

Questions of Senator Tom Coburn, M.D.

*Nomination of Christopher H. Schroeder, to be an Assistant Attorney General, Office of Legal Policy
United States Senate Committee on the Judiciary*

July 1, 2009

1. In a 1991 op-ed entitled “Low Roads to the High Court,” you stated “The Reagan and Bush Administrations have permitted the Supreme Court nomination process to be captured by ultraconservatives who want a judiciary that is far to the right of the nation as a whole.” Do you believe the current Justices on the Supreme Court who were nominated by Presidents Reagan and Bush are “far to the right of the nation as a whole?”

Answer: Such an assessment of a sitting Justice should be done on the basis of his or her entire body of opinions. On that basis, none of the current Justices is far to the right of the nation as a whole.

- a. If so, which positions in particular do you believe are “far to the right?”

Answer: See the response immediately above.

2. You have stated that judicial doctrine should incorporate “the evolving understandings of the Constitution forged through social movements, legislation, and historical practice.” You also said that “[i]n many instances, a court cannot be faithful to the principle embodied in the text unless it takes into account the social context in which the text is interpreted. The relevant context includes not only social conditions and facts about the world, but also public values and social understandings as reflected in statutes, common law, and other parts of the legal landscape.”

- a. When a judge takes into account the “evolving understanding of the Constitution” and “public values and social understandings” does that not give them more latitude to insert their own policies and preferences into their opinions? Why or why not?

Answer: I do not believe taking those matters into account gives judges more latitude. When applying the Constitution in a case, a judge’s responsibility is to remain faithful to the written Constitution, not to insert his or her own policies and preferences.

- b. In *Roper v. Simmons*, Justice Kennedy relied in part on the “evolving standards of decency” to hold that capital punishment for any murderer under age 18 was unconstitutional. Do you agree with Justice Kennedy’s ruling?

*Answer: Although I have not studied the evidence upon which Justice Kennedy relied in *Roper*, I do 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.*

- c. How would you describe judicial activism?

*Answer: I agree with Judge Frank Easterbrook who has written that the term “judicial activism” is “notoriously slippery” (Frank H. Easterbrook, *Do Liberals and Conservatives Differ in Judicial Activism?* 73 *U. Colo. L. Rev.* 1401, 1401 (2002)). Because it means*

different things to different people, I do not think it is a phrase that helps us understand Constitutional interpretation or the work judges undertake.

3. President Obama has described the types of judges that he will select 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.” What role do you believe that empathy should play in a judge’s consideration of a case?

Answer: I agree with the President, who has also said that a judge should be an individual who is “dedicated to the rule of law, who honors our constitutional traditions, who respects the integrity of the judicial process and the appropriate limits of the judicial role,” but that empathy is also “an essential ingredient for arriving at just decisions and outcomes.” As such, all of these qualities should play a role in a judge’s consideration of a case.

- a. What role will empathy play in your vetting process for future judicial nominees?

Answer: The traditional function of the Assistant Attorney General for the Office of Legal Policy is to evaluate candidates for judicial nomination with respect to their professional qualifications, integrity, temperament and other criteria established by the President. To the extent that it is important that nominees for judicial vacancies be able to see cases from all points of view and understand the positions of the variety of litigants that come before them, empathy should play some part in the vetting process. If confirmed, I would carry out the traditional function of the Office of Legal Policy.

- b. Do you believe President Obama’s judicial nominees thus far embody this idea of empathy toward certain groups?

Answer: I have not yet been involved in evaluating any of President Obama’s judicial nominees, so I cannot express an opinion.