrorists on American soil differently than those who were not in America. You wrote, "It is ironic that the men accused of bombing the U.S. Embassy in Nairobi sit comfortably in prison awaiting their trial, while, at the same time, the US bombed a sight of alleged terrorists in Afghanistan. The suspected terrorists of the embassy are allowed rights under the due process of law because they are in the US, while those off US shores have no rights, and can be bombed at will. The terrorists offshore should enjoy the same human rights as those onshore."¹ Is this still your view? If not, please describe your new understanding of the rights of those accused of terrorism on American soil versus those on foreign ground but in U.S. custody.**

Response: The article that I wrote, as published in the national Catholic journal *America* on January 16, 1999, did not contain language quoted in the above question. I have attached a print version of the article for the Committee's review which does not contain the quoted language. I did not write the quoted language. I have reviewed the electronic version of this article that was retrieved from Westlaw which was submitted to the Committee, however, and I do see that this version contains the language quoted, but I do not know who wrote that language or why it appears prior to the text of the article itself. I regret that I did not notice that this version of the article contained this paragraph, because I would not have submitted this version to the Committee if I had realized that it contained this paragraph. I respectfully would ask to remove this electronic version of the article from the Attachments to my Senate Judicial Questionnaire and replace it with the print version which is attached to this response, and is an accurate copy of the article that I wrote.

It is possible that the quoted language may have been written by an editor attempting to summarize the article, but a review of the article itself will show that the quoted language is inconsistent with the position that I took in the article. For example, I did not state in my article "The terrorists offshore should enjoy the same human rights as those on shore." Rather, I drew a distinction between the Constitutional rights available to criminal defendants in the United States, and the unavailability of those rights to those who commit the same criminal acts, but who are located outside the United States. I further noted that the use of military force against terrorists located in other countries operates under rules of engagement that are appropriately different from those that apply in criminal cases, but I stated that our government should be "extremely judicious in using force in other parts of the world." To respond to your request that I describe my understanding of the rights of those accused of terrorism on American soil versus those on foreign ground but in U.S. custody, my view is

¹ Berg, Terrance. "Human Rights for Terrorists Beyond the Water's Edge", Detroit Free Press, January 16, 1999. Berg Senate Attachments, page 114.

that those accused of terrorism on American soil would be protected by the United States Constitution. The question of what rights apply to individuals accused of terrorism outside the United States, but in U.S. custody, is one that the courts are in the process of addressing. In such a case, I would apply the relevant case law as set down by the appellate courts and the U.S. Supreme Court.

8. **In 2006, you participated in a panel, *The Decision to Prosecute*. You provided the committee with the transcript of this panel². On page 12 of the transcript, you appeared to pose the question, “what kinds of cases involving what types of victims should get priority?” There is then a list of “characteristics discussed prior to the panel”, including “politically connected victims”.**

Response: I submitted a law review article, rather than a transcript, from the University of Mississippi Law Journal that summarized the proceedings of a panel discussion in which I was a member. This article was written by Marc M. Harrold, a Visiting Professor at the University of Mississippi School of Law. According to Professor Harrold, the purpose of the article was to provide a “distillation” of two panel discussions presented at a Conference on “Prosecutorial Responses to Internet Victimization.” The panel discussion that I participated in was called “The Decision to Prosecute.” This panel, according to the article, was asked to discuss five questions, including the question: “What role do the characteristics of Internet victims or their experiences play in the decision to prosecute?” In the portion of the article that summarizes the panel’s discussion on this question, I am quoted as posing the question, “What kinds of cases involving what types of victims should get priority?” The author of the article, Prof. Harrold, then states: “Some of the characteristics discussed *prior to the panel* (emphasis added) were:

- seriousness of crime/victimization;
- ease of victim identification;
- chance of recidivism with the same victim (e.g., incest, etc.);
- age of victim;
- previous instances of victimization;
- ability of victim to testify adequately;
- credibility/perceived character of victim;
- whether victim is a "persistent" victim (with regards to past claims);
- trauma to victim from testifying in court;
- "politically-connected" victims; and
- existing or anticipated press coverage of victimization/victim.”

It appears that these factors were discussed prior to the panel. I did not use or author the term “politically-connected victims.” I did not make any statements during the panel discussion pertaining to “politically connected victims.” Prof. Harrold later makes the statement in the article, on page 13-14: “Cases where the victim may be politically connected, in the public eye, or high profile for some other reason can affect the initial decision to prosecute. Prosecutors’ offices are led by an elected official and are dependant

² 76 Miss. L.J. 789

(at least in part) on the legislature for appropriate statutes and funding.” Another prosecutor on the panel followed with a comment relating to this issue, but I am not quoted regarding “politically-connected” victims, and I do not recall making any statements addressing how to respond to the issues presented by this type of victim. If I had commented, I would have stated that a prosecutor should follow the law regardless of any pressures that a politically connected victim may attempt to exert.

a. Who would politically connected victims be?

Response: I did not author or use this term in the article cited, so I do not know what types of victims the author intended to include in this category.

b. How did politically connected victims factor into your decision making as a prosecutor whether to try a case or not?

Response: Other than by a conscious effort to give no weight to such issues, I have never factored a victim’s real or perceived political connections into any decision as a prosecutor regarding whether to charge a case.

c. If confirmed, how will you view ‘politically connected victims’ in your courtroom?

Response: I would view all victims as entitled to fair, impartial, and respectful treatment by the court and the judicial process, regardless of their political affiliations or connections.

9. In your questionnaire, you indicated that you co-hosted a forum on charitable giving rules and designated terrorist organizations on September 4, 2007. You indicated that you have no notes, transcript, or recording. Can you provide the committee with an overview of the forum and your role in it?

Response: The U.S. Attorney’s Office invited a speaker from the Department of Treasury, Michael Rosen, a Policy Advisor with the Office of Terrorist Financing and Financial Crimes, who was an expert in the charitable giving regulations to make a presentation explaining the rules pertaining to designated terrorist organizations to the community in Dearborn, Michigan. Our U.S. Attorney could not attend the meeting and so I stood in, as the First Assistant, and welcomed and introduced the expert to the audience.

10. You have publically supported and campaigned for a Democrat for Attorney General and Governor in your home state of Michigan. While there is certainly nothing inappropriate with supporting one party or the other, your political history may concern future litigants, should you be confirmed.

a. What is your view on the role of politics in the judicial decision-making process?

Response: My role as a volunteer was limited to distributing literature in 1998 and 2002, and providing advice on computer crime issues in 2002. Politics should play no role in the judicial decision-making process. Judicial decision-making should be guided by a faithful and consistent application of the law to the facts.

- b. Can you assure this Committee that, if confirmed, your decisions will be based on law rather than any underlying political ideology or motivation?**

Response: Yes, I believe that fidelity to the rule of law is a judge's solemn obligation. I would follow this principle and not any other motivation or political ideology.

- c. What assurances or evidence can you give the Committee and future litigants that you will put aside any personal views and be fair to all who appear before you, if confirmed?**

Response: I am firmly committed to treating all persons who may appear before the court with equal respect, dignity, fairness, impartiality and courtesy, and to putting aside any and all personal views or feelings in order to apply the law fairly and without favor or bias.

- 11. Since *United States v. Booker*, the Federal Sentencing Guidelines have been advisory rather than mandatory. If confirmed, how much deference would you afford the Guidelines?**

Response: In fashioning any sentence, I would defer to the Federal Sentencing Guidelines as the appropriate starting point in determining the applicable sentencing range. As required under *Booker*, I would determine the sentence after carefully applying the factors set out in 18 U.S.C. § 3553.

- a. Under what circumstances would you be willing to depart from the Guidelines?**

Response: If the government makes a motion for a downward departure based on the defendant's having provided substantial assistance to the government, this would provide a basis for departing from the Guidelines. In other circumstances, I would only depart from the Guidelines when the underlying facts were of such an unusual nature that they were not adequately addressed by the Sentencing Guidelines.

- b. Under what circumstances do you believe it is appropriate for a district court judge to depart downward from the Sentencing Guidelines?**

Response: I would respectfully refer to my previous answer.

- 12. 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, unfairly disparate sentences are unjust to those who receive them and undermine the public's respect for the rule of law. Those who are convicted of crimes, and the public generally, should be able to expect that the sentence will be determined based on the seriousness of the crime and the criminal history of the defendant, and not on who the judge may be.

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

Response: The most important attribute of a judge is to act with integrity in all things. This means to act with fairness, intellectual honesty, courage, and above all fidelity to the rule of law. I believe I have this attribute.

14. 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: The most important elements of judicial temperament are to be fair, impartial, timely, diligent, hardworking, patient, calm, decisive and respectful of the equal dignity of all persons who appear before the court. I do believe I meet this standard.

15. 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. Regardless of any personal opinion I may have, I am firmly committed to applying the precedent of the Sixth Circuit Court of Appeals and the United States Supreme Court.

16. At times, judges are faced with cases of first impression. If there were no controlling precedent that was dispositive on 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: In deciding cases of first impression involving the interpretation of a federal statute, I would consult precedent of the Supreme Court, the Circuit Courts of Appeal and the district courts for persuasive guidance. I would also review the language of the individual statutory provision, as understood within the context of the entire statute, to discern the ordinary meaning of the plain language of the provision. If the language is ambiguous, I would also research the legislative intent of Congress to help determine the correct meaning.

17. 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 best judgment of the merits to decide the case?

Response: Even if I believed that the Supreme Court or the Court of Appeals had incorrectly decided an issue, I would faithfully apply the controlling precedent of the Supreme Court and the Sixth Circuit courts as required by the doctrine of stare decisis.

18. Under what circumstances do you believe it appropriate for a federal court to declare a statute enacted by Congress unconstitutional?

Response: I would approach constitutional challenges to federal statutes with caution because a federal statute enjoys a presumption of constitutionality. If the statute were capable of being interpreted in a manner consistent with the Constitution, I would adopt that interpretation. If a statute clearly violates a provision of the Constitution, or falls outside of one of the enumerated powers of Congress under Article I and the Amendments, I would hold the statute unconstitutional.

19. 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 would canvass the judges of the district to learn and adopt their best practices regarding case management, focusing particularly on those judges who are known to move cases in a timely manner. I would utilize pretrial and status conferences to control the pace of the litigation and impose firm, reasonable deadlines to facilitate an efficient docket. Finally, I would make certain to refer appropriate motions and other matters to magistrate judges to assist in the swift resolution of cases.

20. 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, the judge plays a most significant role in controlling the pace and conduct of the litigation. By setting firm deadlines and disposing of motions in a decisive and timely manner, a judge can create an expectation and reputation among the litigants as an efficient forum in which matters are addressed without unnecessary delay. I would be proactive in setting pretrial and status conferences to ensure that cases are not stagnating.

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

Response: I received and reviewed the questions on June 13, 2012 and prepared responses over the next several days. I then discussed my responses with representatives of the Department of Justice, put them into final form and authorized transmittal to the Committee.

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

Response: Yes.

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Nominee to be United States District Judge for the Eastern District of Michigan
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.

- a. If not, please explain.**

Response: I do not agree that the Constitution is “constantly evolving as society interprets it;” it is subject to change through the amendment process only. The Supreme Court’s interpretation of certain provisions of the Constitution has changed over time, but the Constitution’s provisions do not change over time unless amended.

- 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: No.

- a. Please explain.**

Response: While it is true that the Constitution replaced the Articles of Confederation, and in that sense represented new organizing principles for the government, I would not infer any ongoing “transformative purpose” from that fact which must be considered in constitutional interpretation.

- 3. In your view, is it ever proper for judges to rely on 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 do not see foreign law as having any persuasive authority in interpreting the Constitution.

- 4. You worked as a volunteer for and supported Jennifer Granholm for Attorney General for Michigan in 1998 and later for Governor of Michigan in 2002. Do you agree with all of the positions she took publicly?**

Response: My role as a volunteer was limited to distributing literature in 1998 and 2002 and to also providing advice on computer crime issues in 2002. Governor Granholm was a state-wide elected official for 12 years and I do not know what all her publicly stated positions are; I am sure there are some with which I would not agree. I knew Governor Granholm and served with her as an Assistant U.S. Attorney and believed she was a person of high integrity, intelligence, and leadership skills.

a. If not, with which ones specifically do you disagree?

Response: Any personal views I may have, broadly, or whether in agreement or disagreement with public positions of Governor Granholm, would play no role in my service as a federal judge because my role would not involve applying my personal views but rather applying the law impartially to the facts presented in the narrow confines of specific cases brought before the court.

- 5. In 1999, you wrote an article entitled “Human Rights for Terrorists Beyond the Water’s Edge.” In that article, you wrote: “It is ironic that the men accused of bombing the U.S. Embassy in Nairobi sit comfortably in prison awaiting their trial, while, at the same time, the US bombed a site of alleged terrorists in Afghanistan. The suspected terrorists of the embassy are allowed rights under the due process of law because they are in the US, while those off US shores have no rights, and can be bombed at will. The terrorists offshore should enjoy the same human rights as those onshore.”**

Response: The article that I wrote, as published in the national Catholic journal *America* on January 16, 1999, did not contain the language quoted in the above question. I have attached a print version of the article for the Committee’s review which does not contain the quoted language. I did not write the quoted language. I have reviewed the electronic version of this article that was retrieved from Westlaw which was submitted to the Committee, however, and I do see that this version contains the language quoted, but I do not know who wrote that language or why it appears prior to the text of the article itself. I regret that I did not notice that this version of the article contained this paragraph, because I would not have submitted this version to the Committee if I had realized that it contained this paragraph. I respectfully would ask to remove this electronic version of the article from the Attachments to my Senate Judicial Questionnaire and replace it with the print version which is attached to this response, and is an accurate copy of the article that I wrote.

It is possible that the quoted language may have been written by an editor attempting to summarize the article, but a review of the article itself will show that the quoted language is inconsistent with the position that I took in the article. For example, I did not state in my article “The terrorists offshore should enjoy the same human rights as those on shore.” Rather, I drew a distinction between the Constitutional rights available to criminal defendants in the United States, and the unavailability of those rights to those who commit the same criminal acts, but who are located outside the United States. I further noted that the use of military force against terrorists located in other countries operates under rules of engagement that are appropriately different from those that apply

in criminal cases, but I stated that our government should be “extremely judicious in using force in other parts of the world.”

a. Do you believe terrorists overseas have constitutional rights? Please explain.

Response: No.

i. If so, to what constitutional rights are they entitled?

Response: When I drafted the referenced article, my understanding was that non-citizens outside the jurisdiction of the United States who are not in U.S. custody were not entitled to claim protection under the United States Constitution.

b. Do terrorists overseas have due process rights?

Response: When I drafted the referenced article, my understanding was that non-citizens outside the jurisdiction of the United States who are not in U.S. custody would not be protected by the United States Constitution’s guarantee of due process. Since 9/11, federal courts, including the Supreme Court, have decided a number of cases addressing issues relating to whether the Constitution may be invoked by foreign nationals in U.S. custody. I have not made a careful study of this area of law. If a question in this area were to come before me as a federal judge, I would review the relevant legal authorities and faithfully apply the binding precedents of the Supreme Court and the Sixth Circuit.

i. If so, from where in the constitution are those rights derived?

Response: I respectfully refer to my answer above.

c. Are constitutional rights and human rights coextensive?

Response: No.

d. Do you believe drone strikes against noncitizens are constitutional? Please explain.

Response: When I drafted the referenced article, my understanding was that the Constitution did not generally apply to non-citizens outside the jurisdiction of the United States who are not in U.S. custody. As I mentioned above, since 9/11, case law has developed in this general area which I have not carefully reviewed. If a question in this area were to come before me as a federal judge, I would review the relevant legal authorities and faithfully apply the binding precedents of the Supreme Court and the Sixth Circuit.

e. Given your statement that terrorists offshore should enjoy the same rights as those onshore, do you believe Anwar al-Awlaqi’s constitutional rights were violated?

Response: As stated above, I did not make the statement that terrorists offshore should enjoy the same rights as those onshore. My article made the opposite point, that criminal defendants in the United States are protected by the Constitution while terrorists outside the United States generally are not. Regarding whether Anwar al-Awlaqi's constitutional rights were violated, I am aware that a lawsuit was brought by the father of Anwar al-Awlaqi challenging the constitutionality of targeting him, but this suit was dismissed by the U.S. District Court for the District of Columbia. Because this kind of question could come before me if I were to be confirmed, it would not be appropriate for me to express any opinion as to the merits of this issue. I would seek to faithfully apply the precedent of the Sixth Circuit Court of Appeals and the Supreme Court in deciding such an issue.

i. If not, why not?

Response: I respectfully refer to my answer above.

f. Were Anwar al-Awlaqi's human rights violated?

Response: My understanding is that if it is established that a person is involved in planning and executing terrorist attacks against the United States in another country, it would not necessarily violate international standards of human rights for the United States to use military force against that person.

i. If not, why not?

Response: I respectfully refer to my answer above.

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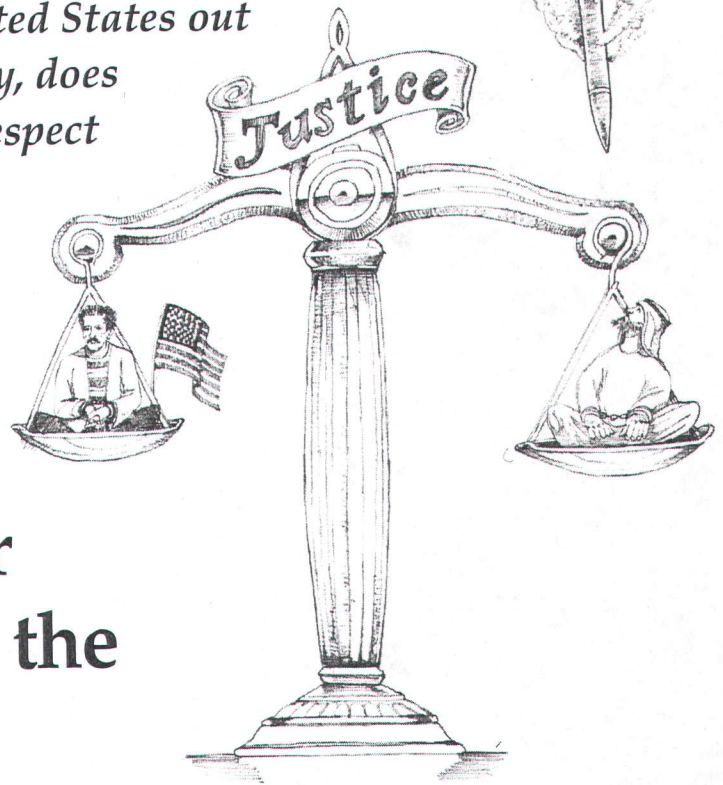
COMMON GROUND FOR PRO-LIFE AND PRO- CHOICE

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If our law restricts the state's power to punish persons for criminal acts within the United States out of respect for the person's dignity, does not that same dignity demand respect outside our borders?



Human Rights for Terrorists Beyond the Water's Edge

By **TERRENCE BERG**

AS A FEDERAL PROSECUTOR, I felt a strong sense of irony in reading about the arraignment in New York Federal court of two Middle-Eastern men accused of bombing the U.S. Embassy in Nairobi. These alleged "Islamic terrorists"—one of whom reportedly confessed—are from the same group our military had tried to destroy in a missile attack last August. Yet they will enjoy all the sacred protections of due process enshrined in our Constitution: counsel to defend them, the right not to answer any questions, the right to call their own witnesses and submit any Government witnesses to cross-examination, the right to have a jury of ordinary people—not Government officials—decide their fate.

Providing constitutional protections to alleged terrorists is something we can be proud of as Americans. No matter how atrocious the crime, or how trivial, in the United States you may not be punished by the state until the full fact-finding and truth-sifting function of "due process" has run its course. Even in the face of such strange results as

TERRENCE BERG is assistant U.S. attorney for the Eastern District of Michigan. He also teaches law at the University of Detroit-Mercy School of Law. (The views expressed in this article are those of the author and do not necessarily represent those of the U.S. Department of Justice.)

those of the O. J. Simpson murder trial or the New England baby-sitter case, most Americans, and other people the world over, recognize that our criminal justice system, despite its many flaws, strives to protect the dignity of the human person by interposing strong barriers between the accused and punishment by the Government. These barriers include protection against unreasonable searches and seizures, the right against self-incrimination, the presumption of innocence and the burden of proof beyond a reasonable doubt.

The respect for human dignity enshrined in our Bill of Rights requires us to go through the slow and careful procedures mandated by due process before imposing any finding of guilt or any punishment on a person. The notion that the law must respect the dignity of the human person is an ideal to be held up as an example for other nations to follow and a goal to which our own society must continue to aspire.

But compare for a moment the slow and tedious criminal justice process—ultimately a procedure for determining the facts and then assessing the appropriate punishment—with the swift judgment and overpowering punishment imposed upon the people who died as a result of our military's cruise missile strikes against Afghanistan and the Sudan. What fact-finding was done before invoking this most powerful of all state punishments, the use of lethal force? What standards were applied to determine whether the evidence of guilt was sufficient? In our criminal justice system, even to

ART: FREDERICK H. CARLSON

lodge a criminal charge against someone requires an independent fact-finder—a magistrate or a grand jury—who examines the Government's evidence and issues the charge only after finding that there is "probable cause" (better than 50-percent likelihood) that the person committed the crime. To find guilt, there must be "proof beyond a reasonable doubt," sometimes called "proof to a moral certainty" by judges who are explaining the concept to juries. To bring a death penalty case, there are whole sets of internal Justice Department policies and procedures that must be carefully followed by the several levels of officials who examine such applications. Even after guilt is established, no death sentence may be imposed until an entire separate procedure is held, again before a jury, during which the jury hears more evidence that must meet certain standards showing that the murder was committed under particularly aggravating circumstances.

Our law's respect for human dignity requires that such rules be followed before the Government may invoke criminal punishments against individual persons. Obviously, we cannot expect our President or our military to hold a trial before a jury of citizens who would determine guilt and then impose a death penalty prior to taking military actions that may result in killing others. Nearly all military actions result in killing others. Although our cruise missile attack on the Sudan was timed to occur when there would be few people near the target, the attack nevertheless, according to the Associated Press, killed one person and wounded nine others. On the other hand, our attack on the training camps in Afghanistan was timed to occur when a meeting of Osama bin Laden's group was supposed to be taking place.

THE IRONY of watching the criminal process unfold for Mohamed Rashed Daoud al 'Owhali and Mohammed Sadiq Odeh is that these same two men could have been killed in an instant if they had been "lucky" enough to escape back to the camps in Afghanistan in time for the military strike. Yet here they sit, safe in a Federal holding facility in New York, enjoying three square meals a day, benefiting possibly from expert legal counsel paid for by the Government, being presumed innocent and given every chance to challenge the proof against them. The same Government that launched 75 \$60-million missiles at their confederates may not even impose a sentence of probation on these two until after due process has been followed.

It is quite proper that the great protections of our Constitution apply to these two men with unchallengeable force, just as they would in any other criminal case. The respect and protection that our laws provide for human dignity is a beacon for all to see. But as a nation that goes to great pains not to allow the state to harm a person in the United States until after a very careful process has determined that person should be harmed, we must recognize a big difference between the rights that we accord persons accused of crimes within our borders, and the rights we accord those accused of crimes outside our borders.

If our law restricts the state's power to punish persons for criminal acts within the United States out of respect for the person's dignity, then does not the same human dignity demand respect beyond the water's edge? As a nation with a highly developed legal tradition regarding human rights, we have a responsibility to be extremely judicious in using force in other parts of the world. With the collapse of the ideological competition between capitalism and Communism, the need for our nation's use of force to be consistent with our values concerning human dignity is even greater.

WHEN APPLYING MILITARY FORCE, as our nation must do at times, we must be an example in protecting human rights and defending human dignity. It must be clear to our citizens, and to the world as well, that our nation's use of military force is factually justified, seeks to minimize the loss of innocent human life and is a proportionate response. The Administration has not yet made its case to meet these standards with respect to the cruise missile attacks, because it has not yet fully disclosed the evidence upon which the use of force was based.

As the laborious criminal process in the New York Federal court unfolds, perhaps many of the facts that supported our use of force will come to light. In the meantime, the irony persists that it appears much easier for our Government to use force to punish terrorists who have not been caught than it is to punish those who have been. A

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