

**Responses of Susan L. Carney
Nominee to be United States Circuit Judge for the Second 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: The Constitution has a fixed text enumerating powers and establishing principles that do not change. Courts sometimes must apply the Constitution in new contexts, such as those presented as our society develops new technology. But the Constitution itself may be altered only through the formal amendment process.

- 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: The process of Constitutional interpretation by the courts is adjudicative rather than transformative. It is the text of the Constitution, as interpreted by the Supreme Court of the United States, that lower courts must apply to disputes properly presented to them.

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

Response: The Constitution is not changed by social movements, legislation, and historical practice.

- 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: I do not believe that empathy should play a role in a judge’s decision-making process, or application of the law to the facts of a case.

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

Response: In *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), the Supreme Court articulated limits on Congress’s power to legislate under the Commerce Clause. Therefore, not all transactions involving the exchange of money are subject to Congress’s Commerce Clause power .

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

Response: In the recent *Heller* and *McDonald* decisions, the Supreme Court has held that the Second Amendment establishes an individual's right to bear arms throughout the United States. See *City of Chicago v. McDonald*, 130 S. Ct. 3020 (2010); *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008). *Heller* allows that laws forbidding possession of firearms by convicted felons and the mentally ill, and laws prohibiting the carrying of firearms in "sensitive places such as schools and government buildings" are constitutionally permissible. *Heller*, 128 S. Ct. at 2816-17.

- 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: Please see my answer above.

- 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: As a Court of Appeals judge, I would be bound by the Supreme Court's ruling in *Roper v. Simmons*. I would not look to "evolving standards of decency" in constitutional interpretation except as instructed to do so by the Supreme Court. My personal opinion would not affect how I carry out my obligation to apply that precedent.

- 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, I would not look to general societal understanding in interpreting the Eighth Amendment except if and as instructed to do so by the Supreme Court.

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

Response: I would follow Supreme Court precedent and reasoning if required to address that question.

- 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: The law of many states provides that the death penalty may be imposed for certain crimes. The Supreme Court has held the death penalty to be constitutional. It would therefore be improper for any inferior judge to make such a finding.

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

Response: Please see my answer to (c), above.

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: I do not believe that contemporary foreign or international laws or decisions control the meaning of the United States Constitution.

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

Response: It is not the role of judges to make policy decisions and therefore it is not appropriate for judges to look to foreign countries for "wise solutions" and "good ideas."

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

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

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

Response: Our laws should be interpreted with reference to their text and Congressional intent and by using standard tools of statutory construction. Only if Congress had looked to foreign laws in enacting a statute or if the Supreme Court directed that foreign law should play a role (as such extraterritorial law might in certain treaty questions, for example) should those laws play a role in courts' interpretation of U.S. laws.

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

Response: As a Court of Appeals judge, I would not expect to consider foreign law when interpreting the amendments to the Constitution.