

Responses of John J. McConnell, Jr.
Nominee to be United States District Judge for the District of Rhode Island
to the Written Questions of Senator Tom Coburn, M.D.

- 1. Please identify all not-for-profit organizations that you have represented in a pro bono capacity and briefly describe the matter(s) at issue.**

Response: I have represented RI Arc, formerly known as the RI Association for Retarded Citizens with various legal issues involving community residences and services for people with developmental disabilities. I have represented Trinity Repertory Company, a local regional theatre in a few business matters including return of a security deposit and notice to prior donors about an endowment issue. I have reviewed my records and these are the two not-for-profit organizations that I could determine that I had represented.

- 2. Please explain your role at the Motley Rice firm involving asbestos litigation.**

Response: Since 1986, I have been an attorney representing workers who suffered injuries caused by exposure to asbestos. I have litigated their claims in state and federal courts and been involved with filing administrative claims.

- 3. Did you or your law firm ever pursue unimpaired asbestos claims in state or federal court? If so, describe when and where you brought such claims.**

Response: Yes, if the law of the state recognized such claims, we would pursue them on behalf of our clients. My firm has represented tens of thousands of workers who suffered injuries caused by exposure to asbestos in all 50 states. My firm has never emphasized its practice in the representation of unimpaired asbestos claims.

- a. Do you or your law firm have any involvement with existing asbestos bankruptcy trusts formed under 524(g) of the federal bankruptcy code? If so, please explain in detail the nature of such involvement.**

Response: I have had no involvement.

Members of my firm have had various roles with existing asbestos bankruptcy trusts. Joseph F. Rice, a member of Motley Rice LLC, currently serves as a member of the trust advisory committee for several of the existing bankruptcy trusts, which are listed below. Motley Rice LLC, as the attorneys for its individual clients, submits and processes claims to various existing bankruptcy trusts.

AC&S , Inc.	Bankr. D. Del.	No. 02-12687
Armstrong World Industries, Inc.	Bankr. D. Del.	No. 00-4471

Babcock & Wilcox Co.	Bankr. E.D.La.	No. 00-10992
Celotex Corp.	Bankr. M.D. Fla	Nos. 90-10016-8B1, 90-10017-8B1
Dresser II	Bankr. W.D. PA.	No. 03-35592
Federal Mogul	Bankr. D. Del	No. 01-10578
G-I Holdings	Bankr. D.N.J.	Nos. 01-30135 and 01-38790
Kaiser Aluminium Corp.	Bankr. D.Del.	No.02-10429
Keene	Bankr. S.D.N.Y.	No. 93B 46090,96 CV 3492
Johns-Manville Corp.	S.D.N.Y., E.D.N.Y.	No.82-B11656 through 82 B 11676
MH Detrick	Bankr. N.D. Ill.	No. 98 B 01004
Owens Corning Corp.	Bankr. D. Del.	No. 00-03837
Rock Wool	Bankr. N.D.Ala.	Nos. CV-99-J-I589-S.BK -96-08295-TBB-11
Rutland Fire Clay	Bankr. D.Vt.	No. 99-11390
Shook & Fletcher	Bankr. N.D. Ala	No. 02-02771-BGc-11
United States Gypsum Corp.	Bankr. D. Del.	No. 01-2094
W.R. Grace Co.	Bankr. D. Del	No.s 01-1139, 01-1140

- b. **Have you or your law firm been involved in the formation and confirmation of an asbestos bankruptcy trust under section 524(g) of the federal bankruptcy code?**

Response: I have had no involvement.

Members of my firm have had various roles with the formation and confirmation of asbestos bankruptcy trusts. Motley Rice LLC represents clients who are representative members of the Asbestos Claims Committee. The Asbestos Claims Committee is a committee appointed by the United States Trustee for the relevant District to address the issues of the various asbestos claimants as it relates to the particular debtor. Joseph F. Rice, a member of Motley Rice LLC, has been involved in the formation and confirmation of various asbestos bankruptcy trusts, which are listed below.

Durabla Corp.	Bankr. D. Del	No. 09-14415
AC&S	Bankr. D. Del.	No. 02-12687
Congoleum Corp.	Bankr. D. N.J.	No.03-51524
Babcock & Wilcox	Bankr. E.D.La	No. 00-10992
Combustion Engineering	Bankr. D. Del.	No. 03-10495
Celotex	Bankr. M.D.Fla.	Nos. 90-10016-8B1, 90-10017-8B1
Federal Mogul	Bankr. D. Del	No. 01-10578
G-I Holdings	Bankr. D.N.J.	Nos. 01-30135 and 01-38790
Johns-Manville Corp.	S.D.N.Y., E.D.N.Y.	No.82-B11656 through 82 B 11676

Keene	Bankr. S.D.N.Y.	No. 93B 46090,96 CV 3492
MH Detrick	Bankr. N.D. Ill.	No. 98 B 01004
North American Refractories Corp.	Bankr. W.D. PA.	No. 02-20198
Owens Corning Corp.	Bankr. D. Del.	No. 00-03837
Pittsburgh Corning Corp.	Bankr. W.D. PA	No. 00-22876
Rock Wool	Bankr. N.D.Ala.	Nos. CV-99-J-I589-S.BK -96-08295-TBB-11
Rutland Fire Clay	Bankr. D.Vt.	No. 99-11390
Shook and Fletcher	Bankr. N.D. Ala	No. 02-02771-BGc-11
United States Gypsum Corp.	Bankr. D. Del.	No. 01-2094
W.R. Grace Co.	Bankr. D. Del	No.s 01-1139, 01-1140

- c. Do you agree that asbestos bankruptcy trusts formed under 524(g) of the federal bankruptcy code should operate in a structure and manner necessary to give reasonable assurance that the trust will value, and be able to pay, similar present and future claims in substantially the same manner?**

Response: Yes.

- d. Do you have any concerns that asbestos bankruptcy trusts formed under 524(g) of the federal bankruptcy code are specifically structured and operated to thwart attempts to obtain information regarding trust claimants who are also making claims of other 524(g) trusts or who are suing solvent defendants in the tort system?**

Response: I do not have the information necessary to have any opinion on this matter. I have had very little dealings with asbestos bankruptcy trusts, other than to cause to be filed administrative claims on behalf of some of my clients.

- e. Have you recovered any attorneys' fees as a result of the filing of a claim with any asbestos bankruptcy trust formed under 524(g) of the federal bankruptcy code?**

Response: Yes.

- f. Do you think that asbestos bankruptcy trusts formed under 524(g) of the federal bankruptcy code have adequate internal controls and safeguards to prevent fraudulent claims from being submitted?**

Response: I do not have the information necessary to have any opinion on this matter. I have had very little dealings with asbestos bankruptcy trusts, other than to cause to be filed administrative claims on behalf of some of my clients.

- g. Do you think that asbestos bankruptcy trusts formed under 524(g) of the federal bankruptcy code should have greater cooperation and transparency**

to prevent the possibility of duplicate payments made by the trusts to the same claimants?

Response: Yes.

- h. Do you think that asbestos bankruptcy trusts formed under 524(g) of the federal bankruptcy require additional oversight from the Congress?**

Response: I do not have the information necessary to have any opinion on this matter. I have had very little dealings with asbestos bankruptcy trusts, other than to cause to be filed administrative claims on behalf of my clients.

- i. Do you think that asbestos plaintiffs who bring claims in the tort system should disclose to the court and the defendants their previous or future asbestos bankruptcy trust filings?**

Response: I think every party should comply fully with their obligations of candor to the tribunal. As to whether any particular information should be disclosed, including asbestos bankruptcy trust filings, it would depend on what the particular state law and circumstances require.

- j. Did you have any involvement in efforts to oppose or support proposed federal legislation to address problems with asbestos litigation during the 108th, 109th, or 110th Congresses?**

Response: No.

- k. Should prevailing legal standards governing expert witness testimony apply to asbestos litigation pursued in state and federal courts?**

Response: Yes, the prevailing legal standard in state and federal courts applicable to expert witness testimony should also apply to experts in asbestos litigation.

- l. Should asbestos claimants show an illness before securing compensation against an asbestos defendant in the tort system?**

Response: Yes.

- m. Should asbestos claimants show substantial exposure to a product of an asbestos defendant before securing a recovery in state or federal court against that defendant?**

Response: Like any litigant, an asbestos claimant should have a good faith basis under the law for all claims made in court, which would include substantial exposure where required by law. The law on what an asbestos claimant must show varies amongst states.

4. **After the Rhode Island Supreme Court issued its ruling overturning the verdict in your lead paint litigation, did you have any discussions with any Justice of the Rhode Island Supreme Court regarding either the case generally or the decision in particular? If so, what was the date and substance of the discussion(s)?**

Response: No.

5. **According to Rhode Island Board of Elections files, you contributed \$1,000 on December 30, 1998, and \$1,000 on November 1, 1998, to Sheldon Whitehouse's 1998 campaign for Rhode Island Attorney General. Did you make any other contributions to Senator Whitehouse's 1998 campaign for Rhode Island Attorney General?**

Response: Not to my knowledge. I do not recall any other and, in answering this question, I rechecked my personal records and publically available databases.

- a. **Did Motley Rice or any attorney at Motley Rice make any contributions to Senator Whitehouse's 1998 campaign?**

Response: Rhode Island election law has prohibited contributions from corporations. Motley Rice LLC did not make any such contributions. I do not know of any attorney affiliated with Motley Rice (other than the two contributions I made) who contributed to Senator Whitehouse's Attorney General campaign.

6. **You cited Democrat presidential candidate Bill Bradley's strong pro-gun control views as one of the main reasons you supported him for president. Do you believe the Second Amendment guarantees a fundamental right to own a firearm, and that the right should be applied to the states?**

Response: I have not formed a view on whether the Second Amendment should be applied to the states and I understand that this is a pending question before the Supreme Court of the United States. If confirmed as a U.S. District Judge, my personal beliefs will have no role in my decision-making in the courtroom. I would be bound by applicable Supreme Court and First Circuit precedent with regard to the scope and reach of the Second Amendment, including *District of Columbia v. Heller*, and the upcoming decision in *McDonald v. Chicago*.

7. **In a 5-4 majority opinion, the U.S. Supreme Court recently held in *District of Columbia v. Heller*, 554 U.S. ____ (2008), that the Second Amendment of the United States Constitution "protects an individual right to possess a firearm unconnected to service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home." As Justice Scalia's opinion in *Heller* pointed out, Sir William Blackstone, the preeminent authority on English law for the Founders, cited the right to bear arms as one of the fundamental rights of Englishmen. Do you personally believe the right to bear arms is a fundamental right?**

Response: I have not formed a view on whether the Second Amendment is a fundamental right that should be applied to the states and I understand that this is a pending question before the Supreme Court of the United States. If confirmed as a U.S. District Judge, my personal beliefs will have no role in my decision-making in the courtroom. I would be bound by applicable Supreme Court and First Circuit precedent with regard to the scope and reach of the Second Amendment, including *District of Columbia v. Heller*, and the upcoming decision in *McDonald v. Chicago*.

- a. Do you believe that explicitly guaranteed substantive rights, such as those guaranteed in the Bill of Rights, are also fundamental rights? Please explain why or why not.**

Response: I do not have an opinion on this matter, but if confirmed as a U.S. District Judge, I would be bound by applicable Supreme Court and First Circuit precedent on this issue.

- b. Is it your understanding of Supreme Court precedent that those provisions of the Bill of Rights that embody fundamental rights are deemed to apply against the States? Please explain why or why not.**

Response: Yes. See, e.g., *Duncan vs. Louisiana*, 391 U.S. 145, 148-149 (1968) (“The test for determining whether a right extended by the Fifth and Sixth Amendments with respect to federal criminal proceedings is also protected against state action by the Fourteenth Amendment has been phrased in a variety of ways in the opinions of this Court. The question has been asked whether a right is among those “fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,” *Powell v. Alabama*, 287 U.S. 45, 67 (1932); whether it is “basic in our system of jurisprudence,” *In re Oliver*, 333 U.S. 257, 273 (1948); and whether it is “a fundamental right, essential to a fair trial,” *Gideon v. Wainwright*, 372 U.S. 335, 343-344 (1963); *Malloy v. Hogan*, 378 U.S. 1, 6 (1964); *Pointer v. Texas*, 380 U.S. 400, 403 (1965)).

- c. *Heller* further stated that “it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a pre-existing right.” Do you believe that the Second Amendment, like the First and Fourth Amendments, codified a pre-existing right? Please explain why or why not.**

Response: The U.S. Supreme court has said that the Second Amendment codified a preexisting right, and if confirmed as a U.S. District Judge I would be bound by applicable Supreme Court and First Circuit precedent on this issue.

- d. Some have criticized the Supreme Court’s decision in *Heller* saying it “discovered a constitutional right to own guns that the Court had not previously noticed in 220 years.” Do you believe that *Heller* “discovered” a**

new right, or merely applied a fair reading of the plain text of the Second Amendment?

Response: I have not studied the history to an extent that would permit me to have formed an opinion on the criticism described. As an opinion of the Supreme Court, *Heller* is the law, and if confirmed as a U.S District Judge, I would follow it.

- 8. 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.

- 9. 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. Do you believe *Lopez* and *Morrison* consistent with the Supreme Court’s earlier Commerce Clause decisions?**

Response: Yes.

- b. Why or why not?**

Response: The *Lopez* and *Morrison* opinions are consistent with the Supreme Court’s earlier Commerce Clause decisions because the decisions themselves so indicate and the Court affirmed this opinion in *Gonzales v. Raich*, 545 U.S. 1 (2005).

- 10. 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 do not disagree with Justice Kennedy’s analysis as the opinion of the U.S. Supreme Court, which, if confirmed as a U.S. District Judge, I would follow.

- a. Do you believe evolving standards of decency are relevant to a court’s evaluation of the text of the Constitution or Bill of Rights?**

Response: If confirmed as a U.S. District Judge, I would not look to “evolving standards of decency” except where instructed to do so by the U.S. Supreme Court or the First Circuit.

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

Response: If required to make such a determination, I would apply precedents from the U.S. Supreme Court and the U.S. Court of Appeals for the First 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 U.S. Supreme Court has previously ruled that the death penalty is a constitutional punishment and, therefore as a U.S. District Judge, I would follow that precedent.

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

Response: The only relevant factors in the analysis of this issue at the district court level are those set forth by the U.S. Supreme Court in its decisions on the issue.

11. 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: Not applicable.

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

Response: No.

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

Response: I would not consider foreign law when interpreting the Eighth Amendment unless required to do so by precedent from the U.S. Supreme Court or the Court of Appeals for the First Circuit.

12. In *Kennedy v. Louisiana*, the Supreme Court held that the death penalty for the crime of child rape always violates the Eighth Amendment. Writing for a five-justice majority, Justice Kennedy based his opinion partly on the fact that 37 jurisdictions – 36 states and the federal government – did not allow for capital punishment in child rape cases.

- a. **Given the heinousness of the crime, as well as the new information on the federal government’s codification of capital punishment in child rape cases under the UCMJ, do you believe *Kennedy v. Louisiana* was wrongly decided? If not, why?**

Response: I have not analyzed this opinion. Justice Kennedy’s opinion in *Kennedy* is binding precedent and I would follow it if confirmed as a U.S. District Judge.

- b. **Following the Supreme Court’s decision, President Obama announced at a press conference: “I think that the death penalty should be applied in very narrow circumstances for the most egregious of crimes. I think that the rape of a small child, 6 or 8 years old, is a heinous crime.” Do you agree with that statement?**

Response: I can agree that the rape of a child is a heinous crime. With respect to when the death penalty should be applied, I would follow binding precedent of the U.S. Supreme Court.

13. **In *Atkins v. Virginia*, the Supreme Court ruled that the imposition of the death penalty on mentally retarded defendants constituted cruel and unusual punishment. In its majority opinion, Justice Stevens stated that the “clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures,” and that the majority first reviewed “the judgment of legislatures that have addressed the suitability of imposing the death penalty on the mentally retarded.” The majority cited the fact that 18 States, less than half of the 38 States that permitted capital punishment, had recently enacted legislation barring execution of the mentally retarded as evidence that a “national consensus” existed about the propriety of executing the mentally retarded.**

- a. **Do you believe that the legislative acts of 47% of the country equates to a national consensus?**

Response: I do not know what constitutes a national consensus.

- b. **In its majority opinion, the Court stated: “Moreover, within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved. Brief for The European Union as *Amicus Curiae* in *McCarver v. North Carolina*, O. T. 2001, No. 00—8727, p. 4.” Do you personally believe it was appropriate for the Court to consider the opinion of the “world community” when interpreting the Eighth Amendment?**

Response: If confirmed as a U.S. District Judge, my personal beliefs will not play a role in my decision making. I would be bound by that precedent and would follow the law.