

Responses of Amy Totenberg
Nominee to be United States District Judge for the Northern District of Georgia
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 the Constitution is fixed, absent amendment through the Article V amendment process. The Constitution establishes a structure of enduring principles of governance as well as rights identified in the Bill of Rights and other Amendments to the Constitution. The Framers intended the Constitution’s principles to be applied to changing circumstances over the course of American history, even though they naturally could not envision or predict these circumstances.

- 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: My understanding of this passage from Justice Brennan’s speech is that he was suggesting that the Supreme Court’s judicial interpretation should be guided by the enduring principles established by the Constitution and its Amendments. Specifically, Justice Brennan was referring in this paragraph to the intent of the Civil War Amendments (Thirteenth, Fourteenth and Fifteenth Amendments) to abolish slavery, guarantee equal protection of law, and establish the right of citizens to vote without regard to race, color, or previous condition of servitude. If confirmed, in my limited role as a District Court judge I would consider a case involving a constitutional question by reviewing the text of the constitutional provisions at issue and the legal analysis required by applicable binding precedent of the Supreme Court and the Eleventh Circuit.

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

Response: In applying the Constitution to the specific facts of a particular case, a district court judge should be solely guided by the text of the Constitution, binding precedent of the Supreme Court and appellate court, and if necessary and appropriate, the record reflecting the intent of the constitutional or legislative provisions at issue. In certain limited constitutional case contexts, binding Supreme Court precedent has considered legislative norms in the United States or relevant historical practices, as evident in the Court’s decisions in *District of Columbia v. Heller*, 128 U.S. 2783 (2008) and *Atkins v. Virginia*, 536 U.S. 304 (2002).

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: When reaching a decision, a judge must put aside whatever sympathy the judge may feel for the position of a specific litigant. To the extent that empathy is defined as the capacity to understand the position and circumstances of witnesses and parties, this quality could contribute to the judge's performance of the responsibility to listen to and understand evidence presented in a given case. However, empathy should not play a role in the judge's application of the law to the facts presented.

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

Response: The Supreme Court's decisions in *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000), identify the three categories of activity covered by the Commerce Clause: activity involving the channels of interstate commerce; instrumentalities of, or persons or things, in interstate commerce; and, activities having a substantial relation to interstate commerce. An exchange of money may therefore not fall under the coverage of the Commerce Clause for a variety of reasons. Specifically, the exchange may involve purely localized transactions between individuals or entities that are solely within one state, community, or family and bear no substantial relation to interstate commerce or involve neither the channels nor instrumentalities of commerce.

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

Response: The Supreme Court has left open the question of what limitations on the Second Amendment right, if any, would pass constitutional muster beyond those prohibitions the Court expressly identified as presumptively lawful regulatory methods. These methods include "longstanding prohibitions on the possession of firearms by felons and the mentally ill or laws forbidding the carrying of arms in sensitive places such as schools and government buildings or laws imposing conditions and qualifications on the sale of arms." *District of Columbia v. Heller*, 128 S.Ct. 2783, 2816-2817 (2008).

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: The Court's decisions in these cases specifically held unconstitutional City ordinances that prohibited handgun possession in the home. While the Court left open for future evaluation other applications of the Second Amendment, it made clear that the core protection conferred by the Second Amendment must be recognized and not "watered-down" by any form of "interest-balancing." *McDonald v City of Chicago*, 130 S.Ct. 3020, 3048-3050 (2010); *District of Columbia v. Heller*, 128 S.Ct. 2783, 2821 (2008).

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 as a District Court judge, I would be bound by and follow the Supreme Court’s holding and analysis in *Roper* in combination with other applicable Supreme Court and Eleventh Circuit 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: The Court observed in *Roper* that because the death penalty is the most severe punishment, “it must be limited to those offenders who commit ‘a narrow category of the most serious crimes’ and whose extreme culpability makes them ‘the most deserving of execution.’” 543 U.S. at 568, quoting *Atkins v. Virginia*, 536 U.S. 304, 319 (2002). The Supreme Court’s analysis of what offenders meet this standard of culpability draws on “history, tradition, and precedent” as well as “the evolving standards of decency that mark the progress of a maturing society” which are referred to so as “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, 100-101 (1958)(plurality opinion). If confirmed as a District Court judge, I would be bound to follow the holding of *Roper* and other relevant binding precedent of the Supreme Court and the Eleventh Circuit.

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

Response: If confirmed as a District Court judge, I would apply established statutory law and Supreme Court and Eleventh Circuit Court of Appeals precedent regarding imposition of the death penalty.

- 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 sustained the constitutionality of the death penalty as a form of punishment as a general matter in a variety of contexts. If confirmed as a District Court judge, I would be bound by and apply these precedents.

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

Response: If confirmed as a District Court judge, I would strictly follow precedent of the Supreme Court and the Eleventh Circuit Court of Appeals and the factors set forth in such precedent.

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, it would not be proper for a judge to do so except to the extent that precedent of the Supreme Court and the applicable Court of Appeals required otherwise.

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

Response: No, a federal judge should not engage in such an examination, except if directed to do so by applicable Supreme Court or Court of Appeals precedent.

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

Response: If confirmed as a District Court Judge, I would not consider foreign law unless explicitly required to do so by binding Supreme Court and Eleventh Circuit precedent.

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 am not aware of any such circumstances. A federal judge has a duty to apply and implement the law of the United States.

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

Response: No, I would not do so except to the extent that binding precedent of the Supreme Court and the Eleventh Circuit Court of Appeals required otherwise.