

Responses of Michael H. Simon
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: No. The text of our written Constitution and the enduring and fundamental principles that its words express do not change over time except by formal amendment ratified in accordance with Article V of the Constitution.

- 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: Justice Brennan made these comments during a speech at Georgetown University in October 1985 and not in a majority opinion from the Supreme Court. Constitutional interpretation must be faithful to the text of the Constitution and to the enduring and fundamental principles that its words express. It is not the proper role of a federal judge in interpreting the law to make policy decisions, including decisions that may be transformative. That role properly belongs to Congress and the President.

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

Response: The text of our written Constitution does not change except by valid amendment. When a lower federal court employs judicial doctrine to aid in the interpretation of a constitutional provision, the principles of precedent and *stare decisis* require the judge faithfully to follow the understandings of the Constitution that have been directed by the Supreme Court and any other binding appellate courts. If confirmed by the Senate, I will faithfully follow all governing precedent.

- 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: It is essential for a judge to listen with an open mind and without bias or prejudice to all parties, to treat all parties respectfully and politely, and to understand all of the relevant facts and circumstances. To the extent that empathy assists a judge in fulfilling these responsibilities, it is appropriate. To the extent, however, that empathy may imply that a judge should fail to apply the law to the facts or should fail to be neutral and impartial, that understanding of empathy plays no proper role in the consideration of a case by a judge.

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

Response: The Supreme Court has held that Congress' power under the Commerce Clause is broad, see *Wickard v. Filburn*, 317 U.S. 111 (1942); *Gonzales v. Raich*, 545 U.S. 1 (2005), but not unlimited. See *United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000).

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

Response: The Supreme Court held in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), that the Second Amendment confers on private individuals a right to keep certain firearms, including handguns, at home for self-defense. In *Heller*, the Supreme Court also stated that laws forbidding the possession of firearms by convicted felons and the mentally ill, laws prohibiting the carrying of firearms in sensitive places such as schools and government buildings, and laws imposing conditions and qualifications on the commercial sale of arms are "presumptively lawful regulatory measures." *Heller*, 128 S. Ct. at 2816-17. In *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), the Supreme Court held that the Second Amendment right to keep and bear arms is fully applicable to the States by virtue of the Fourteenth Amendment. In *McDonald*, the Supreme Court left for future decisions the development of what specific limitations remain on that Second Amendment right and what judicial doctrine or level of review should be employed in evaluating future claims of an infringement of that right.

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: In light of the questions left open by the Supreme Court in both *Heller* and *McDonald*, the scope of any remaining limitations on the individual Second Amendment right to keep and bear arms, as well as the development of the judicial doctrine to be employed in evaluating claims of an infringement of that right, are matters that will likely arise in future lawsuits.

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: Under the rule of law, a judge's personal opinion is not relevant to the decision in a case, which must be based solely on the application of law to facts. If confirmed by the Senate, in all cases that came before me I would fairly determine the facts and faithfully apply the law, including all governing precedent. In *Roper v. Simmons*, 543 U.S. 551 (2005), Justice Kennedy delivered the Supreme Court's majority opinion, which is binding on all lower federal courts.

- 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: If confirmed by the Senate, I will faithfully follow all governing precedent.

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

Response: If confirmed by the Senate, I will faithfully follow all governing precedent, including all governing judicial doctrine for making that determination.

- 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: In *Gregg v. Georgia*, 428 U.S. 153 (1976), the Supreme Court rejected the argument that the death penalty was unconstitutional in all cases. If confirmed by the Senate, I will faithfully follow all governing precedent.

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

Response: In *Graham v. Florida*, 130 S. Ct. 2011, 2022 (2010), the Supreme Court stated that the factors to be considered in evaluating whether a state's death penalty law is constitutional would be the "'objective indicia of society's standards, as expressed in legislative enactments and state practice' ... [and] 'the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose,'" (citations omitted).

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, unless the Supreme Court or other governing precedent directs otherwise.

- a. **Is it appropriate for judges to look for foreign countries for “wise solutions” and “good ideas” to legal and constitutional problems?**

Response: The primary job of a district court judge is to apply the law, including all governing precedent, to the facts in the case that is properly before the court. Looking to foreign countries for "wise solutions" or "good ideas" appears to involve a search for the best policy responses to a problem, but the selection of a policy is a decision to be made by the legislative or executive branches of government, not by the judicial branch deciding a specific case presented in court.

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

Response: None, unless the Supreme Court or other governing precedent directs otherwise.

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

Response: No, unless the Supreme Court or other governing precedent directs otherwise.

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

Response: No, unless the Supreme Court or other governing precedent directs otherwise.

9. **In remarks before a conference sponsored by the Oregon Lawyers Chapter of the American Constitution Society on May 23, 2007, you stated:**

We also do not have agreement on the relevant history and meaning of the constitutional provisions. . . . The historical record is both sufficiently sparse to not tell us very much and sufficiently rich to provide support for all positions, separationist, antiseparationist, and almost everything in between. There is also support for the conclusion that the Founders did not believe that their intentions and understanding should bind future generations. That may be the only real ‘original intent’ of the Founders. There is also support for the proposition that the concept of ‘separation of church and state’ was an ‘unfolding and evolving’ idea at the time of the Founders”

- a. **Given your statement, do you disagree with originalists who believe the Constitution should be interpreted based on the Founder’s original understanding of the meaning of the text at the time it was written?**

Response: The Founders' original understanding of the meaning of the text at the time it was written is a very important, but not exclusive, consideration in the interpretation of the Constitution. If confirmed by the Senate, I will faithfully follow all governing precedent.

- b. **Why do you believe the Founders did not believe their intentions and understanding should bind future generations?**

Response: In THE FEDERALIST No. 37 (1788), James Madison wrote: "All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications." In certain areas of the Constitution, the Founders used precise and unambiguous words and phrases. In other areas, however, the Founders deliberately used more general words and phrases in order to express fundamental and enduring principles, rather than to dictate specific outcomes in

specific applications. In addition, concerning the Establishment Clause in particular, the Founders' views concerning the proper relationship between church and state were varied and changing, even within their own lifetimes, a fact of which they were aware.

c. Should judges look to the original meaning?

Response: Yes, judges should look to original meaning, but not as the exclusive method of constitutional interpretation.

d. If not, what method of judicial interpretation should a judge use? And, what method of interpretation would you use, if confirmed?

Response: If confirmed by the Senate, I will faithfully follow all governing precedent. In the absence of such precedent, I would begin with both the text and context and all interpretative judicial doctrines directed by the Supreme Court or other governing precedent. If further interpretive methodology were needed, I would look both to the original meaning (or understanding) of the text and to the fundamental and enduring principles expressed by the text, as well as to history and tradition. I would not, however, substitute my own policy preferences or personal values for the policy preferences, values, or choices determined by the legislative or executive branches.

10. Does the oft-quoted phrase “wall of separation of church and state” appear anywhere in the Constitution?

Response: No, the phrase "wall of separation of church and state" does not appear within the text of the Constitution.

a. To what extent does this phrase, authored by Thomas Jefferson in his letter to the Danbury Baptists, reflect your view of the proper understanding of the Constitution’s Establishment Clause?

Response: The phrase "wall of separation between church and state" first appeared in a letter from President Thomas Jefferson to the Danbury Baptist Association in 1802. Since then, the Supreme Court has adopted that language "as an authoritative declaration of the scope and effect" of the Constitution's Establishment Clause. *See Reynolds v. United States*, 98 U.S. 145, 164 (1878); *Everson v. Board of Education*, 330 U.S. 1, 15-16 (1947). If confirmed by the Senate, I will faithfully follow all governing precedent.