

**Responses of Sue E. Myerscough
Nominee to be United States District Judge for the Central District of Illinois
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. I do not believe the Constitution is a living document that is constantly evolving as society interprets it.

- 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 know the context in which Justice Brennan said this. Constitutional interpretation should take into account the text of the Constitution, the intent of the framers, and Supreme Court precedent.

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

Response: No. The text of the Constitution, the intent of the framers, and binding precedent from the Supreme Court guide judicial decision-making.

- 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. The court applies the law to the facts.

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

Response: The Supreme Court in United States v. Lopez, 514 U.S. 549 (1995), set forth the test for determining whether a particular transaction is subject to the Commerce Clause: whether the activity falls within the channels of interstate commerce, instrumentalities of, or persons or things in, interstate commerce, or activities having a substantial relation to interstate commerce. The Supreme Court has consistently held the Commerce Clause power is not unlimited. “But even these modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits.” Lopez, 514 U.S. at 557. More recently, the Supreme Court has imposed additional limits on the Commerce Clause. United States v. Morrison, 529

U.S. 598 (2000). Should I be confirmed as a district judge, I will follow the Supreme Court's analysis in these cases.

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

Response: What limits remain on the Second Amendment remain open but for those limits expressly set forth by the Supreme Court as presumptively lawful regulations in District of Columbia v. Heller, 128 S. Ct. 2783 (2008). “[N]othing in our opinion should be taken to cast doubt on the longstanding prohibitions on the possession of firearms by felons and the mentally ill, or 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.” Heller, 128 S. Ct. at 2816-17.

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: Both Heller and McDonald specifically found city ordinances unconstitutional that prohibited handgun possession in the home. The Supreme Court has left open for future evaluations examples of other limits on the Second Amendment. But the Supreme Court made clear that core protections are conferred by the Second Amendment. “In Heller, however, we expressly rejected the argument that the scope of the Second Amendment right should be determined by judicial interest balancing, [citation] and this Court decades ago abandoned ‘the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights.’ [Citation.]” McDonald, 130 S. Ct. at 3047.

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: Having been expressed in an opinion by the Supreme Court in Roper v. Simmons, 543 U.S. 551 (2005), if confirmed as a district court judge, I would be bound by that precedent.

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: In Roper, the Supreme Court stated that “we have established the propriety and affirmed the necessity of referring to ‘the evolving standards of decency that mark the progress of a maturing society’ to determine which

punishments are so disproportionate as to be cruel and unusual.” 543 U.S. at 560-61 (quoting Trop v. Dulles, 356 U.S. 86, 100-01 (1958) (plurality opinion)). If confirmed as a district judge, I would be bound by precedent of the Supreme Court.

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

Response: First I would determine whether the Supreme Court or the Seventh Circuit had decided whether the punishment in question violated the Eighth Amendment. Such precedent would control. In the absence of such precedent, I would research Supreme Court case law to determine which factors govern the Eighth Amendment analysis and how to implement those factors.

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 Supreme Court has rejected challenges to the death penalty on many occasions. If confirmed as a district court judge, I would follow that precedent.

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

Response: As set forth in Question 7(b), and further the Supreme Court has held the death penalty is not unconstitutional in all cases. Therefore, a district court judge would have no occasion to apply the “evolving standards of decency.”

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. The meaning of a constitutional provision is determined by its text and history and by interpretations handed down by the Supreme Court.

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: Under no circumstances.

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

Response: Pursuant to Supreme Court precedent, only rarely are courts to consider foreign materials.

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

Response: No.