

**Responses of O. Rogerie Thompson
Nominee to the U.S. Court of Appeals for the First Circuit
to the Written Questions of Senator Tom Coburn, M.D.**

1. What is your view of the role of a judge?

Response: A judge plays the key role in dispute resolution. In all disputes brought before the court it is the role of a judge to fairly and impartially apply the law to the facts consistent with due deference to the plain and ordinary meaning of legal text, and applicable case precedent.

2. If confirmed, what strengths do you think you bring to this position?

Response: I have 21 years of serving as a neutral judicial arbiter at the state court level. This extensive legal experience of hearing and deciding a myriad of civil and criminal cases has provided me with valuable skills and judgment which I would bring to the Federal Circuit Court should I be confirmed.

a. What weaknesses do you think you bring to this position?

Response: Although not a weakness, a new aspect of being a Federal Court Judge if confirmed would be working in collaboration with other judges to reach case resolution.

3. The American Bar Association's Standing Committee on the Judiciary rated your nomination "Majority Qualified, Minority Not Qualified." Were you satisfied with the ABA's review of your record?

Response: The ABA Committee review is a confidential process so I do not know the manner of its deliberations, nor the methodology of its ratings. Therefore, I am not in a position to evaluate it.

a. Did the ABA explain why you received the "Not Qualified" rating?

Response: No. I was not provided with an explanation of why a minority of the ABA Committee voted not qualified.

b. Did you agree with their analysis of the factors that resulted in the "Not Qualified" rating?

Response: Because I am not aware of the specific factors used by the ABA Committee in its analysis, I cannot respond. However, I agree with the majority vote which deemed me qualified and I do believe I am prepared and qualified to serve as a United States Circuit Court Judge if confirmed.

c. Did you have an opportunity to provide contrary evidence to counter the findings that resulted in the "Not Qualified" rating?

Response: I was not asked nor did I provide any additional information to the ABA Committee after it concluded its vote.

4. Is ever proper for judges to indulge their own values in determining what the law means?

Response: No.

a. If so, under what circumstances?

Response: See above response.

b. Please identify any cases in which you have done so.

Response: None.

c. If not, please discuss an example of a case you have decided where you have had to set aside your own values and rule based solely on the law?

Response: All of my decisions have been based solely upon the law. I cannot think of an example where my personal values have conflicted with my legal rulings.

5. Is ever proper for judges to indulge their own policy preferences in determining what the law means?

Response: No.

a. If so, under what circumstances?

Response: See above response.

b. Please identify any cases in which you have done so.

Response: None.

c. If not, please discuss an example of a case you have decided where you have had to set aside your own policy preferences and rule based solely on the law.

Response: I cannot think of an example where any personal policy preferences have been set aside in order to rule solely on the law.

6. How do you define “judicial activism?”

Response: I do not believe the term “judicial activism” has a commonly accepted meaning. I do not use the term and therefore have no definition for it.

7. What principles of constitutional interpretation help you to begin your analysis of whether a particular statute infringes upon some individual right?

Response: First, I would start with the text of the statute and then look to applicable U.S. Supreme Court and First Circuit precedent. If none exists, I would look for analogous holdings.

8. **As you know the Second Amendment right to bear arms is one that is very important to all Americans, but particularly 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 United States Supreme Court in *District of Columbia vs. Heller* ruled the right to bear arms an individual right under the Second Amendment within federal enclaves. The decisions of the Supreme Court are binding precedent and if confirmed, I would follow that precedent.

- 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 has not ruled on this issue as applied to the states but I will follow the ruling of the Court once it has rendered a decision.

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

Response: The Supreme Court has granted certiorari in a case wherein it will rule if the right to bear arms is a fundamental right as applied to the states. If confirmed as a Circuit Court Judge, I will follow the holding of the Supreme Court.

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

Response: If confirmed I will follow the analytical framework dictated by the Supreme Court and First Circuit for determining if an individual right is fundamental.

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

Response: The Supreme Court has not ruled on this issue but if confirmed, I will follow any precedent it hands down.

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

Response: In *Gonzales v. Raich*, the Supreme Court indicated that its *Lopez* and *Morrison* decisions are consistent with earlier Supreme Court Commerce Clause decisions.

b. Why or why not?

Response: In *Gonzales v. Raich*, the Court rejected a reading of *Lopez* and *Morrison* as inconsistent with prior Commerce Clause precedent. 545 U.S. 1, 23 (2005). Specifically, the Court rejected the respondent's "myopic focus" on *Lopez* and *Morrison*, which "overlook the larger context of modern-era Commerce Clause jurisprudence preserved by those cases."

10. 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. Society does not interpret the Constitution. The Supreme Court does. The words and structure of the Constitution change only when amended in accordance with Article 5. The Constitution is the philosophical underpinning of our governmental structure and is constructed to be enduring. Yet I think it is appropriate to acknowledge that new situations can and do arise which could not have been envisioned by the drafters, e.g., the creation of the internet and its impact upon first amendment rights. In such instances, constitutional interpretation must be grounded in the text of the document, its undergirding principles, historical analogies, and the Supreme Court's interpretation of it meaning.

11. 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 accept the Supreme Court's analysis and would have no difficulty applying the holding of the Court

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

Response: If required to apply the evolving standards of decency test, I would follow the Supreme Court's analysis and apply same.

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

Response: If confirmed I would rely solely on the wealth of existing American statutory and case law unless instructed to do otherwise by the Supreme Court.

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

Response: See above response.

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

Response: See above response.