

**Responses of Stephen N. Six
Nominee to be United States Circuit Judge for the Tenth Circuit
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 do not agree with the idea that the Constitution is constantly evolving as society interprets it. While societal circumstances can change, the Constitution is only changed through amendments as set forth in Article V.

- 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: No.

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

Response: No.

- 4. The U.S. Supreme Court held in *District of Columbia v. Heller*, 554 U.S. 570 (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. Leaving aside the *McDonald v. Chicago* decision, do you personally believe the right to bear arms is a fundamental right?**

Response: The Second Amendment establishes that right and the Supreme Court affirmed that right.

- 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: The Supreme Court stated in *McDonald v. City of Chicago*, that certain rights, including most of the rights guaranteed in the Bill of Rights, have been determined by the Court to be “fundamental” to our country’s “scheme of ordered liberty” or “deeply rooted in the Nation’s history and tradition,” and have been deemed to apply against the States.

- 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. Please see response to 4(a).

- c. **The *Heller* Court 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: Yes. In *Heller*, the Supreme Court determined “the Second Amendment, like the First and Fourth Amendments, codified a pre-existing right.” If confirmed, I would apply the precedent in *Heller* as well as any other applicable cases.

5. **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: The Supreme Court’s decision in *Heller* was based on the text of the Second Amendment and if confirmed I would apply the precedent in *Heller* as well as any other applicable Supreme Court cases.

- a. **Similarly, during his State of the Union address, the President said the Supreme Court’s decision in *Citizens United v. FEC*, 558 U.S. ____ (2010), “reversed a century of law” and others have stated that it abandoned “100 years of precedent.” Do you agree that the Court reversed a century of law or 100 years of precedent in the *Citizens United* decision? Please explain why or why not.**

Response: The holding in *Citizens United* was based on the First Amendment and the Supreme Court’s many cases applying the First Amendment some of which are described by the court as conflicting lines of precedent. If confirmed I would apply the *Citizens United* precedent as well as any other applicable Supreme Court precedent.

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

Response: As the Supreme Court discussed in *McDonald v. City of Chicago* and in *Heller* some limitations remain, such as possession of a firearm by felons or the mentally ill or “laws forbidding the carrying of firearms in sensitive places such as schools and government buildings.”

- a. **Is the Second Amendment 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 in *Heller* and *McDonald* identified certain types of laws that would not infringe on the Second Amendment, however, the Court did not define the extent of Second Amendment rights under all scenarios. If confirmed, I would apply the Supreme Court's precedents in *Heller* and *McDonald*.

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: If confirmed, I would apply the binding precedent of the Supreme Court in *Roper* as well as any other applicable 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: If confirmed as a circuit court judge and faced with an issue involving the Eighth Amendment and capital punishment, I would be required to follow the Supreme Court precedents and the analytical framework in *Roper v. Simmons* on what constitutes cruel and unusual punishment.

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

Response: I would follow the guidance of the Supreme Court in *Roper* and any other applicable binding precedents.

- 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: The Supreme Court has determined the death penalty is constitutional except in limited circumstances. Given this binding precedent, I do not believe a lower court judge could decide otherwise.

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

Response: Given that a lower court judge could not decide that the death penalty was unconstitutional in all circumstances, I do not believe such analysis would be appropriate.

- e. **When determining what the “evolving standards of decency” are, justices have looked to different standards. Some justices have justified their**

decision by looking to the laws of various American states,¹ in addition to foreign law, and in other cases have looked solely to the laws and traditions of foreign countries.² Do you believe either standard has merit when interpreting the text of the Constitution?

Response: In interpreting the Constitution I would look to domestic sources of law and legal authorities unless instructed otherwise by the Supreme Court. In *Roper* the Court held that state laws and foreign laws are relevant but not controlling. I would not consider state law or foreign law in Constitutional interpretation unless binding Supreme Court precedent required it.

- i. If so, do you believe one standard more meritorious than the other? Please explain why or why not.**

Response: Please see response to 7(e).

- 8. In your view, is it ever proper for judges to rely on foreign or international laws or decisions in determining the meaning of the Constitution?**

Response: In interpreting the United States Constitution I would use domestic legal sources, unless instructed to do otherwise by binding Supreme Court precedent.

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

Response: I would not look to the law of foreign counties in evaluating legal and constitutional problems unless directed to do so by the Supreme Court.

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

Response: If confirmed, I would not use foreign laws when interpreting the Constitution unless directed to do so by the Supreme Court.

- 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 believe the United States Constitution and laws should be interpreted with domestic legal authorities not foreign sources.

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

Response: If confirmed, I would not consider foreign law in interpreting the Constitution unless directed to do so by binding Supreme Court precedent.

¹ *Roper v. Simmons*, 543 U.S. 551, 564-65.

² *Graham v. Florida*, 130 S.Ct. 2011, 2033-34.