

**Responses of Josephine Staton Tucker
Nominee to the U.S. District Court for the Central District of California
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 have never referred to the Constitution as a “‘living’ document that is constantly evolving,” and I do not agree with that perspective. I believe that the Constitution is an immutable document establishing rights, principles, obligations and relationships, and that the courts must apply it to a changing society. The Constitution should be interpreted by a district court judge with reference to its language and to the decisions of higher courts.

- 2. 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: Yes.

- b. Why or why not?**

Response: In *Lopez*, the Supreme Court did not indicate that it intended to depart from earlier decisions. Rather, the Court held that the Act at issue could not “be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.” 514 U.S. at 561. Similarly, in *Gonzales v. Raich*, 545 U.S. 1 (2005), the Supreme Court made clear that its decisions in *Lopez* and *Morrison* were not inconsistent with its earlier Commerce Clause decisions.

- 3. 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: *Roper v. Simmons* is binding precedent, and, if confirmed, I would follow it.

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

Response: As a district court judge, if confirmed, I would be constrained by prior higher court decisions that had already determined the constitutionality of capital

punishment in particular circumstances. If I were required to determine the “evolving standards of decency” in a case in which no such higher court guidance were available, I would be bound to use the analysis set forth by the Supreme Court. In *Roper*, the Court explained that its determination began with a review of objective indicia of national consensus, as expressed in particular by the enactments of legislatures, followed by its determination of the proportionality of the punishment. 543 U.S. at 564.

b. 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: A district court judge is obligated to follow the decisions of higher courts. Those binding decisions would not permit a district court judge to find that the death penalty is unconstitutional in all cases.

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

Response: The most relevant factor in a district court judge’s analysis would be the prior, binding decisions of higher courts. For example, while the Supreme Court has articulated its method of determining the constitutionality of capital punishment based on the “evolving standards of decency,” to the extent that the Supreme Court has applied that analysis in a particular circumstance to uphold the death penalty, it is not within the province of a district court judge to ignore that precedent.

4. 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.

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

Response: I cannot conceive of any circumstance in which I would consider foreign law when interpreting the Constitution, except if directed to do so by applicable Ninth Circuit or Supreme Court decisions.

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

Response: Please see my previous answer.