

Questions for the Record
Senate Committee on the Judiciary
Senator Thom Tillis

Walter David Counts, III
Nominee, U.S. District Judge for the Western District of Texas

1. **Some individuals have argued that the United States Constitution is a “living document,” subject to different interpretations as society changes. Do you subscribe to this point of view?**

Response: No, I do not subscribe to the point of view that the Constitution is subject to different interpretations as society changes.

2. **What role, if any, should societal pressure or popular opinion play in interpreting statutes or the United States Constitution?**

Response: None. Neither societal pressure nor popular opinion have any role in the proper exercise of judicial authority, including in the interpretation of statutes and the U.S. Constitution. As a magistrate judge, I rely on the rule of law and precedent in making rulings and drafting opinions, without regard to societal pressure or popular opinion, and if confirmed as a district judge, I pledge to continue to do so.

3. **Please define judicial activism. Is judicial activism ever appropriate?**

Response: Judicial activism is action that exceeds the proper exercise of judicial authority, relying upon personal views as opposed to the rule of law and precedent. Judicial activism is never appropriate.

4. **When, if ever, is it appropriate for a federal court to rule that a statute is unconstitutional?**

Response: A judge should always use restraint in considering whether a statute is constitutional, beginning each analysis with the presumption that statutes enacted by Congress are valid. A judge should decide a case by the most narrow possible construct, avoiding resolution of the case by reaching the constitutional question if another avenue exists. Only in cases where Congress has exceeded its authority under the Constitution or where the

statute violates a provision of the Constitution should a statute be held unconstitutional.

5. What is a fundamental right? From where are these rights derived?

Response: The Supreme Court has defined a fundamental right as a right so rooted in the history and traditions of our people as to be ranked as fundamental and implicit in the concept of ordered liberty such that neither liberty nor justice would exist if they were sacrificed. *See generally Washington v. Glucksberg*, 521 U.S. 702 (1997) (internal quotation marks omitted). Fundamental rights are derived from the Bill of Rights and the Due Process Clause of the Fourteenth Amendment to the Constitution, as recognized by the Supreme Court. *See, e.g., id.* at 719-720.

6. Do you believe the First Amendment or any other provision of the United States Constitution protects private citizens and businesses from being required to perform services that violate their sincerely held religious beliefs?

Response: Yes. In a case concerning the Religious Freedom Restoration Act of 1993 (RFRA), the Supreme Court's decision in *Burwell v. Hobby Lobby Stores, Inc., et al.*, 134 S. Ct. 2751 (2014), in which the court struck down a provision of the Patient Protection and Affordable Care Act of 2010, makes clear that the Constitution protects private citizens and businesses from being required to perform services that violate their sincerely held religious beliefs. The Supreme Court has likewise ruled that the Free Exercise Clause of the First Amendment to the Constitution extends beyond facial discrimination and even "forbids subtle departures from neutrality," and "covert suppression of particular religious beliefs." *Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah*, 580 U.S. 520 at 534 (1993) (internal citations omitted).

7. What level of scrutiny is constitutionally required when a statute or regulation related to firearms is challenged under the Second Amendment of the United States Constitution?

Response: In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court declined to specifically define the level of scrutiny required to evaluate the extent to which a legislature may regulate a specific, enumerated right, including the right to keep and bear arms. The Supreme Court made clear that the standard in such cases is not the rational-basis standard, but is a

heightened level of scrutiny. If confirmed as a district judge, my analysis would be guided by Supreme Court and Fifth Circuit precedent.

8. Do you believe it is constitutional for states to require voters to show photo identification before being eligible to cast their vote?

Response: Various courts have decided the constitutionality of photo identification requirements in relation to voter laws, with varying results depending upon the facts of the state's law. The results are fact-specific. For example, in *Veasey v. Abbott*, 2016 WL 3923868 (July 20, 2016), the Fifth Circuit *en banc*, struck down a portion of a 2011 Texas voter identification law and the Supreme Court in *Crawford v. Marion County Election Board, et al.*, 553 U.S. 181 (2008), upheld an Indiana voter identification law.

9. One challenge you will face as a federal judge is managing a demanding caseload. If confirmed, how will you balance competing priorities of judicial efficiency and due process to all litigants involved in the cases on your docket? Will you give certain cases priority over others? If so, please describe the process you will use to make these decisions.

Response: I manage my caseload by issuing scheduling orders, setting and enforcing reasonable but fair deadlines for discovery, motions, and trials, ensuring that parties are able to fully avail themselves of the judicial system while being ever-mindful of the importance of case resolution. As a magistrate judge for more than seven years, I have extensive experience managing the heavy civil and criminal dockets of the Midland/Odessa Division of the Western District of Texas. If confirmed as a district judge, I would continue this practice, and would refer appropriate matters to the magistrate judge for assistance. Criminal cases require strict adherence with the Speedy Trial Act and the speedy trial provision of the Sixth Amendment to the U.S. Constitution.

10. Do you believe the death penalty is constitutional? Would you have a problem imposing the death penalty?

Response: The Supreme Court has held that the death penalty is constitutional and I would follow the law in imposing the death penalty. As a state prosecutor, I sought the death penalty where appropriate and have had that penalty imposed.