

**Responses of Elizabeth Erny Foote
Nominee to the U.S. District Court for the Western District of Louisiana
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. For a district court judge, constitutional interpretation is governed by the language of the Constitution and the controlling Supreme Court precedent.

- 2. 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: In *Gonzales v. Raich*, 545 U.S. 1 (2005), the Supreme Court explained the consistency of *Lopez* and *Morrison* with the court’s historical precedent. The Justices noted that the statutes under scrutiny in *Lopez* and *Morrison* did not regulate economic activity. Current Supreme Court precedent interprets the power of the federal government under the Commerce Clause as broad, but not unlimited.

- 3. 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: Whether or not I agree with Justice Kennedy’s analysis, I would be bound by the majority’s decision in the case and I would follow it.

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

Response: If confirmed, my job as a district court judge will not be to determine “evolving standards of decency” but to apply the Supreme Court and other appropriate precedent to the dispute before me.

- b. 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, a district court judge could never find that the “evolving standards of decency” dictated that the death penalty is unconstitutional in all cases.

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

Response: In deciding whether or not the death penalty was unconstitutional in a case before me, I would apply the controlling precedent of the United States Supreme Court and the Fifth Circuit.

- 4. 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: No.

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

Response: See above response.

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

Response: No, I would not consider foreign law in interpreting the Eighth Amendment. No, I would not consider foreign law in interpreting other amendments.