

Responses of Terrence G. Berg
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.