

Responses of Denzil Price Marshall Jr.
Nominee to the U.S. District Court for the Eastern District of Arkansas
To the Written Questions of Senator Tom Coburn, M.D.

- 1. Since at least the 1930s, the Supreme Court has expansively interpreted Congress' power under the Commerce Clause. Recently, however, in the cases of *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000), the Supreme Court has imposed some limits on that power.**

- a. Generally speaking, are *Lopez* and *Morrison* consistent with the Supreme Court's earlier Commerce Clause decisions?**

Response: Yes.

- b. Why or why not?**

Response: *Lopez* and *Morrison* are consistent with the Supreme Court's earlier Commerce Clause decisions because the Court so held in *Gonzales v. Raich*, 545 U.S. 1, 23-25 (2005). Moreover, *Lopez* and *Morrison* reflect the settled law that the Congress' power under the Commerce Clause is not unlimited.

- 2. 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.

- 3. 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: My personal agreement or disagreement with Justice Kennedy's analysis for the Supreme Court in *Roper*, or the Supreme Court's analysis in any case, should not, does not, and will not have any effect on my decisions as a judge sworn to uphold the Constitution. I am duty-bound to follow the supreme law of the land and the binding precedent interpreting it.

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

Response: I would set aside my personal views. And I would follow binding precedent from the Supreme Court and the Court of Appeals for the Eighth Circuit.

4. **At your hearing, I asked you whether, in your view, it is ever proper for judges to rely on contemporary foreign or international laws or decisions in determining the meaning of the Constitution. After some clarification, you answered “no,” for which I commend you. However, in a couple of cases including *Roper v. Simmons*, and *Lawrence v. Texas*, 539 U.S. 558 (2003), a majority of the Supreme Court considered and cited foreign law in its majority opinion. Do you believe the majority was incorrect in these cases? Please explain.**

Response: As a judge on the Arkansas Court of Appeals, I am bound to uphold our Constitution as interpreted by binding precedent from the Court of Appeals, the Arkansas Supreme Court, and the United States Supreme Court. If I am fortunate enough to be confirmed as U.S. District Judge for the Eastern District of Arkansas, I will be similarly bound to follow binding precedent from the Court of Appeals for the Eighth Circuit and the Supreme Court. The decisions in *Roper* and *Lawrence* are binding precedent, which I will follow until the Supreme Court overrules them. My personal view about the correctness or incorrectness of the Supreme Court’s analysis in any binding precedent must not and will not make any difference in my work as a judge.

- a. **Do you believe foreign law has any bearing on a court’s interpretation of the Eighth Amendment? What about any other amendments?**

Response: A court’s job is to interpret and apply the laws of the United States---including the Constitution, the supreme law of the land---insofar as necessary to decide cases. When a case requires a court to interpret the Eighth Amendment, any other amendment, or any part of the Constitution, the court must uphold our nation’s fundamental law. That means enforcing the Constitution’s text and following binding precedent about that text.