

**Responses of Stephanie Thacker
Nominee to be United States Circuit Judge for the Fourth Circuit
to the Written Questions of Senator Tom Coburn, M.D.**

- 1. 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. I do not agree with this statement.

- 2. 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. Such policy considerations are reserved to the province of the legislature to the extent the legislature wishes to consider them, and are not to be entered into by the judiciary unless instructed to do so by binding Supreme Court precedent.

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

Response: No. That would be an overly broad interpretation of the limited powers enumerated via the Commerce Clause. Such a broad interpretation would not be consistent with binding Supreme Court precedent found in *United v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000).

- 4. 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: I respect and would adhere to the individual right to bear arms as set forth in *Heller*. I would follow binding Supreme Court precedent in this regard.

- 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: Yes. The Supreme Court has held in *McDonald v. City of Chicago* that certain of the rights guaranteed in the Bill of Rights are, in fact, fundamental having been “deeply rooted in this Nation’s history and tradition.” I respect and would adhere to Supreme Court precedent with regard to these fundamental rights, including their application 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 4a above.

- 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: If confirmed, I would follow Supreme Court precedent that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right.

- 5. 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 *Heller* decision itself indicates that it was based upon the plain text of the Second Amendment. If confirmed, I would follow this binding Supreme Court precedent.

- 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: If confirmed, I would faithfully follow the rule of law as set forth by the Supreme Court in *Citizens United*. Otherwise, I do not have an opinion on this issue.

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

Response: As recognized by the Supreme Court, there are limitations placed on the individual right to bear arms in the context of certain criminal statutes (18 U.S.C. 922(g)), for example. Otherwise, although the *Heller* and *McDonald* opinions recognize that there are limitations on the constitutional right to individual gun possession, the Supreme Court

did not fully resolve the extent or legality of any such limitations. If confirmed, I would follow binding Supreme Court precedent in this regard.

- 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: If I am confirmed, I would confront this issue in the same manner in which I would confront any issue that came before the Court. I would review the text of the statute as well as the text of the Second Amendment and the binding Supreme Court precedent set forth in *Heller* and *McDonald* as well as any other binding Supreme Court or Fourth Circuit precedent that may exist at the time. I would then make a decision consistent with such precedent.

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

Response: Please see response to Question 6a 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: Please see response to Question 6a above.

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

Response: This is not something I have heretofore considered, and on which I do not have an opinion without a full and thorough analysis of the context and the law.

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

Response: Please see response to Question 6a above.

- 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: Per the Supreme Court decisions in *Heller* and *McDonald*, there is an individual and fundamental constitutional right to keep and bear arms. Although the Supreme Court recognized there are limits to this right, it has not specifically addressed the issue raised by this question. However, if confirmed, I would review and follow binding Supreme Court and Fourth Circuit precedent in this regard.

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: The decision of the Supreme Court in *Roper*, and the analysis therein, is binding precedent, and I would follow it, if confirmed.

- 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, I would be required to follow binding Supreme Court precedent in this regard, and I would do so.

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

Response: I would follow the analytic framework of binding Supreme Court decisions.

- 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: If confirmed, I would follow binding Supreme Court precedent. In this instance, the Supreme Court has ruled that the death penalty is constitutional except in limited circumstances. I would follow such precedent.

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

Response: The factors relevant to a judicial analysis on this issue are the same factors which are to be applied in judicial analysis of any issue, that is, a review of Supreme Court precedent. In this instance, Supreme Court precedence is clear. The death penalty is constitutional except in limited circumstances.

- 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: Both standards have some merit, but only to the extent directed by, and limited by, the Supreme Court. Specifically, with respect to the Eighth Amendment, the Supreme Court has held that both state laws and foreign laws are relevant in determining “evolving standards of decency.” *Roper v. Simmons*, 543 U.S. 551 (2005), at 564, 575. Foreign laws are not controlling, however, in interpreting the Constitution. *Roper* at 575. If confirmed, I would not consider state laws or foreign law in interpreting the Constitution unless directed to do so by the Supreme Court.

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

Response: Please see my response to Question 7e.

8. **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. It is not proper to rely on foreign or international laws or decisions in determining the meaning of the Constitution, unless directed by the Supreme Court to do so. First and foremost, the interpretation of the Constitution should be based upon the text of the Constitution itself.

- 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: I do not believe it is appropriate to consider foreign law when interpreting the United States Constitution, unless directed by the Supreme Court to do so.

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

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

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

Response: I do not believe it is appropriate to consider foreign law when interpreting the United States Constitution, unless directed by the Supreme Court to do so. The narrow circumstances when the Supreme Court may so direct may include treaty obligations.

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

Response: No, unless I was required by binding Supreme Court precedent to do so.

9. You have spent much of your career fighting child pornography and child sexual exploitation. Under current law, what factors can a judge consider to support his or her decision to depart downward from the sentencing guidelines when issuing a sentence?

Response: Although the Sentencing Guidelines are now advisory rather than mandatory, they should be accorded deference and are an important component to achieving fairness, uniformity, and justice in sentencing. The Guidelines themselves provide the standards applicable for various grounds for departure. Typically, these grounds are limited in nature and include factual scenarios that are well outside the norm for a given offense. There is also a body of Fourth Circuit precedent applying the various limited grounds for departure to a variety of factual scenarios. Additionally, a judge must also take into account the sentencing factors set forth in 18 USC 3553(a).