

**Responses of Albert Diaz
Nominee to the U.S. Court of Appeals for the Fourth 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: No, the text of the Constitution is fixed and may only be modified by amendment. The framers, however, penned broad constitutional principles that courts are often called upon to interpret in light of modern circumstances.

- 2. What principles of constitutional interpretation help you to begin your analysis of whether a particular statute infringes upon some individual right?**

Response: My analysis would begin with the text of the statute. I would also look to U.S. Supreme Court or Fourth Circuit precedent, and would consider persuasive authority from other circuits. If the statute infringes upon a fundamental right, it would pass constitutional muster only if narrowly tailored to serve a compelling governmental interest. *Reno v. Flores*, 507 U.S. 292, 302 (1993). If the right being infringed upon is not fundamental, a court should (1) presume the statute is constitutional, and (2) uphold it so long as the statute is rationally related to a legitimate governmental interest. *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997).

- 3. As you know the Second Amendment right to bear arms is one that is very important to all Americans, but particularly those in my home state of Oklahoma. Do you believe that the Second Amendment is an individual right or a collective right? Please explain your answer.**

Response: The U.S. Supreme Court held in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) that the Second Amendment right to keep and bear arms is an individual right, at least in federal enclaves. If confirmed, I would apply that holding.

- a. Do you believe an individual Second Amendment right exists outside the context of military service or hunting? If so, please explain.**

Response: Yes, *Heller* extends the Second Amendment right to keep and bear arms beyond the context set out in your question.

- b. Do you believe the right to bear arms is a fundamental right?**

Response: The U.S. Supreme Court will decide this issue in *McDonald v. City of Chicago*, 567 F.3d 856 (7th Cir. 2009), *cert. granted*, 130 S. Ct. 48 (2009). If confirmed, I would apply the Supreme Court’s holding in that case.

- c. **What constitutional analysis would you use to determine whether it is a fundamental right?**

Response: The U.S. Supreme Court will determine the appropriate constitutional analysis governing this question when it decides *McDonald*. If confirmed, I would apply the Supreme Court's holding in that case.

- d. **Do you believe the right to self defense is a fundamental right?**

Response: In *Heller*, the U.S. Supreme Court stated that “the inherent right of self-defense [is] central to the Second Amendment right” to keep and bear arms. 128 S. Ct. at 2817. Whether the right to keep and bear arms is a fundamental right will be decided by the Supreme Court in *McDonald*. If confirmed, I would apply the Supreme Court's holding in that case.

4. **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. **Generally speaking, are *Lopez* and *Morrison* consistent with the Supreme Court's earlier Commerce Clause decisions?**

Response: Yes.

- b. **Why or why not?**

Response: As the Supreme Court noted in *Lopez*, Congress' regulatory authority under the Commerce Clause has historically extended to (1) the use of channels of interstate commerce, (2) protection of the instrumentalities of interstate commerce, as well as persons or things in interstate commerce, and (3) activities that substantially affect interstate commerce. 514 U.S. at 558-59. In *Lopez* and *Morrison*, the Court concluded that the two statutes in question—the first making it a crime to possess a gun in a school zone and the second providing a civil remedy for victims of gender-motivated crimes of violence—were unconstitutional because they had no logical nexus to interstate commerce and did not regulate economic activity. Viewed in that context, I believe *Lopez* and *Morrison* are consistent with the Supreme Court's Commerce Clause jurisprudence.

- c. **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 text of the Constitution is fixed and may only be modified by amendment. The framers, however, penned broad constitutional principles that courts are often called upon to interpret in light of modern circumstances.

5. **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: If confirmed, I would apply the holding in *Roper v. Simmons*, whether I agree with it or not.

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

Response: In *Roper*, the Supreme Court explained that determining evolving standards of decency regarding the proportionality of punishments for criminal offenses begins with a review of objective indicia of consensus, as expressed by legislative enactments, followed by an independent judicial determination as to whether a particular punishment violates the constitutional prohibition against “cruel and unusual punishments.” *Roper*, 543 U.S. at 564. If confirmed, I would apply this analysis.

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

Response: Foreign or international laws or decisions should never bind a judge when determining the meaning of provisions of the Constitution. The Supreme Court has on occasion cited foreign law as persuasive authority for its decisions. See e.g. *Roper* and *Lawrence v. Texas*, 539 U.S. 558 (2003). If confirmed, I would apply the Supreme Court’s holdings in these cases.

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

Response: I cannot envision any circumstance where I would consider foreign law when interpreting the Constitution, except when applying Supreme Court precedents that cite foreign law as persuasive authority,

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

Response: See response above.