

Responses of Gershwin A. Drain
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: The Constitution changes only through the amendment process that is set forth within the Constitution itself.

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

Response: No.

a. If not, please explain.

Response: The Constitution does not change through social movements, historical practice or legislation. Again, it changes only through the amendment process that is set forth within the Constitution itself.

- 3. What principles of constitutional interpretation would you look to in analyzing whether a particular statute infringes upon some individual right?**

Response: In analyzing whether any particular statute infringes upon a Constitutional right, I would look to United States Supreme Court precedent to resolve the question. If there was no controlling precedent from the Supreme Court, I would then look to case law from the Sixth Circuit.

- 4. In a column entitled “I have a dream of nonviolence,” you said you look “forward to a time when a person with a gun will be viewed as a coward or chicken.” Senator Lee asked you about this article and your views on Second Amendment rights, but I would like to ask you some additional questions.**

Response: My statement in that 1994 column was meant to cover a very limited situation. I had no intent to discuss the Second Amendment or the Constitutional right to bear arms. As a trial judge in the City of Detroit I saw so many situations where arguments erupted on the street and in other public places or at some other place than at home. Instead of a fist fight young people would go for a gun and there would be a senseless shooting. When I referenced “a coward or chicken” I was thinking about situations where instead of using fists young people in my city unnecessarily resorted to guns. That was the context of my statement.

- a. **In your opinion, why do you think our founders included this right as the second in its list of amendments?**

Response: I believe that the founders included this right as the second in its list of amendments because of its significance and importance.

- b. **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: Yes. *Heller* and *McDonald* make clear that the Second Amendment protects a fundamental right.

- c. **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: Yes. With a few exceptions, the Supreme Court has held that the rights enumerated in the Bill of Rights are fundamental rights that apply against the states under the 14th Amendment.

- d. **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: Yes. The United States Supreme Court has held that most of the provisions of the Bill of Rights protect fundamental rights and are therefore applicable to the states through the 14th Amendment.

- e. **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 said that the Second Amendment codified a pre-existing right.

- f. **What limitations remain on the individual Second Amendment rights now that the amendment has been incorporated against the States?**

Response: The Supreme Court in *District of Columbia v. Heller*, 554 U.S. 570 at

626 (2008) said “nothing in our 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.”

5. **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 and you are obliged to follow it, but do you agree with Justice Kennedy’s analysis?**

Response: I do not believe I can give an opinion on that question except to say that the *Roper* case is Supreme Court precedent and I, as a lower court judge, would be obligated to follow it.

- a. **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, in addition to foreign law, and in other cases have looked solely to the laws and traditions of foreign countries. Do you believe either standard has merit when interpreting the text of the Constitution?**

Response: If confirmed as District Court Judge I would not look at either of those standards and would be bound by decisions of the United States Supreme Court and the decisions of the Sixth Circuit Court of Appeals.

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

Response: I do not feel it is my position to evaluate standards used by the United States Supreme Court. Whatever measure they use in evaluating and deciding a case, I must abide by it.

6. **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: As a District Court Judge it would not be appropriate for me to rely on foreign or international law in determining the meaning of the United States Constitution.

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

Response: As a District Court Judge I would never use foreign law when interpreting the Constitution.

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

Response: Foreign nations may or may not have ideas or solutions that might be helpful to legislators, but as a judge I would not look to those sources in interpreting U.S. law.

- 7. As a judge, have you ever presided over a death penalty case? If so, please provide a summary of and citations for these cases.**

Response: I have never presided over a death penalty case because we do not have the death penalty in the State of Michigan. In fact, there is a Michigan Constitutional provision that specifically prohibits the legislature from enacting any law that would impose the death penalty.

- a. As an attorney, did you ever represent a defendant who could receive the death penalty as a sentence? If so, please provide a summary of and citations for these cases.**

Response: When I practiced law for 12 years at the Federal Defender's Office I never represented a defendant who could have received the death penalty.

- 8. You wrote, "One of my unpleasant tasks on occasion is to impose mandatory sentences." When asked about this statement at your hearing, you stated: "A lot of times when I imposed a mandatory sentence I didn't do it with any type of joy or happiness. It was something that was hard to do." And, you said, "in dealing with mandatory sentences sometimes ... I would rather do something different." You also testified, "to have mandatory sentences is difficult to deal with and to handle cases in an equitable fashion. They just present some, like I said, very difficult situations." You also have written, "[w]e need to trust our judiciary and give judges discretion to impose the sentence they feel is appropriate." Given the dozens if not hundreds of mandatory minimums in federal law and your obvious aversion to imposing those sentences, why do you want to be a federal judge?**

Response: In the 25 years of my judicial career, 13 of which were in criminal court, I have handled several thousand cases. In Michigan there are many mandatory minimum sentences and it was only in a small percentage of the cases that I heard where I felt the mandatory minimum sentence was too harsh. Most of the time I felt the mandatory sentence was appropriate. I believe that personal feelings should not be considered when sentencing and I am committed to following the mandatory sentences in federal court if I am confirmed. I enjoy serving as a judge and am deeply honored to be considered to serve on the federal bench.

- a. You specifically noted in your testimony that, in certain cases such as "aiding and abetting" and "conspiracy" cases, "people who do very little toward the commission of a crime are treated just as though they were the major offender or the shooter." 18 U.S.C. §2 states: "Whoever commits an offence against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal." Do you believe Congress was wrong when it enacted this statute?**

Response: No. I believe that Congress was very wise in enacting that statute. Many times “drug kingpins” do very little in a major drug operation and insulate themselves from direct contact with narcotics and aiding and abetting and conspiracy are sometimes the only way that the “kingpins” can be reached.

- i. Do you believe it is the role of a judge to question the law the legislature makes?**

Response: No.

- ii. Do you believe a judge who issues a mandatory sentence as directed by the legislature is not handling a case in an “equitable fashion?”**

Response: No.

- iii. Given that you made many of the statements about your aversion to mandatory minimums as a sitting judge and your statement in one case that you were “looking for any reason to be lenient,” do you believe a victim could perceive your statements as showing empathy towards defendants?**

Response: No. My sentences are based on the law and the circumstances of each case, in that sometimes there are reasons consistent with the law to impose a lesser sentence, and in other cases I have not hesitated to impose a harsh sentence. It is important for a judge to understand the impact of crime on crime victims.

- iv. If, based on your statements, a victim might believe you were empathetic towards defendants in some cases, do you believe it was appropriate to make these statements?**

Response: My statements do not reflect inappropriate empathy for defendants.

- 9. When asked what you meant when you stated, “it does not make sense to keep people in prison during their later years when the crime-committing period is over,” you stated, “the older a person gets, I think the less likely they are to commit crime.” And, when asked whether you are willing to sentence an older person to the same amount of time as a younger person for a similar crime, you were uncertain and merely answered “probably.” How much weight would you give to the age of the defendant when determining the sentence?**

Response: It would be an extremely rare situation where I would give any weight to a person’s age in sentencing. There might be some cases in which the defendant’s age would be relevant to the appropriate sentence under the applicable statutes and sentencing guidelines.

- a. **You have also stated: “Advanced, mature societies should engage in punishment and not vengeance as a way of dealing with crime.” Are the victims of crimes and their family and loved ones not entitled to see the person who committed a crime against them or their loved one punished if the perpetrator is older?**

Response: All crime victims and their families are entitled to see the perpetrators punished in accordance with the law.

10. **You were asked about sentencing under the guidelines in Michigan and you stated: “there were some mitigating circumstances where I went below the guidelines.” Recently, a few federal judges have expressed concerns about mandatory minimums in child pornography laws.¹ Do you have any concerns about mandatory minimums in child pornography laws?**

Response: No.

- a. **Do you believe mandatory minimums in child pornography laws allow judges to be equitable to the defendant?**

Response: Yes.

- b. **Have you ever handled a child pornography case either as a judge or a lawyer?**

Response: No.

- i. **If so, please provide a summary of and citations for all the cases in which you participated.**

Response: Not applicable.

- ii. **If you handled these cases as a judge, please include the sentencing range called for under the Michigan guidelines, if applicable, and the sentence you issued.**

Response: Not applicable.

¹ A.G. Sulzberger, “Defiant Judge Takes on Child Pornography Law,” *New York Times*, May 21, 2010, available at <http://www.nytimes.com/2010/05/22/nyregion/22judge.html>.