

**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.