

Responses of Brian C. Wimes
Nominee to be U.S. District Judge for the Eastern and Western Districts of Missouri
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 agree with the perspective that the Constitution is a “living” document constantly evolving as society interprets it. The Constitution is a document that can only be changed by the amendment process set forth in the document itself.

- 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.

- 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 believe an unbiased and impartial view is essential for arriving at just decisions. Therefore, empathy would not be an essential ingredient or play a role in the judicial decision-making process.

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

Response: The Supreme Court has held that Congress has broad but limited power under the Commerce Clause. If confirmed as a district judge for the Eastern and Western Districts of Missouri, I would follow precedent established by the Supreme Court and the Eighth Circuit Court in determining the breadth of congressional power 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: The Supreme Court held in *Heller* that the Second Amendment protects an individual's right to bear arms and *McDonald* held that right to be fundamental and therefore applicable to the States. I have not reviewed the relevant legal issue sufficiently enough to have formed a personal view or belief. If confirmed as a district judge for the Eastern and Western Districts of Missouri, my personal view or belief on this issue would not play a role in my analysis and decision-making process. I would be bound by and follow precedent established by the Supreme Court in the *Heller* and *McDonald* decisions and any other applicable precedent bearing on this issue by the Supreme Court or the Eighth Circuit Court.

- 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 have not reviewed the relevant legal issues sufficiently enough to have formed a personal view or belief on this question. My personal view or belief would not play a role in my analysis and decision-making process as a judge. If confirmed as a district judge for the Eastern and Western Districts of Missouri, I would be bound by and follow any applicable precedent in this area established by the Supreme Court and the Eighth Circuit Court.

- 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, I do recognize that the Supreme Court has held that certain fundamental rights embodied in the Bill of Rights are in fact applicable to the States. If confirmed as a district judge for the Eastern and Western Districts of Missouri, I would be bound by and follow any applicable precedent with regard to these fundamental rights and any other applicable precedent established by the Supreme Court and the Eighth Circuit Court.

- 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 have not reviewed the relevant legal issues sufficiently enough to have formed a personal view or belief on this question. My personal view or belief would not play a role in my analysis and decision-making process as a judge. Further, consistent with the Supreme Court's holding in *Heller*, I would

follow the Supreme Court and the Eighth Circuit Court precedent and any other applicable precedent bearing on the issue.

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 decision of the Supreme Court in the *Heller* case was based in part upon the Court’s reading of the plain text of the Second Amendment. I have not reviewed the relevant legal issues sufficiently enough to have formed a personal view or belief on this question. My personal view or belief would not play a role in my analysis and decision-making process as a judge. If confirmed as a district judge for the Eastern and Western Districts of Missouri, I would be bound by and follow *Heller* and any other applicable precedent in this area established by the Supreme Court and the Eighth Circuit 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: I have not reviewed the relevant legal issues sufficiently enough to have formed a personal view or belief on this question. My personal view or belief would not play a role in my analysis and decision-making process as a judge. If confirmed as a district judge for the Eastern and Western Districts of Missouri, I would be bound by and follow the Supreme Court’s holding in *Citizens United*.

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

Response: The Supreme Court in *Heller* and *McDonald* held that the Second Amendment protects an individual’s right to bear arms. The rulings in the two cases do not preclude all limitations on the right to bear arms. For example, in *Heller* the Court stated that there are limitations to this right as it relates to convicted felons, the mentally ill, carrying weapons in sensitive places, and imposing conditions and qualifications on the commercial sale of arms. However, the Supreme Court’s ruling did not undertake a full analysis of the Second Amendment and the extent of these limitations. If confirmed as a district judge for the Eastern and Western Districts of Missouri, I would be bound by and follow any applicable precedent in this area established by the Supreme Court and the Eighth Circuit Court.

- a. **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: In *Heller* and *McDonald* the Supreme Court did not define the limits of an individual's right to bear arms nor address the issue in this question. If confirmed as a district judge for the Eastern and Western Districts of Missouri, I would be bound by and follow the precedent established in *Heller* and *McDonald* and any other applicable precedent of the Supreme Court and the Eighth Circuit Court.

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 for the Eastern and Western Districts of Missouri, my personal views or belief would not play a role in my analysis and decision-making process. I would be bound by and follow the precedent established by the Supreme Court in *Roper*.

- 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 district judge for the Eastern and Western Districts of Missouri, I would follow Supreme Court and Eighth Circuit Court precedent when determining what constitutes cruel and unusual punishment.

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

Response: If confirmed as a district judge for the Eastern and Western Districts of Missouri, I would follow the analytic framework established by the relevant Supreme Court and Eighth Circuit Court precedent.

- 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 as a district judge for the Eastern and Western Districts of Missouri, I would follow Supreme Court and Eighth Circuit Court precedent. The Supreme Court has held that the death penalty is constitutional except in limited circumstances, and I would follow that precedent.

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

Response: Given that the Supreme Court has held that the death penalty is constitutional except in limited circumstances, that analysis would be inappropriate.

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 for the Eastern and Western Districts of Missouri, I would be bound to follow precedent, including precedent established by Supreme Court decisions in *Roper* and *Graham*. To that end, my analysis of any Supreme Court and Eighth Circuit Court holding in this area would be consistent with precedent.

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 9e above.

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, unless directed to do so by 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: No, I do not believe it is appropriate unless directed to do so by Supreme Court precedent.

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 directed to do so by 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?

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

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

Response: I believe it is inappropriate to adopt ideas and solutions to legal problems from foreign nations unless directed to do so by Supreme Court precedent.

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

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