

Responses of J. Paul Oetken
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: No, I do not agree with the proposition that the Constitution is constantly evolving as society interprets it. While courts may apply the Constitution to new contexts, the Constitution itself may be changed only through the amendment process set forth in Article V.

- 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: I do not believe that the Constitution changes as a result of social movements, legislation, or historical practice. I believe that district judges are bound by the text of the Constitution and must follow the relevant precedents of the Supreme Court and their particular circuit in interpreting that text.

- 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: I believe that judges should decide cases on the basis of a faithful interpretation of the law and an impartial application of the law to the facts, not on the basis of sympathy for a particular party or outcome.

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

Response: In *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), the Supreme Court held that Congress’s power under the Commerce Clause is not unlimited, and the Court explained the limitations of that power. If confirmed as a district judge, I would apply those precedents and any other applicable precedents of the Supreme Court and the Second Circuit under the Commerce Clause.

- 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: In *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), the Supreme Court held that the Second Amendment right to keep and bear arms is applicable to the States through the Fourteenth Amendment. In reaching that decision, the Court concluded that the right to keep and bear arms is a fundamental right. If confirmed as a district judge, I would follow that precedent.

- 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: The Supreme Court explained in *McDonald v. City of Chicago*, 130 S. Ct. at 3036, that certain rights – including most (though not all) of the rights guaranteed in the Bill of Rights – have been determined by the Court to be “fundamental” to our Nation’s “scheme of ordered liberty” or “deeply rooted in this Nation’s history and tradition,” and accordingly have been deemed to apply against the States.

- 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: Please see Response to Question 6(a).

- 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: The Supreme Court in *Heller v. District of Columbia*, 554 U.S. 570 (2008), stated that “the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right.” If confirmed as a district judge, I would follow the Court’s decision in *Heller* as well as any other applicable precedents of the Supreme Court.

- 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 the *Heller* case was based on the text of the Second Amendment, and if confirmed as a district judge I would follow that decision as well as any other applicable precedents of the Supreme Court.

- 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: The Supreme Court's decision in *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010), was based on the First Amendment and the Court's application of a long line of precedents interpreting the First Amendment, some of which the Court described as conflicting lines of precedent. If confirmed as a district judge, I would follow that decision as well as any other applicable precedents of the Supreme Court.

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

Response: In *McDonald*, the Supreme Court reiterated that its 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.'"

- 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: As noted above, the Supreme Court in *Heller* and *McDonald* described certain types of laws that would not infringe the Second Amendment under those decisions, but the Court did not delineate the boundaries of the right to keep and bear arms in all circumstances. If confirmed as a district judge and if faced with a specific state law such as the one described in the question, I would follow the Supreme Court's decisions in *Heller* and *McDonald* as well as any

other applicable precedents of the Supreme Court and the Second Circuit; I would apply those precedents to the facts of the case.

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

Response: Please see Response to Question 8(a).

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: Please see Response to Question 8(a).

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

Response: Please see Response to Question 8(a).

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

Response: Please see Response to Question 8(a).

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: Please see Response to Question 8(a).

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 district judge, I would be obligated to follow binding precedent of the Supreme Court, and I would apply the Court’s decision in *Roper v. Simmons* as well as any other applicable precedent of the Court.

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: The Supreme Court has held in several cases that “evolving standards of decency that mark the progress of a maturing society” are relevant in determining what constitutes “cruel and unusual punishments” under the Eighth

Amendment. If confirmed as a district judge, I would follow those precedents as well as any other applicable precedents of the Court.

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

Response: I would follow the standards set forth in the relevant precedents of the Supreme Court, such as *Roper v. Simmons*, 543 U.S. 551 (2005).

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 not unconstitutional in all cases. I do not believe that a lower court judge could hold otherwise.

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

Response: Because I do not believe that a lower court judge could hold the death penalty unconstitutional in all cases, I do not believe that any such analysis would be warranted.

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: If confirmed as a district judge, I would not consider the laws of the States or foreign law in interpreting the Constitution unless directed to do so by applicable precedent of the Supreme Court. In the specific context of the Eighth Amendment, the Supreme Court has held that both State laws (*Roper*, 543 U.S. at 564), and foreign laws (*id.* at 575) are relevant in determining the “evolving standards of decency” that give meaning to the Cruel and Unusual Punishments Clause. However, the Court has also stated that foreign laws are not “controlling” because “the task of interpreting the Eighth Amendment remains our responsibility.” *Id.*

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

Response: Please see Response to Question 9(e).

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?

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

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

Response: The United States Constitution is properly interpreted by reference to domestic legal sources, not foreign or international sources. If confirmed as a district judge, I would not interpret the Constitution by reference to foreign or international law unless directed to do so by applicable Supreme Court precedent.

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

Response: I do not believe that district judges should look to foreign countries for wise solutions or good ideas unless directed to do so by applicable Supreme Court precedent.

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

Response: If confirmed as a district judge, I would not consider foreign law in interpreting the Constitution unless directed to do so by applicable Supreme Court precedent.

- 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 believe that the Constitution and U.S. laws should be interpreted by reference to U.S. legal sources, not foreign sources.

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

Response: If confirmed as a district judge, I would not consider foreign law in interpreting any amendment to the Constitution unless directed to do so by applicable Supreme Court precedent.