

Responses of Paul J. Watford
Nominee to be United States Circuit Judge for the Ninth 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, I do not agree with that view.

a. If not, please explain.

Response: I think the Constitution’s text expresses core principles that do not change over time. Some of the Constitution’s provisions use broad and general language to describe principles that the framers knew would need to be applied in different circumstances confronting succeeding generations. But the principles themselves are enduring and constant.

- 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: I do not understand the point Justice Brennan was attempting to make in this passage well enough to state whether I agree or disagree with it.

a. Please explain.

Response: In the passage immediately following the language quoted above, Justice Brennan stated, “Thus, for example, when we interpret the Civil War amendments – abolishing slavery, guaranteeing blacks equality under the law, and guaranteeing blacks the right to vote – we must remember that those who put them in place had no desire to enshrine the status quo.” That observation seems to me to be obviously correct. But it is not clear to me what impact Justice Brennan believed this observation should have on interpretation of the amendments in question. Understanding the purpose the drafters sought to achieve is surely an important tool in constitutional interpretation. If Justice Brennan intended to convey something beyond that basic proposition, it is not apparent what he meant, and thus is not something I am in a position to evaluate.

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

Response: No, I do not agree, with two small caveats noted below.

a. If not, please explain.

Response: As stated in my answer to Question 1 above, I do not believe the core principles of the Constitution change over time; they are enduring and constant. I cannot think of any instance in which the Supreme Court has held that social movements were relevant to interpreting the meaning of the Constitution. But when interpreting the Cruel and Unusual Punishments Clause, the Court has found an examination of legislative changes to be relevant, and in the realm of substantive due process the Court has found an examination of historical practice to be relevant.

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.

a. If not, please explain.

Response: I think it is important for a judge to have the capacity to understand an issue from another person's point of view, because that helps ensure the judge has fully and fairly understood each litigant's position before arriving at the correct legal decision in a case. But judges cannot be guided by their personal feelings or sympathies in deciding cases. They must decide cases based solely on what the law requires.

b. Can you provide an example of a case where you had to set aside your feelings of empathy for the litigant and, instead, pursue a result that was consistent with the law?

Response: I cannot think of any case I have litigated that fits this description.

5. In 2005, you wrote an article entitled: "State Lines: Redefining the Reach of the Commerce Clause May Be One of the Important Legacies of the Rehnquist Court," which traced the evolution of the Supreme Court's commerce clause jurisprudence from our nation's founding through the post-*Raich* decisions.

Given your familiarity with the Court's commerce clause jurisprudence, what would you say are the limitations on the federal government's power under the commerce clause?

Response: This of course is a subject on which the Supreme Court may provide further guidance in the near future. Under current precedent, the primary limitations on Congress's Commerce Clause power are set forth in the Supreme Court's decisions in *Lopez* and *Morrison*. Those cases hold that Congress may regulate in only three areas: "First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558-59 (1995) (citations omitted); *see also United States v. Morrison*, 529 U.S. 598, 608-09 (2000). In addition, the Court has held, in *Printz v. United States*, 521 U.S. 898 (1997), and *New*

York v. United States, 505 U.S. 144 (1992), that principles of state sovereignty inherent in the Constitution place limits on Congress's power under the Commerce Clause.

a. Is any transaction involving the exchange of money subject to Congress's commerce clause power?

Response: No. The transactions would still need to fall within one of the three categories mentioned above and regulation of those transactions could not violate principles of state sovereignty.

b. In the 2005 article, you state: "The *Raich* decision calls into question the notion, widely accepted until now, that the Rehnquist Court has initiated a dramatic realignment of the legislative powers held by Congress and those reserved to the states." Prior to *Raich* did you see the *Lopez* and *Morrison* decisions as a "dramatic realignment of the legislative powers held by Congress and those reserved to the states?"

Response: No. But I did regard *Lopez* and *Morrison* as significant developments in the Court's Commerce Clause jurisprudence.

i. In what sense was it dramatic?

Response: Those two decisions marked the first time in 60 years that the Supreme Court had invalidated a federal statute on the ground that the statute was beyond Congress's Commerce Clause power to enact.

c. Which do you believe is closer to the original meaning of the commerce clause, the decisions in *Lopez* and *Morrison* or the Supreme Court's decisions in *NLRB v. Jones & Laughlin Steel Corp.* and *U.S. v. Darby*? Please explain.

Response: All four decisions remain binding precedent, and I would be bound to faithfully follow all of them if confirmed. Given that fact, I do not believe it would be appropriate for me to comment on whether *Lopez* and *Morrison* better reflect the original meaning of the Constitution than do *Jones & Laughlin* and *Darby*.

d. In the 2005 article, you state: "In the late 1930s the Court responded to the exigencies created by the Great Depression by relaxing the limits it had earlier placed on Congress' authority to legislate under the commerce clause." Do you believe this was an appropriate and justified response by the Court?

Response: I do not believe it would be appropriate for me to critique the Court's work in that fashion. The Court's cases from that era have not been overruled and remain binding precedent. If confirmed, I would be bound to apply those decisions faithfully whether I agreed or disagreed with their underlying rationale.

i. Do national emergencies justify judges deviating from the text of the Constitution?

Response: No. I think that is the principal lesson to be drawn from *Korematsu v. United States*, 323 U.S. 214 (1944).

1. If so, in what specific circumstances?

Response: I cannot think of any such circumstances.

- ii. **In Federalist Paper No. 78, Alexander Hamilton states: “[T]he courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges as, a fundamental law. It, therefore, belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.”**

Are justices who relax limits on legislative power during exigent circumstances treating the constitution as fundamental law?

Response: No. If they are relaxing limits imposed by the Constitution, they are not treating the Constitution as fundamental law.

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

Response: The Supreme Court itself has never articulated a single approach to constitutional interpretation; it has instead emphasized different approaches in different contexts and cases. With respect to any given provision, absent contrary direction from the Supreme Court, I would focus most closely on the text of the constitutional provision, the historical context in which the provision was adopted, the drafting history of the provision, the provision’s relationship with the broader constitutional scheme, and prior precedent interpreting the scope of the rights protected by the provision.

- 7. 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 do not believe it would be appropriate for me to offer my personal views on that subject; any such views would play no role in any decision I would be called upon to make if confirmed as a judge. The Supreme Court clearly held in *McDonald* that the

individual right to bear arms protected by the Second Amendment is a fundamental right, and I would have no difficulty faithfully applying that decision.

- 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 has held that almost all of the substantive rights guaranteed in the Bill of Rights are fundamental rights enforceable against the States. As to the handful of rights that have not yet been declared fundamental, I would not feel comfortable expressing an opinion on whether they should be declared fundamental outside the confines of a concrete case providing the benefit of briefing and argument from opposing parties on both sides of the issue.

- 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: Yes, that is my understanding. The Supreme Court has followed a policy of selective incorporation, pursuant to which those rights found to be fundamental are enforceable against the States under the Fourteenth Amendment.

- 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 has held that the Second Amendment codified a pre-existing right. As the Court explained, “[t]he very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it ‘shall not be infringed.’ ” *Heller*, 554 U.S. at 592.

- d. What limitations remain on the individual, Second Amendment rights now that the amendment has been incorporated against the States?**

Response: That will have to be resolved by the lower courts in the first instance and, ultimately, by the Supreme Court. If past experience involving other fundamental rights is any indication, I suspect the process of determining permissible limitations on the scope of the right to bear arms will be ongoing for some time. In the Ninth Circuit, litigation is still pending to determine the standard of review that applies when restrictions on the right to bear arms are challenged as unconstitutional. See *Nordyke v. King*, 644 F.3d 776 (9th Cir. 2011), *rehearing en banc granted*, ___ F.3d ___, 2011 WL 5928130 (9th Cir. Nov. 28, 2011). Some of the substantive questions that remain open relate to the types of firearms protected, which classes of persons may be prohibited from possessing firearms, and whether there are sensitive locations in which the possession of firearms may be restricted. See *Heller*, 554 U.S. at 626.

8. **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 and you are obliged to follow it, but do you agree with Justice Kennedy’s analysis?**

Response: I do not believe it would be appropriate for me to state whether I agree or disagree with Justice Kennedy’s analysis in *Roper*. Justice Kennedy wrote the opinion for the Court and the decision in *Roper* remains binding precedent. Regardless of whether I agreed or disagreed with that decision, if confirmed I would faithfully follow it.

- 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,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: In some cases, as in *Roper* and *Graham*, the Supreme Court has found the practices of American States and foreign countries relevant to its analysis. I do not believe it would be appropriate for me to comment on whether the Court’s approaches have merit; if confirmed I would be bound to follow the Supreme Court’s precedent in this area whether I agreed or disagreed with it.

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

Response: Please see my answer to Question 8(a) above.

9. **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: As a general rule, I think our Constitution should be interpreted in accordance with U.S. law. However, in some cases the Supreme Court has held that foreign or international law may be relevant when determining the meaning of the Cruel and Unusual Punishments Clause. I am not aware of any other context in which the Court has held that it is permissible to consider foreign or international law in determining the meaning of a constitutional provision, and absent direction from the Supreme Court, I would not do so.

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

Response: I would do so only as directed by the Supreme Court, as in certain of its cases interpreting the meaning of the Cruel and Unusual Punishments Clause.

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

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

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

Response: No.