

Responses of Amy B. Jackson
Nominee to be United States District Judge for the District of Columbia
to the Written Questions of Senator Jeff Sessions

1. **During the 2004 presidential election, you co-authored an article entitled, “[Question]: Who’s Better for Lawyers? [Answer]: John Kerry,” published in the *Legal Times*.**

a. **Can you explain what you meant when you said that President Bush had no commitment to the law and that he “view[ed] the legal profession with contempt”?**

Response: In retrospect, the language of the article was too harsh. It was meant to suggest that the courts should play a role in the resolution of issues such as those ultimately addressed in *Haamdi v. Rumsfeld*, 542 U.S. 507 (2004) and *Boumediene v. Bush*, 553 U.S. 723 (2008). I think that the tone of the article can be attributed to the fact that it was a political piece, written on the eve of a close election, and also to the fact that it was the product of joint authorship. The piece stands out among my thirty years’ worth of writings and public statements not only because of its tone, but because it was the only political piece that I played any role in writing. When one gets past the rhetoric of the article, I believe that at bottom it expresses the view that a President should appoint judges who will follow the rule of law.

b. **Do you still stand by your statement that “the Bush presidency was secured through the legal process rather than the electoral process”?**

Response: The electoral process and the legal process were both involved in the election of President Bush.

c. **You said of President Bush’s appointment of John Ashcroft as Attorney General:**

“When Bush selected his attorney general, he chose not a distinguished leader of the bar with the stature and experience appropriate to the position, but an undistinguished politician who could not win against a deceased opponent. The choice of John Ashcroft . . . was a stick in the eye of the American electorate”

Do you still stand by that statement?

Response: No. I have a great deal of respect for the manner in which Attorney General Ashcroft sought to perform his duties during a very difficult period for the country.

- d. **You also wrote that since the terror attacks of September 11th, “the [Bush] administration has most clearly engaged in a brazen disregard of the law . . . [pursuing] policies that condoned the torture of enemy prisoners in violation of international treaties.” You also blamed Bush Administration policies for “Muslim hatred of the United States.” Do you still stand by those statements?**

Response: I did not and I do not blame the Bush Administration for the criminal actions of terrorists who target innocent civilians. At the time of the article, I was troubled by reports of torture of prisoners held by the United States, and I was impressed by statements by Sen. John McCain, Sen. Lindsay Graham, and others that such tactics were not consistent with American values and that they could ultimately be ineffective or counter-productive.

- e. **Do you still believe that the recess appointments of Judges Pickering and Pryor, and the elevation of Judge Bybee, were a “circumvention of the democratic process”?**

Response: I have a great deal of respect for the Senate’s role in the advice and consent process, and I acknowledge that recess appointments are fully constitutional.

2. **Under the Supreme Court’s decision in *United States v. Booker*, the federal sentencing guidelines are now advisory, rather than mandatory.**

- a. **If confirmed, how much deference will you afford the Sentencing Guidelines?**

Response: If I am confirmed, the Guidelines will assist me in achieving the important goals of uniformity and predictability in sentencing. Under 18 U.S.C. §3553 and Supreme court precedent, including *Rita v. United States*, 551 U.S. 338 (2007), the Guidelines serve as an important benchmark and the starting point for the sentencing determination. If confirmed, I would look to the Guidelines in accordance with the sentencing statute and the relevant Supreme Court precedents.

- b. **Do you agree that the sentence a defendant receives for a particular crime should not depend on the judge he or she happens to draw?**

Response: Yes.

- c. **Under what circumstances do you believe it appropriate for a district court judge to depart downward from the sentencing guidelines?**

Response: A sentence should be based upon a consideration of all of the factors set forth in 18 U.S.C. §3553, including proper consideration of the applicable Guideline range in accordance with the Supreme Court’s directives. As the

Supreme Court has held, any variance from the applicable Guideline range must be supported by clearly stated reasons.

3. When Justice Stevens announced his retirement, the President said that he would select a Supreme Court nominee with “a keen understanding of how the law affects the daily lives of the American people.”

- a. Do you believe judges should base their decisions on a desired outcome, or solely on the law and facts presented?**

Response: Judges should base their decisions solely on the law and facts.

- b. Do you believe a judge should consider his or her own values or policy preferences in determining what the law means?**

Response: No.

- c. During her confirmation hearings, Justice Sotomayor rejected President Obama’s so-called “empathy standard” stating, “We apply the law to facts. We don’t apply feelings to facts.” Do you agree with Justice Sotomayor?**

Response: Yes.

4. Do you believe that the Second Amendment is an individual right or a collective right? Please explain your answer.

Response: In *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), and *McDonald v. City of Chicago, Illinois*, 130 S. Ct. 3020 (2010), the Supreme Court held that the Second Amendment confers an individual right.

- a. What standard of scrutiny do you believe is appropriate in a Second Amendment challenge against a Federal or State gun law?**

Response: The Supreme Court has indicated that it should be a higher level of scrutiny than rational basis scrutiny. See *District of Columbia v. Heller*, 128 S. Ct. 2783, 2817 n. 27 (2008).

5. What is your view of the role of a judge?

Response: The role of a District Court judge is to apply the law set forth in the Constitution, statutes, and Supreme Court and appellate court precedent to the particular facts of each case in a fair and impartial fashion. When ruling on the legal questions presented to the court for decision, a judge has the responsibility to decide on a timely basis and to articulate the reasons for the decision with clarity. A District judge presides over trials, ruling on evidentiary questions and instructing the jury as to the law to be applied, and a judge can serve as the finder of facts

during motions and bench trials. It is the role of a judge to perform all of these tasks with objectivity, intellectual honesty, appropriate temperament, efficiency, sound judgment, and clear reasoning.

6. Do you believe that the death penalty constitutes cruel and unusual punishment under the Constitution? Please explain your answer.

Response: The Supreme Court has held that the death penalty comports with the Eighth Amendment except in certain specific circumstances.

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

Response: Congress has determined that certain federal crimes should be punishable by the death penalty, and the Supreme Court has held that the death penalty comports with the Eighth Amendment. If confirmed as a District Court judge, I would be bound by federal law and Supreme Court precedent.

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

Response: I received the questions from the Department of Justice Office of Legal Policy on Wednesday, September 22, 2010, and carefully drafted answers to them myself. I reviewed those answers with representatives of the Department of Justice and requested that they be submitted to the Committee.

9. Do these answers reflect your true and personal views?

Response: Yes.

**Responses of Amy B. Jackson
Nominee to be United States District Judge for the District of Columbia
to the Written Questions of Senator Al Franken**

- 1. In March 2006, you gave a speech to the Federal Practice Institute where you described more aggressive government enforcement of corporate criminal law. In this speech, you implied that the government has crossed a line, that it is asking too much of corporate defendants. Specifically, you said:**

What we used to consider cooperation is considered nothing. And what we used to consider putting up a defense is now characterized as obstructing justice. [...] Why? Why can't federal prosecutors – with the awesome reach of their subpoena and grand jury power – why can't they do their own jobs anymore? [...] Instead of building cases for trial, [...] [they're] putting enormous pressure on you to put enormous pressure on your officers and employees to coerce pleas [and] cooperation. [I] can't understand why self respecting [sic] prosecutors want to take this route.

Only answer: because they can.

Is the Department of Justice really being too tough on corporations?

Response: No. As a former federal prosecutor, I appreciate the importance of vigorous criminal enforcement and corporate compliance.

The intent behind the comments described above was not to question the need for tough criminal prosecution of corporate crime, but to discuss a policy that was being used at the time to achieve those ends that affected individual employees. In particular, I was addressing a Department of Justice policy that was facing strong criticism at the time not only from the defense bar, but also the ABA, business leaders, the ACLU, and Members of Congress from both parties, including the bipartisan leadership of the Senate Judiciary Committee. In response to these concerns, the policy has since been rescinded.

At that time, Departmental policy governing whether prosecutors should seek criminal charges against the business entities themselves -- as opposed to just the individuals involved -- was set out in a 2003 memorandum issued by the then Deputy Attorney General, Larry D. Thompson, entitled: Principles of Federal Prosecution of Business Organizations. The "Thompson Memorandum," as it came to be known, listed a series of factors prosecutors should consider when making a charging determination including the company's "willingness to cooperate in an investigation of its agents." The Memorandum stated that the factors to be considered in assessing the "adequacy" of that cooperation should include: whether the company waived its attorney-client privilege and attorney work product protection, and whether it was advancing attorneys' fees for the individuals under investigation or providing them with information under a joint defense agreement.

After I described the Thompson Memorandum, I made the comments based on the notes that are excerpted from page 8 of my outline above. Speaking as a former federal prosecutor, I asked why prosecutors would need to call for attorney work product given the investigative tools and the skill they had at their disposal. The tone of the remarks reflected the serious concerns at that time that were animating many defense attorneys who represented individuals and employees at that time, as well as others. But I did not suggest at any point that corporations should not fully cooperate with criminal investigations, or that culpable individuals should not be punished.

In response to these widespread concerns, the Department of Justice revised the policy in the summer of 2008. See <http://www.justice.gov/opa/pr/2008/August/08-odag-757.html> (DOJ press release announcing the revision of the Thompson memo). The Principles of Federal Prosecution of Business Organizations adopted in 2008 under Attorney General Mukasey remain the policy today. See *U.S. Attorneys Manual*, 9-28.710, 720, and 730.

These revisions covered all of the concerns that I raised in my talk in March of 2006.

After everything we have seen in this most recent financial meltdown, would you say these same words today?

Response: No. The revision of the Department's policies concerning corporate cooperation has alleviated all of the concerns I was expressing at the time.

- 2. I'm concerned that our courts have become far too cozy with big business. The Roberts Court is an exemplar of this. This is a Court that has made it easier for corporations to discriminate against older Americans. It's made it easier for corporations to keep their employees out of court through secret, binding arbitrations. And it's made it harder for investors to recover money from the firms that have defrauded them.**

What do you think is the proper relationship between the federal courts and corporations?

Response: The role of the federal courts is to fairly apply all statutory and Constitutional provisions and to adhere to the law, including the law governing corporations as it is set forth by Congress. District Court judges are bound to follow the precedents of the Supreme Court and the Courts of Appeals in performing that function. It is not the role of District Judges to accord special rights not found in law to corporations who appear before them. It is the role of Congress to expand or restrict the rights and obligations of corporations or their employees.

Responses of Amy B. Jackson
Nominee to be United States District Judge for the District of Columbia
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. I do not believe that the Constitution is constantly evolving as society interprets it.

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 familiar with the context in which this statement was made or what Justice Brennan has said about how the Constitution’s purpose could or should inform its interpretation. A District Judge should look to the language of the Constitution and to Supreme Court and appellate court precedent interpreting that language in an effort to apply the principles embodied in the Constitution to the circumstances presented in a particular case.

- 2. 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 it is the role of the legislature, and not the courts, to determine whether and how evolving social views should be incorporated in law.

- 3. 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: No.

- 4. Is any transaction involving the exchange of money subject to Congress’s Commerce Clause power?**

Response: The Supreme Court has held that the scope of the Commerce Clause is broad, but not unlimited. If I am confirmed and I am presented with a case involving the application of the Commerce Clause, I would carefully read the statute that is the subject of the lawsuit and apply the relevant Supreme Court and D.C. Circuit precedents, including *United States v. Lopez*, 514 U.S. 549 (1995), and *Morrison v. United States*, 529 U.S. 598 (2000).

5. 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*, 128 S. Ct. 2783 (2008), the Supreme Court held that the Second Amendment protects an individual right. In *McDonald v. City of Chicago, Illinois*, 130 S. Ct. 3020, (2010), the Court stated that the *Heller* decision “did not cast doubt on such longstanding regulatory measures such 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 or government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.’” The Court did not specify what other limitations remain, if any.

a. Is it 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: If I am confirmed and I am presented with a case involving the interpretation of the Second Amendment, I would carefully read the statute that is the subject of the lawsuit to understand its terms and its scope, and apply Supreme Court and D.C. Circuit precedents, including *Heller*, *McDonald*, and any future cases addressing this issue.

6. 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: If confirmed as a District Court judge, I would be bound by the holding and the analysis set forth in the majority opinion in *Roper*.

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: In *Roper*, the Supreme Court stated: “we have established the propriety and affirmed the necessity of referring to ‘the evolving standards of decency that mark the progress of a maturing society’ to determine which punishments are so disproportionate as to be cruel and unusual.” 543 U.S. at 560 – 61, quoting *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958)(plurality opinion). If confirmed as a District Judge, I would be bound to follow these and other Supreme Court precedents and any applicable decisions of the U.S. Court of Appeals for the District of Columbia Circuit.

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

Response: If confirmed as a District Judge, I would follow the directives set forth in Supreme Court precedent as to what factors should be considered in making this determination.

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: The Supreme Court determined that the death penalty is constitutional, and it has reiterated that determination in many subsequent opinions. A District Judge would be bound by those precedents.

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

Response: Any analysis should be conducted by consideration of the factors set forth in Supreme Court and appellate court precedent.

7. 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: It would only be proper to rely on foreign or international law in those circumstances in which Supreme Court precedent, D.C. Circuit precedent, or a statute requires the District Court to do so.

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: If confirmed as a District Judge, I would only consider foreign law in those circumstances in which it is required by Supreme Court precedent, D.C. Circuit precedent, or a statute.

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 am not aware of any circumstance where that would be the case.

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

Response: If confirmed as a District Judge, I would follow Supreme Court precedent to ascertain in what circumstances, if any, foreign law should be taken into consideration in interpreting any Constitutional amendment.