

Responses of Edward J. Davila
Nominee to be United States District Judge for the Northern 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: No. The Constitution is fixed unless amended.

- 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 am not familiar with Justice Brennan’s statement regarding constitutional interpretation. If confirmed as a district judge, I would look to the text of the Constitution and follow Supreme Court of the United States and circuit appellate precedent in analyzing any constitutional question that comes before me.

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

Response: No. In applying the Constitution to a specific fact situation, a district court judge should be guided by the plain language of the text of the Constitution, binding precedent of the Supreme Court of the United States and relevant appellate decisions, and as necessary, the record of the legislative history reflecting the intent of the law at issue. The incorporation of evolving social views is within the purview of the legislative branch.

- 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.

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

Response: The Supreme Court of the United States has ruled that the scope of the Commerce Clause, while broad, is not unlimited. The Supreme Court in *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000), has identified three categories of activity which are covered by the Commerce Clause. These are activities involving the channels of interstate commerce; instrumentalities of, or persons or things, in interstate commerce; and activities having a substantial relationship to interstate commerce. In determining whether a particular transaction involving the

exchange of money is subject to the Commerce Clause I would analyze the transaction under the framework established by these and other appellate precedents.

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

Response: In *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), the Supreme Court of the United States held that an individual's right to possess a firearm in the home for self defense is protected by the Second Amendment. In the subsequent case of *McDonald v. City of Chicago, Illinois*, 130 S. Ct. 3020 (2010), the Supreme Court stated that the *Heller* holding "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. The Court did not specify other additional limitations.

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 mentioned in my previous answer, the Supreme Court, in *Heller* and *McDonald*, recognized some but not all limitations on individual gun ownership. The interpretation of other restrictions on gun possession and ownership will be the subject of future litigation. If confirmed as a district court judge I will carefully follow Supreme Court and appellate court precedent should a Second Amendment case come 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: As the majority opinion, Justice Kennedy's ruling and analysis in *Roper* is binding precedent. If confirmed as a district 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 judge, I would follow the precedent established by the Supreme Court of the United States as required by the doctrine of stare decisis. In deciding any case regarding the Eighth Amendment, I would adhere to the framework outlined in Supreme Court of the United States and appellate decisions in which the Court has analyzed what constitutes "cruel and unusual punishment," including *Roper v. Simmons*, 543 U.S. 551 (2005).

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

Response: If confirmed as a district judge I would follow the analysis of Supreme Court precedent in making this determination.

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 Supreme Court has ruled that the death penalty is not per se unconstitutional, and therefore a district judge could not so rule.

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

Response: As I do not believe a judge could find the death penalty unconstitutional in all cases, I do not believe that a judge should 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 would not be proper for a judge to rely on foreign or international law to determine the meaning of the Constitution unless the Supreme Court of the United States or appellate courts direct it.

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

Response: No.

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

Response: If confirmed as a district judge, I would only consider foreign law when interpreting the Constitution if directed by Supreme Court of the United States or appellate precedent.

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

Response: I am not aware of any circumstance where that would be appropriate.

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

Response: No, unless the Supreme Court of the United States or appellate courts direct otherwise.