

Responses of Robert L. Wilkins
Nominee to be United States District Judge for the District of Columbia
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: If the “living document” perspective means that the Constitution should not be interpreted first and foremost in accordance with its text, then I disagree.

- 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: I am not familiar with this statement by Justice Brennan or the context in which it was made. If confirmed as a District Court judge, I would consider the text of the Constitution, the intent of the framers, and Supreme Court precedent to resolve constitutional questions.

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

Response: I am not familiar with this statement or the context in which it was made. The Supreme Court has held that the plain language of the text of the Constitution, as well as the original intent of the framers, is the starting point for constitutional interpretation. At the same time, the Court has at times recognized that the Constitution can protect rights in a context not explicitly envisioned by the framers, such as by holding that the 14th Amendment prohibits gender discrimination and racial segregation, even though both of those practices were embraced by the framers of that amendment. If confirmed as a District Court judge, I would be bound by those precedents.

- 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: To the extent that empathy is defined as the ability to recognize the position and circumstances of others, that quality could enhance a judge’s ability to listen to the parties, but it should not play a role in applying the law to the facts.

- 5. 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. **Do you believe *Lopez* and *Morrison* are consistent with the Supreme Court's earlier Commerce Clause decisions?**

Response: Yes.

- b. **Why or why not?**

Response: In *Gonzales v. Raich*, 545 U.S. 1 (2005), the Supreme Court explained that *Lopez* and *Morrison* were consistent with the Court's earlier Commerce Clause decisions because the statutes struck down in those two cases did not actually regulate economic activity, in contrast to the statutes which had been upheld in earlier Commerce Clause decisions.

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 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 the holding and analysis of the majority opinion in *Roper*.

- 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: I am not familiar with this statement. In *Roper*, the Supreme Court stated that "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." 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 by that and other relevant precedent of the Supreme Court and the Court of Appeals for the District of Columbia Circuit.

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

Response: If confirmed as a District Court judge, I would follow Supreme Court precedent to perform this analysis.

- 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 rejected constitutional challenges to the death penalty in a variety of circumstances. Judges are bound by those precedents.

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

Response: As a District Court judge, I would follow Supreme Court precedent to ascertain the relevant factors.

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: If confirmed as a District Court judge, it would be proper to rely upon foreign law only in those circumstances where precedent of the Supreme Court or the Court of Appeals for the District of Columbia Circuit so requires.

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

Response: If confirmed as a District Court judge, it would be appropriate to look to foreign law only in those circumstances where Supreme Court precedent or domestic law so requires.

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 consider foreign law only in those circumstances where Supreme Court precedent so requires.

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.

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

Response: If confirmed as a District Court judge, I would follow Supreme Court precedent to ascertain whether foreign law was relevant to an Eighth Amendment challenge.

e. Other amendments?

Response: If confirmed as a District Court judge, I would follow Supreme Court precedent to ascertain whether foreign law was relevant to a constitutional issue.