

Responses of Gary Scott Feinerman
Nominee to the United States District Court for the Northern District of Illinois
to the Written Questions of Senator Tom Coburn, M.D.

- 1. On April 16, 2007, you participated in a panel discussion entitled, “Confessions from a Blue State Solicitor General” for the American Constitution Society. The ACS’s web site described the program as “an open discussion between the attendees and Mr. Feinerman about shaping one’s law career while maintaining a commitment to progressive legal values.” You were asked about this panel discussion at your hearing. In particular, you were asked how you defined “progressive” to which you responded “I think that the author of that posting was using ‘progressive’ in the more modern sense, and I think it was an American Constitution Society event, and I think it was meant the way it is meant in contemporary political discourse. ... there are people who consider themselves conservative, people who consider themselves progressive or liberal.”**

- a. While I appreciate your answer at your hearing that you commit to “follow those precedents and follow those legal tools” and that “in terms of the job of a judge, those [progressive] values do not determine how a statute is interpreted or how a fact is found.” Notwithstanding your answer, do you consider yourself to be a “progressive” under ACS’s definition?**

Response: The word “progressive,” like the word “conservative,” is a subjective term that means different things to different people. I do not understand the ACS to have promulgated a definition of “progressive,” and thus respectfully am unable to answer the question. I can assure the Committee, however, that if confirmed as a district judge, I would not allow personal policy preferences to intrude on the proper judicial role.

- b. Have you used your career to maintain a commitment to progressive legal values? Please explain.**

- i. If so, please provide examples.**

Response: The term “progressive legal values” was not my term, and I do not know what the term meant to the University of Chicago law student who drafted the post on the website. Over the course of my career, I have provided public service to the state and federal governments, and in public and private practice have represented a broad range of clients – including the State in criminal cases, wardens in federal habeas cases, criminal defendants, large corporations, small corporations, taxpayers, non-profit entities, school districts, and individuals – and have undertaken pro bono representations.

- c. What advice did you give the attendees about shaping their law careers while maintaining a commitment to progressive legal values?**

Response: The term “progressive legal values” was not my term, and I do not know what the term meant to the law student who drafted the post on the website. My remarks at the University of Chicago were similar to remarks I delivered to the Appellate Lawyers Association of Illinois on October 24, 2006, an outline of which I retained and provided to the Committee. As the outline reflects, my message was that lawyers who enter public service should be prepared to discharge the responsibilities that come with those positions.

2. **On June 30, 2009, you were installed as the president of the Appellate Lawyers Association of Illinois. In your speech, you stated: “It’s the appellate judges, of course, whose opinions develop, shape and change the law.” That statement is very similar to Justice Sotomayor’s statement that “Court of Appeals is where policy is made.” Can you please explain how judges “change the law?”**

Response: In the quoted portion of my remarks, I had in mind the role of reviewing courts in applying constitutional provisions to new circumstances (developing and shaping the law) and in overturning their own precedent (changing the law). By “change the law,” I meant that judges on reviewing courts occasionally overturn their own precedents by adopting a different interpretation of the constitutional and statutory provision at issue. I did not intend in any way to suggest, and I do not believe, that federal judges should be engaged in making policy.

- a. **Do you disagree that judges changing the law could be a recipe for judicial activism?**

I do not disagree with the statement; courts should not overturn precedent (and thus change the law) in a manner inconsistent with principles of *stare decisis*.

3. **In the case of *Reyes-Hernandez v. I.N.S.*, you worked with an ACLU attorney in representing an alien who petitioned for review of a decision by the Board of Immigration Appeals denying his application for discretionary waiver of deportation. The alien had two cocaine possession convictions and the Seventh Circuit denied his petition for review.**

- a. **Did you represent the alien *pro bono*?**

Response: Yes.

- b. **Why did you feel your representation was necessary when the alien already had at least one other lawyer?**

Response: As I recall, *Reyes-Hernandez* was a case where the ACLU – as public interest organizations often do – asked a private law firm to “carry the laboring oar” as co-counsel in briefing and arguing the case. A lawyer senior to me assumed the representation and asked me to assist, and I accepted the request.

4. **In *In re B.C.*, you drafted an amicus brief on behalf of the Anti-Defamation League, the Chicago Lawyers’ Committee for Civil Rights Under Law, the Asian-American**

Institute, the Chicago Urban League, Horizons Community Services, the Illinois Ethnic Coalition, the Japanese American Citizens League, MALDEF, and others. In this brief, you argued that the Illinois Hate Crimes Law applies even where the victim is not a member of the group targeted by the perpetrator. The Appellate Court of Illinois previously had interpreted the law as applying only where the victim was a member of the racial or ethnic group targeted by the perpetrator. I understand that the Supreme Court of Illinois agreed with your interpretation of the statute and reversed, but I continue to have concerns about Hate Crimes legislation, in particular federal hate crimes legislation.

- a. The 14th Amendment guarantees “equal protection under the law” for all citizens. Can you explain why federal Hate Crimes legislation does not prioritize the protection of certain individuals over others contrary to the 14th Amendment?

Response: I understand the question to refer to 18 U.S.C. § 245(b)(2), which makes it a crime to willfully injure, intimidate, or interfere with, by force or threat of force, “any person because of his race, color, religion or national origin and because he is or has been” engaged in certain activities. I have no experience with the statute. However, if the quoted text is interpreted the way comparable text in Title VII has been interpreted, then § 245(b)(2) would protect persons from injury, intimidation and interference regardless of their race, color, religion, or national origin, and thus would not prioritize the protection of certain individuals over others. If confirmed as a district judge, my consideration of these issues would be governed by Supreme Court and Seventh Circuit precedent.

5. 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 do not believe that the Constitution is constantly evolving as society interprets it.

6. 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. Do you believe *Lopez* and *Morrison* consistent with the Supreme Court’s earlier Commerce Clause decisions?

Response: Yes.

- b. Why or why not?

Response: I believe that *Lopez* and *Morrison* are consistent with the Supreme Court’s earlier Commerce Clause decisions for the reasons expressed by the Court in *Lopez* and *Morrison* and later in *Gonzales v. Raich*, 545 U.S. 1 (2005).

7. **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: Having been expressed in an opinion for the Court, the analysis is binding precedent. If confirmed as a district judge, I would be bound by that precedent.

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

Response: I first would determine whether the Supreme Court or the Seventh Circuit had decided whether the punishment in question violated the Eighth Amendment. Any such precedent would be dispositive. In the absence of such precedent, I would consult Supreme Court case law to determine which factors govern the Eighth Amendment analysis and how to implement those factors.

- 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: Under Supreme Court precedent, which expressly rejects the proposition that the death penalty is unconstitutional in all cases, a district judge could not so find.

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

Response: In accord with the analysis set forth in the response to Question #7(a), because the Supreme Court has held that the death penalty is not unconstitutional in all cases, a district judge would not have occasion to apply the “evolving standards of decency” factors if presented with that issue.

8. **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: No, the meaning of a constitutional provision is determined by its text and history and by interpretations handed down by the Supreme Court.

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

Response: Under no circumstances would I use contemporary foreign decisions or laws to determine the meaning of 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: This is a different and broader question than Questions #8 and #8(a). In *Medellin v. Texas*, 552 U.S. 491 (2008), the Supreme Court recognized that international treaties are among our laws, *id.* at 504-505, and reiterated the

principle that “[b]ecause a treaty ratified by the United States is an agreement among sovereign powers, we have also considered as aids to its interpretation the negotiation and drafting history of the treaty as well as the postratification understanding of signatory nations,” *id.* at 507 (citing cases) (internal quotation marks omitted). If confirmed as a district judge, I would be bound by *Medellin* and other Supreme Court precedents that articulate when and under what circumstances foreign laws or decisions bear or do not bear on the proper interpretation of our laws. My understanding is that the instances are rare where, under Supreme Court precedent, courts are to consider such foreign materials.

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

Response: Please see the responses to Questions #8 and #8(a).