

Responses of Terrence G. Berg
Nominee to be United States District Judge for the Eastern District of Michigan
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.