

Responses of Richard Gary Taranto
Nominee to be United States Circuit Judge for the Federal Circuit
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.

a. If not, please explain.

Response: The Constitution grants only the powers and protects only the rights that have been included and remain in it through its original adoption or the duly authorized processes of amendment. A court’s job is to interpret and apply the Constitution’s provisions, not to add new powers or rights evolved outside the constitutionally prescribed processes of constitutional creation and amendment.

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

Response: No.

a. If not, please explain.

Response: The principles of the Constitution do not change unless the Constitution has been changed.

- 3. What principles of constitutional interpretation would you look to in analyzing whether a particular statute infringes upon some individual right?**

Response: As an appellate judge, I would look to those sources that governing Supreme Court precedent deems relevant as a methodological matter to resolution of a constitutional issue. I would follow any on-point and still-good precedent on the particular issue, whether from the Supreme Court or from my own court. To the extent that precedent is not controlling on the particular point, I would examine the text of the constitutional provision at issue, what the language means by itself and in the context of the Constitution as a whole, what binding precedent prescribes about the general method of applying that provision and says about other issues bearing on the particular question, and what light is authoritatively shed on the meaning of the provision by Framers-era sources and other relevant history. I would examine what courts have said on the matter in decisions that do not serve as binding precedent for my court. And I would follow the canon favoring adoption of reasonable interpretations of statutes to avoid unconstitutionality.

- 4. 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. You filed an *amicus* brief in this case on behalf of the American Psychiatric Association. I understand that the Supreme Court has ruled on this matter and you are obliged to follow it, but do you agree with Justice Kennedy's legal analysis?

Response: As a judicial nominee, I believe that it would not be appropriate for me to express agreement or disagreement with a binding Supreme Court decision or its rationale. The amicus brief by the American Medical Association in *Roper*—a brief that was joined by my long-time client, the APA (but on which my name does not appear)—made no legal arguments about “evolving standards of decency,” or foreign or state laws, but instead was focused on presenting empirical literature about adolescence. 2004 WL 1633549. The same is true of the amicus brief of the American Psychological Association in *Graham v. Florida*, 130 S. Ct. 211 (2010) (invalidating “imposition of a life without parole sentence on a juvenile offender who did not commit homicide”)—a brief that was joined by my client, the APA (and on which my name does appear). 2009 WL 2236778. Moreover, the briefs stated the positions only of my client; and my job in any case in which I represented or advised the APA, as with any client, was to advance the client's positions, not mine. If confirmed, I would follow *Roper*, *Graham*, and any other binding Supreme Court precedent under the doctrine of stare decisis.

- a. 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, in addition to foreign law, and in other cases have looked solely to the laws and traditions of foreign countries. Do you believe either standard has merit when interpreting the text of the Constitution?**

Response: The decisions of the American people, not those of foreign countries, determine the content of our Constitution, and it is not a judge's proper function to seek to bring our constitutional law into alignment with the laws or practices of other countries. The Supreme Court has held that the States' laws may be examined in determining whether a punishment is “unusual” under the Eighth Amendment. It also has cited certain foreign and international law as “confirmation” of a determination under the Eighth Amendment. *Roper v. Simmons*, 543 U.S. 551, 575, 578 (2005). As a judge, I would be bound by that and all other Supreme Court precedent.

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

Response: Beyond what I have just stated, I do not believe that it would be appropriate for me to comment on the merits of binding Supreme Court precedents, which I would follow as a lower court judge.

- 5. 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: The decisions of the American people, not those of foreign countries, determine the content of our Constitution, and it is not a judge's proper function to seek to bring our constitutional law into alignment with foreign or international laws or decisions. The Supreme Court has held, however, that the Framers' understanding of English common law may be relevant to the meaning of certain constitutional provisions. *United States v. Jones*, 132 S. Ct. 945 (2012). And it has cited certain foreign and international law as "confirmation" of a determination under the Eighth Amendment. *Roper v. Simmons*, 543 U.S. 551, 575, 578 (2005). Those decisions are binding on a lower court.

a. 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 except to the extent that Supreme Court precedent so required.

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

Response: The proper interpretation of our laws is that which gives effect to the ideas and solutions that our lawmakers enacted, not any ideas foreign nations have. Beyond that fundamental principle, there also are vital practical reasons for courts, in interpreting our laws, to resist looking at foreign ideas and solutions: inviting such inquiries can multiply costs, produce unreliable and inaccurate pictures of foreign systems that are not easily understood by outsiders, and harmfully divert attention from arrival at the proper domestic result, which is already a difficult enough task.