

**Responses of Marco A. Hernandez
Nominee to be United States District Judge for the District of Oregon
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: I would not describe the Constitution as a “living” document.

- 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 do not agree that the Constitution’s purpose is transformative.

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

Response: Judicial doctrine should limit the interpretation of the Constitution using precedent and the language of the document for guidance. It is Congress’s role to determine how social views should be incorporated into law.

- 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: Not all transactions involving the exchange of money are subject to Congress’s Commerce Clause power. The Supreme Court recognized in *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000) that Congress has broad but not unlimited power to regulate commerce.

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

Response: There are some limitations on the Second Amendment. For example, the limitation on felons possessing firearms was not affected by the decisions in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) and *McDonald v. City of Chicago*, 561 U.S. ____ (2010). Future cases will determine what other limitations remain.

- 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: The Supreme Court left open the question of what limitations remain. Future cases will help answer this question. If confirmed as a District Court judge, I would follow the Supreme Court's rulings.

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 not considered Justice Kennedy’s analysis. However, the Supreme Court has spoken on this subject. If confirmed, I will follow the law.

- 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: The Supreme Court has stated that the death penalty is constitutional. If confirmed, I will follow all relevant precedent on this issue.

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

Response: I would look to the Supreme Court’s analysis on death penalty challenges.

- 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.

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

Response: The judge should carefully consider the Supreme Court’s 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: No.

- 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: I cannot think of an example when it would be correct to use foreign law to interpret our Constitution. I would only consider foreign law if required by 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 cannot think of situations where a foreign nation's ideas and solutions would inform interpretation of our laws.

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

Response: No.