

Responses of Edward M. Chen
Nominee to be District Judge for the Northern District of California
to the 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: Absent a constitutional amendment, the text of the Constitution and the principles embodied therein are fixed and enduring. While circumstances may change, the Constitution does not. It is for the Supreme Court to decide how the Constitution applies to new circumstances. As a district court judge, if confirmed, I would apply the constitutional analysis as directed by precedents of the Supreme Court and the Ninth Circuit.

- 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: Absent a constitutional amendment, the text of the Constitution and the principles embodied therein are fixed and enduring. Where the text is ambiguous or where new contexts arise (resulting, for instance, from new technologies), it is the role of the Supreme Court to give more specific meaning to the text as applied to particular contexts. The role of the district court is to apply the precedents set by the Supreme Court and Courts of Appeals.

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

Response: Absent a constitutional amendment, the text of the Constitution and the principles embodied therein are fixed and enduring. The proper approach to constitutional interpretation is for the Supreme Court to decide. The role of the district court is far more limited. Its task is to apply the precedents set by the Supreme Court and Courts of Appeals, including precedent instructing the lower courts on the proper method of constitutional analysis.

- 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. Decisions should be made on the evidence and law applied free of personal bias or sympathy.

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

Response: The Supreme Court has held there are limits to Congress's Commerce Clause power. See e.g., *United States v. Morrison*, 529 U.S. 598 (2000), and *United States v. Lopez*, 514 U.S. 549 (1995).

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

Response: If confirmed as a district judge, my function would be to apply Supreme Court and Ninth Circuit precedent. While the Supreme Court has held that the Second Amendment right to bear arms applies to state and federal governments, it has not defined what limits remain on the individual Second Amendment right. See *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago, Ill.*, 130 S.Ct.3020 (2010). In *Heller*, the Court noted that "the right secured by the Second Amendment is not unlimited." 554 U.S. at 626.

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 noted above, the Supreme Court has yet to define the limits of the individual Second Amendment right.

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: I have no view as to the merits of Justice Kennedy's opinion in *Roper v. Simmons*. Most importantly, were I to be confirmed as a district judge, I would be bound by and apply the precedents of the Supreme Court and the Ninth Circuit.

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 I would be bound by and apply the precedents of the Supreme Court and Ninth Circuit.

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

Response: Were this issue to come before me as a district judge, I would apply the legal analysis dictated by the precedents of the Supreme Court and Ninth Circuit.

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: No. The Supreme Court held in *Gregg v. Georgia*, 428 U.S.153 (1976) that the death penalty does not inherently violate the constitutional ban on cruel and unusual punishment. If confirmed, as a district judge I would be bound by and apply the Supreme Court's precedent.

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

Response: I would apply those factors specified by the Supreme Court and the Ninth Circuit.

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: If confirmed as a district judge, I would not rely on contemporary foreign or international laws or decisions in determining the meaning of the Constitution unless otherwise directed by precedents of the Supreme Court or Ninth Circuit.

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

Response: If confirmed as a district judge, I would not look to foreign countries for "wise solutions" or "good ideas" unless otherwise directed by precedents of the Supreme Court or Ninth Circuit.

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

Response: If confirmed as a district judge, I would not consider foreign law when interpreting the Constitution unless otherwise directed by precedents of the Supreme Court or Ninth Circuit.

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 as a district judge, I would not look to the ideas and solutions to legal problems by foreign countries when interpreting the laws of the United States unless otherwise directed by precedents of the Supreme Court or Ninth Circuit.

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

Response: If confirmed as a district judge, I would not consider foreign laws when interpreting the Eighth Amendment unless otherwise directed by precedents of the Supreme Court or Ninth Circuit.

9. What powers do you believe the 10th Amendment guarantees to the state? Please be specific.

Response: If confirmed as a district judge, I would apply the legal analysis dictated by the Supreme Court and the Ninth Circuit. The Supreme Court has stated that the Tenth Amendment “confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States” (*New York v. United States*, 505 U.S. 144, 157 (1992)), and that one limitation is that the federal government may not “commandeer the legislative process of the States by directly compelling them to enact and enforce a federal regulatory program.” *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 288 (1981).