

**Responses of Audrey Goldstein Fleissig
Nominee to the U.S. District Court for the Eastern District of Missouri
to the Written Questions of Senator Jeff Sessions**

- 1. According to your questionnaire, you were a member of the ACLU until 1995. According to the ACLU's website, the ACLU believes that the death penalty inherently violates the constitutional ban on cruel and unusual punishment and the guarantees of due process and equal protection.**

- a. Do you agree with the ACLU's position on the death penalty, as set forth on its website? Please explain your answer.**

Response: I have not paid dues to the ACLU in many years, and have not followed what position the organization takes regarding the death penalty. The Supreme Court has rejected arguments that the death penalty inherently violates the constitutional ban on cruel and unusual punishment and the guarantees of due process and equal protection. I have handled one case involving the federal death penalty statute as a judge, and I followed the Supreme Court precedent and rejected the defendant's challenges to the constitutionality of the statute on each of these grounds. If confirmed, I would continue to follow the Supreme Court case law and any binding precedent interpreting that case law.

- b. The ACLU Capital Punishment Project, which "challenges the unfairness and arbitrariness of capital punishment while working towards its ultimate repeal," filed an *amicus* brief in the Supreme Court case *Kennedy v. Louisiana*, arguing that the Eighth Amendment's rule against cruel and unusual punishment prohibited application of the death penalty for child rapists under "evolving standards of decency." The Supreme Court held that the death penalty for the crime of child rape always violates the Eighth Amendment. Writing for a five-justice majority, Justice Kennedy based his opinion partly on the fact that 37 jurisdictions (36 states and the federal government) did not allow for capital punishment in child rape cases. In reality, however, Congress and the President specifically authorized the use of capital punishment in cases of child rape under the Uniform Code of Military Justice (UCMJ) in the National Defense Authorization Act of 2006, as reported first by Col. Dwight H. Sullivan in his blog and later by the *New York Times*.**

- i. Given the heinousness of the crime, as well as the new information on the federal government's codification of capital punishment in child rape cases under the UCMJ, do you believe *Kennedy v. Louisiana* was wrongly decided? If not, why?**

Response: I do not have an opinion on whether *Kennedy v. Louisiana* was wrongly decided. I am bound by the Supreme Court's rulings and would follow its rulings and any binding precedent interpreting those rulings.

- ii. **Following the Supreme Court’s decision, President Obama announced at a press conference: “I think that the death penalty should be applied in very narrow circumstances for the most egregious of crimes. I think that the rape of a small child, 6 or 8 years old, is a heinous crime.” Do you agree with that statement? Please explain your answer.**

Response: I agree that the rape of a small child is a heinous crime. I have not formulated any personal opinion on the types of crimes for which the death penalty should be applied, and any personal opinion I may formulate must have no effect on my rulings as a judge. I am duty bound to follow the Supreme Court’s rulings and any binding precedent interpreting those rulings, and if confirmed would continue to do so.

- c. **Do you believe that the death penalty is an acceptable form of punishment? Please explain your answer.**

Response: As a sitting judge who may be called upon to address these issues, any expression of my personal beliefs regarding the acceptability of the death penalty as a form of punishment would be inappropriate, and any such beliefs must have no bearing on my decisions. In the one death penalty case assigned to me, I followed Supreme Court precedent and upheld the constitutionality of the federal death penalty act.

2. **In *Roper v. Simmons*, 543 U.S. 551 (2005), Justice Kennedy relied in part on “evolving standards of decency” in holding that capital punishment for any murderer under the age of 18 was unconstitutional.**

- a. **Do you agree with Justice Kennedy’s analysis?**

Response: I am bound by the Supreme Court’s rulings and would follow its rulings and any binding precedent interpreting those rulings.

- b. **How would you determine what constitutes “evolving standards of decency”? What factors would you consider?**

Response: If called upon to make that determination, I would follow the Supreme Court rulings and analysis and other controlling precedent.

- c. **Do you think that a judge could conclude that “evolving standards of decency” dictate that the death penalty is unconstitutional in all cases? Please discuss what factors you believe would be relevant to the judge’s analysis.**

Response: I was called upon to address this issue in one case, in which the defendant asserted an Eighth Amendment challenge to the federal death penalty

statute based, in part, on the assertion that the statute was inconsistent with evolving standards of decency. I rejected the argument, finding that it was foreclosed by Supreme Court case law. A lower court judge must be bound by the Supreme Court case law.

3. As you may know, President Obama has described the types of judges that he will nominate to the federal bench as follows:

“We need somebody who’s got the heart, the empathy, to recognize what it’s like to be a young teenage mom. The empathy to understand what it’s like to be poor, or African-American, or gay, or disabled, or old. And that’s the criteria by which I’m going to be selecting my judges.”

a. While I understand that you cannot know what President Obama may or may not have meant by this statement, do you believe that you fit President Obama’s criteria for federal judges, as described in his quote?

Response: I believe I am a person who has empathy, or sensitivity to the feelings and experiences of others. However, my sensitivity to the situation and experiences of others does not interfere with my obligation to determine cases in a fair and impartial manner, and I believe that my record as a United States Magistrate Judge reflects that impartiality and allegiance to the rule of law.

b. What role do you believe that empathy should play in a judge’s consideration of a case?

Response: I believe that a judge must set aside any sense of empathy in interpreting the law. A sense of empathy nonetheless can and should perform an important role in performing judicial functions. For example, a sense of empathy may assist a judge in understanding the arguments that a party is attempting to make, especially when dealing with unrepresented parties who are not skilled in expressing legal concepts. Maintaining a sense of empathy also reminds a judge that treating all persons associated with the court process with dignity and respect -- be they attorneys, litigants, criminal defendants, or jurors -- is critical to maintaining the integrity of our judicial system. Thus, a judge should display empathy in the manner in which he or she deals with those who come before or perform a function of the court, but must set aside any such empathy in rendering a decision.

c. Do you think that it’s ever proper for judges to indulge their own subjective sense of empathy in determining what the law means?

Response: No.

i. If so, under what circumstances?

Response: Not applicable.

- ii. **Please identify any cases in which you have done so.**

Response: None.

- iii. **If not, please discuss an example of a case where you have had to set aside your own subjective sense of empathy and rule based solely on the law.**

Response: I must often set aside my own sense of empathy. For example, I have at times had sympathy for a social security claimant, but have nonetheless upheld the decision denying benefits because the law and case precedent required that I uphold the Commissioner's decision.

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

Response: On February 18, 2010, I received these questions from the Justice Department and drafted my answers. After discussing the questions with representatives from the Justice Department, I finalized my answers and forwarded my final responses to the Justice Department for transmission to the Committee.

5. **Do these answers reflect your true and personal views?**

Response: Yes

**Responses of Audrey Goldstein Fleissig
Nominee to the U.S. District Court for the Eastern District of Missouri
to the Written Questions of Senator Tom Coburn, M.D.**

- 1. You are currently a U.S. Magistrate Judge and, when asked about your current position, you testified that the biggest surprise to you on taking the bench was “what a tremendous challenge it is to do the job well every single day.” You further stated that judging is a “very, very difficult job,” that it has been a “tremendous surprise ... how weighty the job has felt, and that “every day [you] wake up and just hope that [you are] equal to the task that is expected of [you].” Do you have similar concerns about the job requirements if you are confirmed as a federal district court judge?**

Response: I do not have any reservations about my ability to meet the job requirements if I am fortunate enough to be confirmed as a federal district judge. Being a judge is an enormous responsibility, which requires the highest level of commitment. I make that commitment daily in my current position, and would continue to do so if confirmed.

a. How will you prepare yourself to meet these challenges?

Response: As I now do as a Magistrate Judge, I would need to continually keep abreast of legal developments and educate myself as I encounter new substantive areas of the law. I believe that my previous professional experience has prepared me well to meet the challenges of the position of a federal district judge. Prior to my appointment to the bench, I had more than ten years of experience as a civil litigator in the federal courts, and ten years of experience as a federal prosecutor, including service as the United States Attorney for the Eastern District of Missouri. I have served as a United States Magistrate Judge for more than eight years and was recently reappointed to a second term. I believe that my record as a United States Magistrate Judge demonstrates my ability to meet the challenges posed by the position for which I have been nominated.

- 2. 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. I believe that the Constitution has a fixed meaning as expressed by the Framers in the language of the document, and that it sets forth fundamental principles that do not change with the times.

- 3. Since at least the 1930s, the Supreme Court has expansively interpreted Congress’ power under the Commerce Clause. Recently, however, in the cases of *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000), the Supreme Court has imposed some limits on that power.**

- a. **Generally speaking, are *Lopez* and *Morrison* consistent with the Supreme Court's earlier Commerce Clause decisions?**

Response: Yes.

- b. **Why or why not?**

Response: In *Gonzales v. Raich*, 545 U.S. 1, 23-25 (2005), the Supreme Court harmonized these decisions and expressed its determination that *Lopez* and *Morrison* are consistent with the Supreme Court's earlier Commerce Clause decisions.

4. **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: I am bound by the Supreme Court's rulings and would follow its rulings and any binding precedent interpreting those rulings.

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

Response: If called upon to make that determination, I would follow the Supreme Court rulings and analysis and other controlling precedent.

- b. **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: I was called upon to address this issue in one case, in which the defendant asserted an Eighth Amendment challenge to the federal death penalty statute based, in part, on the assertion that the statute was inconsistent with evolving standards of decency. I rejected the argument, finding that it was foreclosed by Supreme Court case law. A lower court judge must be bound by the Supreme Court case law.

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

Response: A judge would be required to apply the analysis established by Supreme Court case law and any binding Circuit precedent interpreting that case law.

5. In your view, is it ever proper for judges to rely on contemporary foreign or international laws or decisions in determining the meaning of the Constitution?

Response: I am unaware of any case law that would permit such reliance.

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

Response: Although the Supreme Court has at times cited to or discussed foreign or international law, I am unaware of any Supreme Court cases in which the Court has actually relied on foreign or international law to determine the meaning of the Constitution. I would continue to be bound by and follow Supreme Court precedent.

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

Response: This issue under the Eighth Amendment has been presented to me only one time, and in that case I determined that certain international treaties could not serve as the basis to invalidate the federal death penalty act. I am unaware of any Supreme Court cases in which the Court has actually relied on foreign or international law to determine the meaning of the Eighth Amendment or other Amendments to the Constitution, and I would continue to be bound by and follow Supreme Court precedent.