

Responses of James E. Boasberg
Nominee to be United States District Judge for the District of Columbia
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 this perspective of constitutional interpretation.

- 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 believe that district judges must carefully follow constitutional interpretations articulated by the Supreme Court and their particular circuit. When faced with an issue of truly first impression, district judges should begin with the text of the Constitution and then use only those interpretive tools endorsed by the Supreme Court.

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

Response: I believe that district judges must carefully follow constitutional interpretations articulated by the Supreme Court and their particular circuit. When faced with an issue of truly first impression, district judges should begin with the text of the Constitution and then use only those interpretive tools endorsed by the Supreme Court.

- 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: If empathy means sympathizing with one party such that a judge fails to follow the law, then I believe it should not play a role in a judge’s consideration of a case.

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

Response: The Supreme Court has held that the Commerce Clause is very broad; in some recent cases, however, such as *United States v. Morrison*, 120 S. Ct. 1740 (2000), and *United States v. Lopez*, 115 S. Ct. 1624 (1995), the Court has made clear that it is not unlimited. I would, if confirmed, apply that jurisprudence in evaluating any challenge brought to Congress’s power under the Commerce Clause.

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

Response: In *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), the Supreme Court applied the Second Amendment's protections to the states. In so doing, it reiterated that the holding in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), "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.'" *Id.* at 3047.

a. Is it 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: As quoted above, *Heller* and *McDonald* recognized a number of limitations on individual gun possession, but they did not settle every question about the legality of possible restrictions on such possession. Those issues are currently being litigated all over the country, and, if confirmed, I would follow applicable precedent in determining the legality of any restrictions challenged before me.

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: Justice Kennedy's analysis is binding precedent, and, if confirmed as a district court judge, I would follow it.

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 court judge, I would be required to follow the law as set forth by the Supreme Court. On Eighth Amendment questions, I would be guided by the framework articulated by the Supreme Court in *Roper v. Simmons*, 543 U.S. 551 (2005), and other cases in which the Court has analyzed what constitutes "cruel and unusual punishment."

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

Response: Making a determination about evolving standards of decency would fall to the Supreme Court. If confirmed and facing the issue, I would be guided

by the Supreme Court's decisions and any framework it has articulated for making such determinations.

- 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: As the Supreme Court has repeatedly held that the death penalty is constitutional, I do not believe a district judge could find it unconstitutional in all cases.

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

Response: As I do not believe a district judge could find the death penalty unconstitutional in all cases, I would not engage in such analysis.

- 8. 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: It is not proper for a district court judge to rely on contemporary foreign or international laws or decisions in determining the meaning of the Constitution, except in those very limited circumstances in which the Supreme Court has endorsed such reliance.

- a. Is it appropriate for judges to look for foreign countries for “wise solutions” and “good ideas” to legal and constitutional problems?**

Response: District courts should only do so in the very limited circumstances where the Supreme Court or their circuit has endorsed such an approach.

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

Response: If confirmed, I would consider foreign law only in those circumstances in which the Supreme Court has ruled it is appropriate to be considered.

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

Response: If confirmed, I would consider foreign law only in those circumstances in which the Supreme Court has ruled it is appropriate to be considered.

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

Response: If confirmed, I would consider foreign law only in those circumstances in which the Supreme Court has ruled it is appropriate to be considered.