

Responses of Kimberly J. Mueller
Nominee to the U.S. District Court for the Eastern District of California
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 would not use the word “living” to describe the Constitution. I believe its text is established as written.

- 2. 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. Do you believe *Lopez* and *Morrison* consistent with the Supreme Court’s earlier Commerce Clause decisions?**

Response: Yes.

- b. Why or why not?**

Response: I believe *Lopez* and *Morrison* are consistent with the Supreme Court’s earlier Commerce Clause decisions because the decisions themselves indicate as much and the Court in *Gonzales v. Raich*, 545 U.S. 1 (2005), confirmed it.

- 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: As a United States Magistrate Judge, I have not had occasion to consider the analysis referenced here. If confirmed and appointed as a District Judge, and called upon to reach this question in the future, I would undertake the analysis required to reach the result required by law.

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

Response: If a dispute did require that I reach the question of what “evolving standards of decency” are, I would ascertain the holdings of the Supreme Court and relevant appellate court authority and apply that precedent to the facts of the case before me in a reasoned written decision.

- b. 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: As the Supreme Court has determined that the death penalty itself is Constitutional, a finding that it is not Constitutional is precluded by law.

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

Response: The only factors that should be relevant to a judge performing any such analysis are those required by the Supreme Court and the appellate court with jurisdiction over the trial court conducting the analysis in the first instance. To the extent there is no controlling circuit authority, it may also be appropriate to consider the decisions of other circuit courts.

4. In your view, is it ever proper for judges to rely on contemporary foreign or international laws or decisions in determining the meaning of the Constitution?

Response: I would not consider foreign or international law in determining a Constitutional question unless the Supreme Court or controlling authority from the circuit court required as much. If I am confirmed as a District Judge for the Eastern District of California, I expect to be applying the laws of the United States day in and day out.

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

Response: If confirmed and appointed as a District Judge, I would not consider foreign law in interpreting the Constitution unless Supreme Court precedent or controlling appellate authority required it, and those precedents were implicated by a dispute before me.

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

Response: If presented with such an argument in a dispute before me, I would answer the question with reference to Supreme Court and controlling appellate court authority. As a United States Magistrate Judge, the only times I recall considering foreign law in any respect have been in the context of extradition proceedings or foreign governments' requests for assistance in carrying out criminal investigations.

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

Response: If confirmed and appointed as a District Judge, I would not consider foreign law in interpreting any Constitutional amendment unless the Supreme Court or controlling appellate court authority required me to do so.