

Responses of Beryl A. Howell
Nominee to be United States District Judge for the District of Columbia
to the Written Questions of Senator Jeff Sessions

1. According to a May 2009 presentation you gave at the 18th Annual National Seminar on the Federal Sentencing Guidelines, only roughly 40% of sentences handed out by the D.C. District Courts are within the federal sentencing guidelines. Of course, that means that around 60% of all sentences are departures from the guidelines. If you are confirmed as a District Judge, you will be among the judges within the D.C. District Court imposing sentences.

a. Do you agree that the sentencing guidelines, if applied properly and followed faithfully, can go a long way to assure predictability and uniformity in sentencing?

Response: Yes.

b. I recognize a substantial number of the downward departures in the District of D.C. are requested by the government; however, if you are confirmed, do you think you would conclude the sentencing guidelines got it wrong more than half the time?

Response: Should I be confirmed as a District Court Judge for the District of Columbia, I would adhere to a three-step sentencing process, in accordance with the policy statements of the U.S. Sentencing Commission and consistent with the directions of the U.S. Supreme Court. Specifically, first, I would determine correctly the applicable guideline range. *See* 18 U.S.C. § 3553(a)(4); *Rita v. United States*, 551 U.S. 338, 347-48 (2007) (a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range); *Gall v. United States*, 552 U.S. 38, 49 (2007) ("As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark."). Second, I would consider whether policy statements or commentary in the Guidelines Manual warrant consideration in imposing sentence. *See* 18 U.S.C. § 3553(a)(5). Finally, I would consider the factors set forth in 18 U.S.C. § 3553(a), taken as a whole, to determine the appropriate sentence in each individual case. As part of the process, I would consider fully and fairly the arguments made by the government and defendant, and explain the reasons for the sentence imposed.

2. On April 30, 2008, you gave a presentation at the White Collar Women's Lunch entitled "Data Detours: E-Discovery and the EU Data Protection Directive." In that presentation, you discussed the effect European law has on discovery in cases involving multinational corporations. I recognize your presentation was about the practical consequences of foreign law, not the interpretation of American law. However, do you believe the multinational nature of the business environment

makes it permissible for American judges to take foreign law into account when determining the meaning of America’s laws and Constitution?

Response: No. Consideration of foreign law is not appropriate in interpreting the meaning of domestic law and the U.S. Constitution, unless such consideration is required by statute or the Constitution, or controlling precedent from the U.S. Supreme Court or the U.S. Court of Appeals for the District of Columbia Circuit.

3. **During the 2008 presidential campaign, President Obama 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. **Without commenting on 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 am honored that President Obama nominated me to the position of District Court Judge for the District of Columbia and that my record of educational and professional achievements met his criteria.

b. **During her confirmation hearing, Justice Sotomayor rejected this 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.

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

Response: In consideration of a case, a district court judge should find the relevant law from the text of the statute or the Constitution and binding precedent from the Supreme Court and appellate courts, determine the facts fairly from the evidence presented by the parties, and then apply the law to the facts, with clear articulation of the findings of fact and conclusions of law to the parties. Empathy does not play a role.

d. **Do you think that it is 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.

e. Following Justice Stevens' 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." 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 a diligent application of the law to fairly evaluated facts that are presented by the parties.

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

Response: I prepared my responses after careful consideration of each question and any relevant legal issues raised. I discussed my responses with representatives of the Department of Justice and requested that my responses be transmitted to the Committee.

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

Response: Yes.

Responses of Beryl A. Howell
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: The Constitution embodies principles that district courts are called upon to apply to specific factual situations, guided by the text of the Constitution, the historical record reflective of the purpose and intent of the provision at issue, and binding precedent from the Supreme Court and appellate courts. While the factual situations may change, the Constitution does not.

- 2. 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: In context, Justice Brennan’s quoted statement from his October 12, 1985 speech at Georgetown University titled “Constitutional Interpretation,” is immediately followed by his statement that: *“Thus, for example, when we interpret the Civil War Amendments to the charter—abolishing slavery, guaranteeing blacks equality under law, and guaranteeing blacks the right to vote—we must remember that those who put them in place had no desire to enshrine the status quo. Their goal was to make over their world, to eliminate all vestige of slave caste.”* Justice Brennan appears to be suggesting that interpretation of the Constitution should take into account the original purpose of the Constitutional provision at issue. I believe that when presented with a case that requires application of the Constitution to a specific factual situation, a district court judge must be guided by the text of the Constitution, the historical record reflective of the purpose and intent of the provision at issue, and binding precedent from the Supreme Court and appellate courts.

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

Response: No. In applying the Constitution to a specific factual situation, a district court judge must be guided by the text of the Constitution, the historical record reflective of the purpose and intent of the provision at issue, and binding precedent from the Supreme Court and appellate courts.

4. 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: In consideration of a case, a district court judge should find the relevant law from the text of statute or the Constitution and binding precedent from the Supreme Court and appellate courts, determine the facts fairly from the evidence presented by the parties, and then apply the law to the facts, with clear articulation of the findings of fact and conclusions of law to the parties. Empathy does not play a role.

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

Response: Whether a particular transaction involving the exchange of money would be subject to Congress’s Commerce Clause power would depend on whether the transaction falls within three categories of activity identified by the Supreme Court as covered by the Clause: namely, the channels of interstate commerce; instrumentalities of, or persons or things in, interstate commerce; and activities having a substantial relation to interstate commerce. *United States v. Lopez*, 514 U.S. 549 (1995).

a. In light of the Court’s Commerce Clause jurisprudence, if the government can mandate that every man, woman, and child purchase a health insurance policy, can the federal government require citizens to join a gym (and therefore lower national health care costs)?

Response: As noted in the response above, the Supreme Court has set out a framework for determining whether federal regulations fall within the scope of authority vested in Congress by the Commerce Clause. A federal regulation requiring citizens to join a gym would be subject to analysis under this framework.

i. If not, what in the Constitution prevents this?

Response: The powers granted to Congress under Article I of the Constitution are enumerated, with limits on their scope, as well as bounded by the protections in the Bill of Rights and other constitutional amendments.

ii. In a recent report discussing the constitutionality of the individual mandate, the Congressional Research Service (CRS) stated: “whether Congress can use its Commerce Clause authority to require a person to buy a good or service and whether this type of required participation can be considered economic activity” is “a novel issue.” Do you agree with CRS that this is a novel issue for the courts to decide?

Response: In view of the recent enactment of the Patient Protection and Affordable Care Act, Pub. L. 111-148, 124 Stat. 119 (2010), courts

have yet to determine the constitutionality under the Commerce Clause of section 1501, the Minimum Essential Coverage Provision. To do so, courts will analyze the statute under the framework provided by the Supreme Court.

6. 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 the right to possess a handgun in the home for the purpose of self-defense. The Supreme Court expressly noted in *McDonald v. City of Chicago, Illinois*, 130 S. Ct. 3020 (2010), in applying the Second Amendment protection to the States, that the holding in *Heller* “did not cast doubt on such longstanding regulatory measures 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 and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.’” The currently recognized limitations on the individual Second Amendment right are those expressly noted by the Supreme Court; whether any additional limitations apply may be resolved in future cases.

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: The Supreme Court has expressly noted that some limitations exist on the scope of the Second Amendment right but not as narrowly as this question suggests. Whether any additional limitations apply may be resolved in future cases.

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: In evaluating challenges to sentences, including capital punishment, brought under the Eighth Amendment to the Constitution, the Supreme Court has looked beyond historical conceptions of whether a punishment is cruel and unusual to “the evolving standards of decency that mark the progress of a maturing society.” *Graham v. Florida*, 130 S. Ct. 2011, 2021 (2010) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)(plurality opinion)). Should I be confirmed as a district court judge, I would follow the law regarding imposition of the death penalty, both as directed by statute and in binding precedent from the Supreme Court and the Court of Appeals for the District of Columbia Circuit.

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 explaining the Eighth Amendment’s prohibition on infliction of cruel and unusual punishments, the Supreme Court has stated that the “standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.” *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2649 (2008). Should I be confirmed as a district court judge, I would follow the law regarding imposition of the death penalty, both as directed by statute and in binding precedent from the Supreme Court and the Court of Appeals for the District of Columbia Circuit.

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

Response: Should I be confirmed as a district court judge, I would follow the law regarding imposition of the death penalty, both as directed by statute and in binding precedent from the Supreme Court and the Court of Appeals for the District of Columbia Circuit.

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 has held that the death penalty is constitutional, with exceptions in certain circumstances, such as imposition of the death penalty for nonhomicide crimes against individuals, *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2649 (2008), for defendants who committed their crimes before the age of 18, *Roper v. Simmons*, 543 U.S. 551 (2005), or whose intellectual functioning is in a low range, *Atkins v. Virginia*, 536 U.S. 304 (2002). Accordingly, should I be confirmed as a district court judge, I would follow the law that the death penalty is not unconstitutional in all cases.

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

Response: The Supreme Court has looked at several factors in determining whether a sentence is unconstitutionally “cruel and unusual” under evolving standards of decency, including (1) “objective indicia of society’s standards, as expressed in legislative enactments and state practice” to determine whether there is a national consensus against the sentencing practices at issue, *Roper v. Simmons*, 543 U.S. 551, 563 (2005); (2) “the standards elaborated by controlling precedents and by the Supreme Court’s own understanding and interpretation of the Eighth Amendment’s text, history, meaning and purpose,” *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2649 (2008); and (3) the Supreme Court’s exercise of its “own independent judgment whether the punishment in question violates the Constitution.” *Roper, supra*, at 564. In the judicial exercise of independent judgment, the Supreme Court has considered such factors as whether the challenged sentencing practice serves legitimate penological goals, the proportionality of the sentence to the defendant’s crime, and the offender’s culpability and characteristics. *Roper, supra*, at 568. Should I be confirmed as a district court judge, I would follow the law regarding imposition of the death penalty, both as directed by statute and in binding precedent from the Supreme Court and the Court of Appeals for the District of Columbia Circuit.

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: Consideration of foreign law is not appropriate in interpreting the meaning of domestic law and the U.S. Constitution, unless such consideration is required by statute, the Constitution or controlling precedent from the U.S. Supreme Court or the U.S. Court of Appeals for the District of Columbia Circuit.

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: Consideration of foreign law is not appropriate in interpreting the meaning of domestic law and the U.S. Constitution, unless such consideration is required by statute, the Constitution or controlling precedent from the U.S. Supreme Court or the U.S. Court of Appeals for the District of Columbia Circuit.

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

Response: No.

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

Response: Should I be confirmed as a district court judge, I would not consider foreign law in interpreting the meaning of domestic law and the U.S. Constitution, unless such consideration is required by statute, the Constitution or controlling precedent from the U.S. Supreme Court or the U.S. Court of Appeals for the District of Columbia Circuit.