

**Responses of Jane Branstetter Stranch
Nominee to the U.S. Court of Appeals for the Sixth Circuit
to the Written Questions of Senator Tom Coburn, M.D.**

- 1. What principles of constitutional interpretation would you look to in analyzing whether a particular statute infringes upon some individual right?**

Response: There are a number of recognized tools of constitutional interpretation employed by the courts, including: textual, historical, structural, doctrinal, ethical and prudential. The Supreme Court has issued opinions that address the use of such tools in particular individual rights cases. For example, in the recent case of *District of Columbia v. Heller*, 128 S. Ct. 2783 (U.S. 2008), the Supreme Court employed several of these interpretation tools, emphasizing some, such as textual, historical and doctrinal, and finding limited or lack of applicability of others, such as “interest balancing.” I would be bound by the Supreme Court’s articulations of the applicable standard and its determinations regarding individual rights.

- 2. As you know, the Second Amendment right to bear arms is one of that is very important to all Americans, but particularly to those in my home state of Oklahoma. Do you believe that the Second Amendment is an individual right or a collective right? Please explain your answer.**

Response: The recent Supreme Court case of *District of Columbia v. Heller*, 128 S. Ct. 2783 (U.S. 2008) determined that the Second Amendment contains an individual right to keep and bear arms. That decision is binding precedent on the circuit courts.

- a. Do you believe an individual Second Amendment right exists outside the context of military service or hunting? If so, please explain.**

Response: The Supreme Court in the *Heller* case addressed that issue and determined that the Second Amendment contains an individual right to keep and bear arms in self defense.

- b. Do you believe the right to bear arms is a fundamental right?**

Response: *Heller* recognized an individual right to keep and bear arms but left open the question of whether the Second Amendment is a fundamental right, incorporated as to the States through the due process clause. Whether the Second Amendment is incorporated as to the States either through the due process clause or the privileges or immunities clause of the Fourteenth Amendment is before the Supreme Court in *McDonald v. Chicago*, writ of certiorari granted, on appeal from the Seventh Circuit decision in 2009, U.S. App. LEXIS 11721 (2009). The Court’s decision in *McDonald* will govern lower courts’ interpretation of Second Amendment rights as they apply to the States. It is not appropriate for a nominee to a circuit court to opine on an issue that is pending before the

Supreme Court. I can confirm that I would follow any decision issued by the Supreme Court.

c. What constitutional analysis would you employ to determine whether it is a fundamental right?

Response: The Supreme Court has accepted certiorari in *McDonald v. Chicago* in which the 7th Circuit affirmed dismissal of an action challenging a municipal ban on the possession of most handguns. Noting that it is the prerogative of the Supreme Court to overrule one of its own precedents, the 7th Circuit affirmed on the basis of three historic Supreme Court cases, *Cruikshank*, *Presser* and *Miller*, that had refused to apply the Second Amendment to the States. The Supreme Court noted in the *Heller* case that *Cruikshank* did not engage in the Fourteenth Amendment inquiry now required; however, it found that question was not presented by *Heller*. The Supreme Court has since accepted certiorari in *McDonald* where it is presented with the question of whether the Second Amendment is incorporated as to the States either through the due process clause or the privileges or immunities clause of the Fourteenth Amendment. The Supreme Court will explicate the appropriate Constitutional analysis and its decision will be binding on the lower courts. It is not appropriate for a nominee to a circuit court to opine on an issue that is pending before the Supreme Court. I can confirm that I would follow any decision issued by the Supreme Court.

d. Do you believe the right to self defense is a fundamental right?

Response: *Heller* recognized an individual right to keep and bear arms in self defense but left open the question of whether this is a fundamental right. The Supreme Court has since accepted certiorari in *McDonald* where it is presented with the question of whether the Second Amendment is incorporated as to the States either through the due process clause or the privileges or immunities clause of the Fourteenth Amendment. Its decision will be binding on the lower courts. It is not appropriate for a nominee to a circuit court to opine on an issue that is pending before the Supreme Court. I can confirm that I would follow any decision issued by the Supreme Court.

3. The Second Amendment states: “A well regulated Militia, being necessary to the security of a free State, the right of the people to bear Arms, shall not be infringed.” (Emphasis added). In contrast, nowhere in the Constitution is there a statement of or reference to any right to privacy. How, then is the right to privacy considered a “fundamental right,” but the right to bear arms is apparently not?

Response: The Supreme Court has found a right to privacy to be inherent in the Constitution, noting that a number of Amendments address rights, centered on the concept of inviolable individual privacy, that are enforceable as to the States. In *Griswold v. Connecticut*, 381 U.S. 479 (1965), the Court found a state statute criminalizing the use of contraception to be an

unconstitutional incursion into “the zone of privacy created by several fundamental constitutional guarantees.” Whether the right to bear arms is a fundamental right has not been resolved. The three historic Supreme Court cases, *Cruikshank*, *Presser* and *Miller*, had rejected application of the Second Amendment to the States under the privileges or immunities clause of the Fourteenth Amendment. The Supreme Court has since accepted certiorari in *McDonald* where it is presented with the question of whether the Second Amendment is incorporated as to the States either through the due process clause or the privileges or immunities clause of the Fourteenth Amendment. Its decision will be binding on the lower courts.

a. Do you agree that this is a perverse result?

Response: We await the determination of the Supreme Court on this issue. I do not think it would be appropriate for me, a judicial nominee, to comment on whether a pending decision of the Supreme Court might be considered a “perverse result.”

4. 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. Generally speaking, are *Lopez* and *Morrison* consistent with the Supreme Court’s earlier Commerce Clause decisions?

Response: The Supreme Court in *Gonzales v. Raich*, 545 U.S. 1 (2005), took the position that its decisions in *Lopez* and *Morrison* are wholly consistent with its earlier, New Deal era decisions, which granted expansive legislative powers under the Commerce Clause.

b. Why or why not?

Response: The Court in *Raich* distinguished the circumstances presented in *Lopez* and *Morrison*. The challenge in *Raich* sought to excise individual applications, there as to medical marijuana, of a concededly valid statutory scheme under the Controlled Substance Act. The prior cases challenged their statute or provision as outside Congress’ commerce power in its entirety. The Court also distinguished the nature of the statutes themselves, noting the appropriate economic nature of the larger regulatory scheme in *Raich* as opposed to the noneconomic, criminal nature of the statutes in *Lopez* and *Morrison*.

5. 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 think referring to the Constitution as a document “constantly evolving as society interprets it” misses the mark. The Constitution is the supreme law of our land and its wording does not change absent amendment; however, the Supreme Court tells us what those words mean as it applies them to new situations. The Supreme Court is charged with the ultimate authority to apply the law of the Constitution to the facts of a particular case. If confirmed to serve, I will uphold the Constitution and honor legal precedent interpreting its provisions.

6. **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 the 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: In cases where the Supreme Court has ruled, whether a judge agrees with the analysis or the outcome is not relevant as the judge is bound by the Supreme Court’s determinations.

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

Response: The Supreme Court in *Roper* articulated both the standard and the factors considered in applying that standard. As a portion of its explanation, the Court noted, “The prohibition against ‘cruel and unusual punishments,’ like other expansive language in the Constitution, must be interpreted according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design. To implement this framework 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. *Trop v. Dulles*, 356 U.S. 86, 100-101, 2 L. Ed. 2d 630, 78 S. Ct. 590 (1958) (plurality opinion).” *Roper* at 560-61. The Court held that the beginning point of that determination is its review of objective indicia of consensus as expressed by enactments of legislatures. The exercise of the Court’s independent judgment regarding the proportionality of the punishment followed. I am bound to the standard set and the determination made by the Court in accordance with the doctrine of *stare decisis*.

7. **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: The Supreme Court has provided guidance on this question. I am aware of only a very few cases in which it has referenced non-U.S law in a majority opinion, including *Roper*. In these few cases, references to foreign law were made for such purposes as extrapolating on societal norms and standards of decency, refuting contrary assertions or confirming American views. *Roper* specifically noted that the foreign law references were not “controlling” and were presented for the purpose of confirmation of

the Court's conclusions. None of these cases used foreign or international law to interpret a constitutional text. The Supreme Court's restraint on this issue is a model for the lower courts.

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

Response: I would follow the Supreme Court's restraint in which such law, if referenced at all, would be used as confirmatory only. The fact that such references are so rare at the Supreme Court level suggests even rarer usage in the lower courts.

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

Response: I would follow the Supreme Court's restraint in which such law, if referenced at all, would be used as confirmatory only. The fact that such references are so rare at the Supreme Court level suggests even rarer usage in the lower courts.

8. Does the oft-quoted phrase "wall of separation of church and state" appear anywhere in the Constitution?

Response: It does not.

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 Supreme Court's determination of how the Establishment Clause is to be understood and applied would be binding on me, were I confirmed. The Court's test in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), taken in context with more recent Supreme Court decisions interpreting the *Lemon* test, governs the interpretation of the Establishment Clause by all lower courts. The Court stated the test: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'" *Lemon* at 612-3. That test, and the more recent Supreme Court cases interpreting it, would govern my view and decision making.

b. Is the First Amendment right to freedom of religion a fundamental right?

Response: The Supreme Court has found this right to be fundamental, noting that the First Amendment is made applicable to the states by the Fourteenth Amendment. In general terms, the First Amendment has been found to guarantee a right to free

exercise of religion, a right to be free of government entanglement with religion, and a right to religious belief. See *Everson v. Board of Education*, 330 U.S. 1 (1947).

9. Over the course of your career in private practice, you have represented labor unions and union locals and were a member of the Board of Directors of the AFL-CIO Lawyers Coordinating Committee, which “is comprised of more than 1,800 union-side labor lawyers in more than 500 firms and union legal departments nationwide. Since its inception in 1983, the LCC has provided a unique opportunity for lawyers who represent unions to share information and resources.”

a. You have clearly spent a great deal of your career representing unions. Will you recuse yourself from cases involving unions or a union local that you represented or the AFL-CIO?

Response: I have had a varied practice that includes representation of labor organizations, individuals, municipalities, and a variety of companies and entities. I would have to examine the parties and particular facts and issues of each case to determine if, under the governing rules, recusal is warranted.

i. Please explain how you will determine whether recusal is warranted in these cases.

Response: A determination of whether recusal is warranted is a fact intensive process. If confirmed, I would automatically recuse myself from cases in which I was providing representation when appointed to the bench and from cases in which my family members are counsel. For an appropriate period of time, I would also recuse myself from cases in which my law partners are counsel. For any cases that include as a party a union client I have represented during my 30 plus years of practice, I would err on the side of caution, examining the case for even the appearance of impropriety. I would be guided by the recognized procedures, including review of applicable statutes, the Code of Conduct for United States Judges, and where helpful, I would consult with the entities authorized to render advice on these issues as well as my colleagues on the bench. Where appropriate, I would disclose facts on the record of the case and consider the positions of the parties.

b. When determining whether recusal is required, do you believe the rules should be interpreted narrowly or broadly?

Response: It appears to me that the rules of recusal should be interpreted broadly. This enables the judge to consider all the factors that might impact even the appearance of impropriety and supports public confidence in the impartiality of the judiciary.

i. Please explain your reasoning.

Response: Public respect for and confidence in the impartiality and fairness of the judicial system is very important. One of the most effective ways to inspire that confidence is to assure that all judges are reviewing recusal issues using the same method and rules. That is why review under the Code of Conduct of United States Judges and adherence to established precedent are important. There is a well developed system in place to review these issues and to provide support and advisory assistance in making determinations regarding conflicts of interest. I would review all recusal issues under these established rules because I believe that consistent adherence by all the judiciary to the established process can be as important as the result.