Responses of Bernice B. Donald
Nominee to be United States Circuit Judge for the Sixth Circuit
to the Written Questions of Senator Tom Coburn, M.D.

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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: I do not.

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: I am not certain what Justice Brennan meant, but I believe that the Constitution must be interpreted according to its text and the precedent established by the U.S. Supreme Court.

3. **Do you believe judicial doctrine rightly incorporates the evolving understandings of the Constitution forged through social movements, legislation, and historical practice?**

   Response: I believe that judicial doctrine must be confined to the text of the U.S. Constitution and its Amendments, as well as precedent established by the U.S. Supreme Court.

4. **Do you believe empathy is an essential ingredient for arriving at just decisions and outcomes and should play a role in a judge's consideration of a case?**

   Response: Empathy is not an appropriate factor for a judge to incorporate in the decision making process. A judge should shed personal views and feelings at the courthouse door.

5. **Is any transaction involving the exchange of money subject to Congress's Commerce Clause power?**

   Response: I would look to Supreme Court precedent to answer the question. The Supreme Court has held that an activity must fall within one of three categories to be subject to regulation by Congress. Specifically, in *United States v. Lopez*, 514 U.S. 549, 558 (1995), the Supreme Court held that the Commerce Clause allows Congress to regulate (1) "the channels of interstate commerce"; (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities"; and (3) "those activities that substantially affect interstate commerce." This holding was reiterated in *United States v. Morrison*, 529 U.S. 598, 608-09 (2000), and *Gonzales v. Raich*, 545 U.S. 1, 16-17 (2005). The Supreme Court did not state in *Lopez*, *Morrison*, or *Raich* that the test for determining whether an activity lies within the ambit of Congress' Commerce Clause power to be whether it involves an exchange of money.

6. **The U.S. Supreme Court held in *District of Columbia v. Heller,* 554 U.S. 570 (2008), that the Second Amendment of the United States Constitution "protects an individual right to possess a firearm unconnected to service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home." As Justice Scalia's opinion in *Heller* pointed out, Sir William Blackstone, the preeminent authority on English law for the Founders, cited the right to bear arms as one of the fundamental rights of Englishmen. Leaving aside the *McDonald v. Chicago* decision, do you personally believe the right to bear arms is a fundamental right?**

   Response: The Second Amendment of the U.S. Constitution establishes that right. The Supreme Court has affirmed that right. This is the law of the land.

   a. **Do you believe that explicitly guaranteed substantive rights, such as those guaranteed in the Bill of Rights, are also fundamental rights? Please explain why or why not.**

      Response: I have no personal view on this question and have not had occasion to address such an issue during my judicial career. I would follow Supreme Court precedent on this issue.

   b. **Is it your understanding of Supreme Court precedent that those provisions of the Bill of Rights that embody fundamental rights are deemed to apply against the States? Please explain why or why not.**

      Response: Please see response to 6a.

   c. **The *Heller* Court further stated that "it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right." Do you believe that the Second Amendment, like the First and Fourth Amendments, codified a pre-existing right? Please explain why or why not.**

      Response: Yes, the Supreme Court has made this determination.

7. **Some have criticized the Supreme Court's decision in *Heller* saying it "discovered a constitutional right to own guns that the Court had not previously noticed in 220 years." Do you believe that *Heller* "discovered" a new right, or merely applied a fair reading of the plain text of the Second Amendment?**

   Response: I do not have an opinion about this issue, but if it comes before the court I will apply the precedent established by the Supreme Court and the Sixth Circuit.

   a. **Similarly, during his State of the Union address, the President said the Supreme Court's decision in *Citizens United v. FEC,* 558 U.S. ___ (2010), "reversed a century of law" and others have stated that it abandoned "100 years of precedent." Do you agree that the Court reversed a century of law or 100 years of precedent in the *Citizens United* decision? Please explain why or why not.**

Response: I do not have an opinion on this issue. Should the issue come before the court, I will apply established Supreme Court and Sixth Circuit precedent.

8. **What limitations remain on the individual Second Amendment right now that it has been incorporated against the States?**

Response: In *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. ___, 130 S. Ct. 3020 (2010), the U.S. Supreme Court clarified that the Second Amendment established an individual's right to bear arms throughout the United States. In *Heller*, the Court explained that "nothing in [the Court's] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." I will follow relevant Supreme Court and Sixth Circuit precedent.

a. **In *McDonald v. Chicago,* the majority wrote: "We made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as 'prohibitions on the possession of firearms by felons and the mentally ill,' 'laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.'"**

What if a state passed a law imposing a $2,000 registration fee as a condition for the commercial sale of a firearm? Without stating how you would rule in such a case, please explain how you would conduct your analysis to determine whether the fee violated the Second Amendment right to keep arms?

Response: The Supreme Court has recognized that the Second Amendment guarantees an individual's right to own a firearm and that this right is incorporated against encroachment by state and local governments. Although the Supreme Court has not expressly articulated a standard for reviewing laws that burden firearms ownership, the constitutionally-protected status of the right to keep and bear arms necessitates a heightened level of scrutiny for any such law that would seek to burden the right to bear arms. I would look to Supreme Court and Sixth Circuit precedent for guidance.

i. **To what cases or authorities would you refer? Please be specific.**

Response: I would look to *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. ___, 130 S. Ct. 3020 (2010), and any other Supreme Court and Sixth Circuit precedent.

b. **What if a state outlawed the carrying and possession of firearms on the grounds of hospitals that have psychiatric wards, regardless of whether they are private? Without stating how you would rule in such a case, please explain how you would conduct your analysis to determine whether that**

regulation complied with the Second Amendment's guarantee of the right to bear arms.

Response: The Supreme Court has recognized that the Second Amendment guarantees an individual's right to own a firearm and that this right is incorporated against encroachment by state and local governments. Although the Supreme Court has not expressly articulated a standard for reviewing laws that burden firearms ownership, the constitutionally-protected status of the right to keep and bear arms necessitates a heightened level of scrutiny for any such law. I would look to Supreme Court and Sixth Circuit precedent for guidance.

i. **Could a hospital qualify as a "sensitive place?"**

Response: I would examine Supreme Court and Sixth Circuit precedent in examining such an issue.

ii. **To what cases or authorities would you refer? Please be specific.**

Response: I would examine Supreme Court and Sixth Circuit precedent in examining such an issue. Specifically, I would look to *District of Columbia v. Heller,* 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. ___, 130 S. Ct. 3020 (2010), as well as any other Supreme Court or Sixth Circuit precedent.

c. **Is the Second Amendment limited only to possession of a handgun for self-defense in the home, since both *Heller* and *McDonald* involved cases of handgun possession for self-defense in the home?**

Response: The Supreme Court did not specify such limits. I would look to the Supreme Court and Sixth Circuit precedent to answer this question.

9. **In *Roper v. Simmons*, 543 U.S. 551 (2005), Justice Kennedy relied in part on the "evolving standards of decency" to hold that capital punishment for any murderer under age 18 was unconstitutional. I understand that the Supreme Court has ruled on this matter, but do you agree with Justice Kennedy's analysis?**

Response: As a lower court judge, I am bound by the precedent of the Supreme Court and the Sixth Circuit in evaluating issues of capital punishment as well as any other issues that come before the court.

a. **Do you agree that the Constitution's prohibition on cruel and unusual punishment "embodies a principle whose application is appropriately informed by our society's understanding of cruelty and by what punishments have become unusual?"**

Response: As a lower court judge, I am bound by the precedent of the Supreme Court and the Sixth Circuit in evaluating issues of capital punishment as well as any other issues coming before the court.

b. **How would you determine what the evolving standards of decency are?**

Response: I would look to Supreme Court and Sixth Circuit precedent if I were required to address this issue.

c. **Do you think that a judge could ever find that the "evolving standards of decency" dictated that the death penalty is unconstitutional in all cases?**

Response: No, the Supreme Court has held that the death penalty is Constitutional.

d. **What factors do you believe would be relevant to the judge's analysis?**

Response: Not applicable.

e. **When determining what the "evolving standards of decency" are, justices have looked to different standards. Some justices have justified their decision by looking to the laws of various American states,[1] in addition to foreign law, and in other cases have looked solely to the laws and traditions of foreign countries.[2] Do you believe either standard has merit when interpreting the text of the Constitution?**

Response: As an intermediate appellate court judge, if I am confirmed, the only appropriate role for me would be to follow the precedent of the Supreme Court and the Sixth Circuit.

i. **If so, do you believe one standard more meritorious than the other? Please explain why or why not.**

Response: Not applicable.

10. **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. **Is it appropriate for judges to look for foreign countries for "wise solutions" and "good ideas" to legal and constitutional problems?**

Response: No.

b. **If so, under what circumstances would you consider foreign law when interpreting the Constitution?**

Response: I would not consider foreign laws except as required by the Supreme Court.

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[1] *Roper v. Simmons*, 543 U.S. 551, 564-65.
[2] *Graham v. Florida*, 130 S.Ct. 2011, 2033-34.

c. **Do you believe foreign nations have ideas and solutions to legal problems that could contribute to the proper interpretation of our laws?**

   Response: I would not consider foreign laws except as required by the Supreme Court.

d. **Would you consider foreign law when interpreting the Eighth Amendment? Other amendments?**

   Response: No, unless required by the Supreme Court.

11. During your hearing, Senator Schumer asked you about a statement you made in a 2008 panel discussion on employment discrimination as reported by the American Bar Foundation newsletter. According to the newsletter, you commented as follows:

> **"[Judge Donald] shared with the audience how, as an African American woman sitting on an appellate court composed of white men, she had a 'vastly different' view of what evidence supports summary judgment, a difference she ascribed to the men having never experienced discrimination. Though judges try to 'objectively evaluate the facts and apply the law,' Donald said, they 'are viewing things through the lens of culture, through their experience, and that may impact how…much weight [they] accord to different things.'"**

This statement is very similar to Justice Sotomayor's assertion that "[p]ersonal experiences affect the facts that judges choose to see."

a. **You told Senator Schumer that your statement was taken out of context. Can you explain how it was taken out of context and by whom?**

   Response: I have never held a vastly different view of the summary judgment standard. The statement was erroneously attributed to me.

   Before my hearing, I made a good faith effort to be responsive in my answers to the Senate Judiciary Questionnaire and to provide all requested materials. After conducting a diligent search and making an exhaustive inquiry of persons and entities involved, I was advised by the American Bar Foundation ("ABF") that there was no transcript or tape of this panel discussion. Although I did not recall making this statement because it is not something that I have ever believed, I assumed that the writer misinterpreted my remarks. It did not occur to me that the article might have misattributed another speaker's remarks to me. Rather, I assumed that the statement must have been in reference to a specific case that I heard while sitting by designation. That is why I answered as I did during my hearing before the Senate Judiciary Committee. Then as now, I maintained that I adhere to Supreme Court and Sixth Circuit precedent in analyzing summary judgment motions in all cases.

   After my hearing, in preparing my responses to subsequent written questions, I conducted a search to find any case to which I might have been referring and determined that I sat by designation in three cases involving review of summary judgment in discrimination cases: *Still v. Wilkinson,* 194 F.3d 1314 (Table), 1999 WL 801577 (6th Cir. 1999) (affirming the district court's grant of summary judgment to defendants in a religious discrimination case); *Hatcher v. General Electric*, 208 F.3d 213 (Table), No. 98-6304, 2000 WL 245515 (6th Cir. 2000) (affirming the district court's grant of summary judgment to defendants in an age discrimination case); and *E.E.O.C. v. Watkins Motor Lines, Inc.*, 463 F.3d 436 (6th Cir. 2006) (affirming the district court's grant of summary judgment to defendant as to a claim under the Americans with Disabilities Act).

The week of March 24, 2011, I again contacted the ABF and requested that they explore all sources to try and find a transcript or tape. On Monday April 4, 2011, a representative of the ABF advised that, after checking with the office of the ABF Fellows, she had located a tape recording of the panel discussion as well as a transcript. After reviewing this information, the ABF representative has concluded, and I have confirmed, that the "vastly different standard" statement was made by the appellate court judge on the panel, not by me.

The misattributed quote appears on page 53 of the transcript and reads as follows:

> I have to comment on one area of the summary judgments. I joined an appellate court of all white men and I have to say that our view of what evidence supports summary judgment, of what . . . what evidence is needed, was vastly different. Most . . . they hadn't experienced discrimination, but some of these situations that came up, I mean, I felt clearly that they should go forward and it was like, no, this was not something that should be litigated at all.

This statement was made by Judge Miriam Shearing, a former justice on the Supreme Court of Nevada and the first woman to join that court. Unfortunately, the contract transcriber to whom the tape was sent misattributed the quote to me and, because the author of the article was working from the transcript, the error was perpetuated.

I am including, for the benefit of the Committee, the original tape recording of the panel discussion, a CD to which I have transferred the tape recording, and the unofficial, original transcript. Katharine Hannaford, Senior Writer and Grants Officer of the ABF, has listened to the recording and corrected the relevant pages. I have also attached the corrected pages 53 and 54 for the Committee's benefit.

Ms. Hannaford has informed me that a correction will be posted on the *Researching Law* section of the ABF website and also printed in the next hard copy issue of *Researching Law*.

i. **Please provide a transcript or recording of the statements you made on that panel.**

   Response: I have attached the transcript and recording.

b. **If your statement was accurately reflected in that article, please explain in what ways your view of a summary judgment motion could be "vastly different" based on your culture and experiences.**

Response: Not applicable.

c. **Other than discrimination cases, in what types of cases do you think you have a "vastly different" view of what evidence supports summary judgment?**

Response: Not Applicable.

d. **Please give me an example of a case where your life experiences impacted your view and influenced your judicial decision, and explain why you reached the conclusion you did. Please provide the case name and citation.**

Response: My decisions are based on an impartial application of the law to the facts. My life experiences do not affect my decisions.

e. **During your hearing in response to a question from Senator Schumer, you said: "I was speaking to how my experience allowed me to bring a different and diverse perspective to an assessment of the facts in that case." How did your experience affect your assessment of the facts of the case? Please be specific.**

Response: Please see answer to 11a.

f. **Are there any other cases where your experiences affected your assessment of the facts in a case?**

Response: There are no cases that I am aware of where my experiences affected the outcome of a case.

   a. **If so, please list the cases, the citations, and a brief description of your ruling and any subsequent judicial rulings.**

   Response: Not applicable.