

Responses of Paul A. Engelmayer
Nominee to be United States District Judge for the Southern District of New York
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: I do not. The Constitution’s text and principles are fixed. The Constitution can be altered only by amendment.

- 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: No.

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

Response: No. Considerations such as legislative norms or historical practices are for legislators to take into account in fashioning legislation, should they so wish. They are not for judges to consult in ascertaining the meaning or application of the Constitution, except in those limited contexts in which binding Supreme Court precedent instructs otherwise.

- 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: No. I do believe a judge must show dignity to all parties and counsel in his or her courtroom, and must be a good listener. Those traits, however, are quite distinct from empathy.

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

Response: No, because that is not the test that the Supreme Court has used to determine the scope of Congress’s power under the Commerce Clause. Rather, in *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000), the Court ruled that that power, while broad, is not unlimited, and identified three distinct categories of activity that are covered by the Commerce Clause. These are activities involving the channels of interstate commerce; instrumentalities of, or persons or things, in interstate commerce; and activities having a substantial relationship to interstate commerce. Under those precedents, the issue as to a transaction involving the exchange

of money would appear to be whether that transaction involved one of these three categories of activity.

6. **The U.S. Supreme Court held in *District of Columbia v. Heller*, 554 U.S. 570 (2008), that the Second Amendment of the United States Constitution “protects an individual right to possess a firearm unconnected to service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home.” As Justice Scalia’s opinion in *Heller* pointed out, Sir William Blackstone, the preeminent authority on English law for the Founders, cited the right to bear arms as one of the fundamental rights of Englishmen. Leaving aside the *McDonald v. Chicago* decision, do you personally believe the right to bear arms is a fundamental right?**

Response: As noted, the Supreme Court held in *Heller* that the Second Amendment confers an individual with the right to possess a firearm unconnected to service in a militia, and the Court more recently held in *McDonald* that that constitutional right is also applicable against the states. If confirmed as a United States District Judge, I will faithfully follow these (and any future) Supreme Court precedents in this area, as well as any applicable precedents of the United States Court of Appeals for the Second Circuit. I do not have any personal beliefs that would interfere with my following these precedents.

- a. **Do you believe that explicitly guaranteed substantive rights, such as those guaranteed in the Bill of Rights, are also fundamental rights? Please explain why or why not.**

Response: I do not have a personal view about the circumstances under which substantive rights that are explicitly protected from intrusion by the federal government are also fundamental rights applicable as against the states. I have not read significantly in this area since law school. If confirmed as a United States District Judge, and if a case presenting the question whether a particular substantive right guaranteed in the Constitution was also a fundamental right protected against intrusion by the states, I will follow Supreme Court (and Second Circuit) precedent in the area, and if no precedent were controlling, I would carefully apply the methodology used by the Supreme Court to consider questions of this nature.

- b. **Is it your understanding of Supreme Court precedent that those provisions of the Bill of Rights that embody fundamental rights are deemed to apply against the States? Please explain why or why not.**

Response: Same answer as to 6(a), above. I do not have a view about this subject.

- c. **The *Heller* Court further stated that “it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a pre-existing right.” Do you believe that the Second Amendment, like the**

First and Fourth Amendments, codified a pre-existing right? Please explain why or why not.

Response: I do not have a view on this subject.

- 7. Some have criticized the Supreme Court's decision in *Heller* saying it "discovered a constitutional right to own guns that the Court had not previously noticed in 220 years." Do you believe that *Heller* "discovered" a new right, or merely applied a fair reading of the plain text of the Second Amendment?**

Response: The Supreme Court's decision in *Heller* states clearly that it is applying the text of the Second Amendment, as informed / confirmed by historical practices and understandings.

- a. Similarly, during his State of the Union address, the President said the Supreme Court's decision in *Citizens United v. FEC*, 558 U.S. ____ (2010), "reversed a century of law" and others have stated that it abandoned "100 years of precedent." Do you agree that the Court reversed a century of law or 100 years of precedent in the *Citizens United* decision? Please explain why or why not.**

Response: I do not have a view on this issue. If confirmed as a United States District Judge, I would be bound by, and would faithfully follow, the Court's decision in *Citizens United*.

- 8. What limitations remain on the individual Second Amendment right now that it has been incorporated against the States?**

Response: *Heller* and *McDonald* recognize that there are limitations on the constitutional right to individual gun possession, but they do not resolve what those limitations are, or settle the legality of the various potential restrictions that units of government may seek to impose on such possession. Those issues are currently being litigated across the country. If confirmed, I would closely study *Heller* and *McDonald* (which I have not done, beyond reading each decision once, shortly after it was handed down) and follow applicable precedent in determining the legality of any restrictions challenged in a case before me.

- a. In *McDonald v. Chicago*, the majority wrote: "We made it clear in *Heller* that our holding 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.'" What if a state passed a law imposing a \$2,000 registration fee as a condition for the commercial sale of a firearm? Without stating how you would rule in such a case, please explain how you would conduct your analysis to**

determine whether the fee violated the Second Amendment right to keep arms?

Response: Such a law would present, among others, the question whether a state-imposed fee of this nature upon firearm transactions is tantamount to a ban on gun possession, and as such is inconsistent with the decisions in *Heller* and *McDonald*. I would review those two precedents (and any other Supreme Court decisions, or Second Circuit decisions, that by then had been issued in this area) for guidance. I would also review, for guidance, any post-*Heller* decisions by other federal courts in the area of the Second Amendment. More generally, I expect that I would review Supreme Court and Second Circuit doctrine bearing on the circumstances under which monetary fees, when attached to the exercise of a constitutional right, impermissibly infringe upon that right. If such doctrine made such an inquiry relevant, it might be relevant to inquire as to the basis or justification for the fee in question, and whether there was adequate justification, under the applicable doctrine, for imposing such a fee on the acquisition of a gun.

i. To what cases or authorities would you refer? Please be specific.

Response: See discussion immediately above.

b. What if a state outlawed the carrying and possession of firearms on the grounds of hospitals that have psychiatric wards, regardless of whether they are private? Without stating how you would rule in such a case, please explain how you would conduct your analysis to determine whether that regulation complied with the Second Amendment's guarantee of the right to bear arms.

Response: Such a law would present, among others, the question whether a law that prohibited the carrying and possession of firearms in hospitals as a whole – and did not confine such a prohibitions to the psychiatric wards within such hospitals – is consistent with the Second Amendment right. Here, too, I would review the decisions in *Heller* and *McDonald*, and any post-*Heller* decisions in the Supreme Court or the Second Circuit, and, if those decisions were not decisive on this question, other post-*Heller* Second Amendment decisions in the federal courts, for guidance as to the applicable legal doctrine and the scope of the Second Amendment right. One relevant question would be whether there is an absolute right to carry and possess firearms outside of such sensitive areas, or, alternatively, whether a legislature potentially retains latitude to restrict access to firearms in places that are not themselves sensitive but from which there may be ready access to a sensitive area. Depending on the answer to that legal question, it might then be relevant to inquire as to the basis or justification for banning the carrying or possession of a gun in the hospital as a whole, and whether there was adequate justification, under the applicable doctrine, for doing so rather than more narrowly drawing the area within the hospital in which possession was forbidden.

i. Could a hospital qualify as a “sensitive place?”

Response: I do not know and would need to do legal research to form an opinion on this question.

ii. To what cases or authorities would you refer? Please be specific.

Response: I would consult the same authorities as discussed in my responses to questions 8(a) and (b).

c. Is the Second Amendment 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: As noted, *Heller* and *McDonald* hold that there is an individual right to gun possession, but that there are also permissible limitations on individual gun possession. The scope of that right, and the related question of the extent to which that right applies outside the context at issue in those cases, is the subject of pending cases around the country. If confirmed as a United States District Judge, I would faithfully apply the applicable precedents in this area from the Supreme Court and the United States Court of Appeals for the Second Circuit.

9. 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 United States District Judge, I would be required to follow the law as set forth by the Supreme Court, under the doctrine of *stare decisis*. Justice Kennedy’s analysis in *Roper* is binding precedent, and I would therefore follow it.

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: If confirmed as a United States District Judge, I would be required to follow the Supreme Court’s precedent. In deciding a case under the Eighth Amendment, I would be required to, and would, adhere to the analytic framework set out in the Court’s decisions analyzing what constitutes “cruel and unusual punishment,” including *Roper v. Simmons*.

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

Response: If confirmed as a United States District Judge and required under Eighth Amendment precedent to make any such determination, I would follow the analytic approach used by the Supreme Court in this area.

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 clearly held that the death penalty is constitutional, except in discrete circumstances. As a District Judge, I therefore could not so rule.

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

Response: In light of governing Supreme Court precedent, a District Judge could not, consistent with the rule of law and the principle of *stare decisis*, properly engage in any inquiry as to whether the death penalty is unconstitutional in all cases. I would not engage in any such inquiry.

e. When determining what the “evolving standards of decency” are, justices have looked to different standards. Some justices have justified their decision by looking to the laws of various American states,¹ in addition to foreign law, and in other cases have looked solely to the laws and traditions of foreign countries.² Do you believe either standard has merit when interpreting the text of the Constitution?

Response: I do not believe it is proper for a judge to rely on foreign or international law when interpreting the text of the United States Constitution.

i. If so, do you believe one standard more meritorious than the other? Please explain why or why not.

Response: Not applicable.

10. In your view, is it ever proper for judges to rely on foreign or international laws or decisions in determining the meaning of the Constitution?

Response: No. I do not believe it is ever proper for judges to rely on foreign or international law or decisions in determining the meaning of the United States Constitution.

a. Is it appropriate for judges to look for foreign countries for “wise solutions” and “good ideas” to legal and constitutional problems?

Response: I cannot think of a situation in which a foreign nation's “solutions” or “ideas” would inform interpretation of our laws.

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

Response: I would not consider foreign law when interpreting the Constitution, unless a Supreme Court decision directed federal judges to do so.

¹ *Roper v. Simmons*, 543 U.S. 551, 564-65.

² *Graham v. Florida*, 130 S.Ct. 2011, 2033-34.

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

Response: Foreign or international law may be relevant to the interpretation of our laws only in very narrow circumstances, such as where a domestic law has been enacted to implement an obligation under an international treaty, or where domestic law incorporates a foreign law by reference.

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

Response: No.