

Senator Vitter
Questions for the Record

Responses of Dale Alan Drozd
Nominee, United States District Judge for the Eastern District of California

- 1. What is your opinion of the constitutionality of the majority ruling NLRB v. Canning and what would be your allowable time frame between pro forma sessions of the senate before the president can soundly exercise his recess appointment power? Is it 3 days? 4? 5?**

Response: In *N.L.R.B. v. Noel Canning*, 573 U.S. ___, 134 S. Ct. 2550, 2567 (2014), the Supreme Court concluded that: “a recess of more than 3 days but less than 10 days is presumptively too short to fall within the [Recess Appointments] Clause. We add the word ‘presumptively’ to leave open the possibility that some very unusual circumstance—a national catastrophe, for instance, that renders the Senate unavailable but calls for an urgent response—could demand the exercise of the recess-appointment power during a shorter break.” If fortunate enough to be confirmed, I will continue to faithfully apply and follow all precedent of the United States Supreme Court, including the decision in *N.L.R.B. v. Noel Canning*, and of the United States Court of Appeals for the Ninth Circuit.

- 2. In your opinion, is it an undue burden on a woman seeking an abortion under Planned Parenthood v. Casey if a state requires that doctors performing the procedures have admitting privileges at one of the hospitals in the state to protect women’s health and, as a result, all abortion clinics in the state are shut down?**

Response: In *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), the Supreme Court reaffirmed the essential holding of *Roe v. Wade* but announced a new standard for determining the validity of laws restricting abortions. The new standard asks whether a state abortion regulation has the purpose or effect of imposing an “undue burden,” which is defined as a “substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.” *Id.* at 877. Applying this “undue burden” standard, the Court invalidated the spousal notification requirement of the Pennsylvania Abortion Control Act of 1982, but it upheld other provisions of that Act. Because the issue presented in this question is being litigated in various federal courts, I do not believe it would be appropriate for me to address the issue in advance of a case that could come before me. If confirmed as a district judge, I would faithfully apply and follow the binding precedent of the Supreme Court and the United States Court of Appeals for the Ninth Circuit in addressing such issues.

- 3. The Court’s ruling on the right to privacy in Griswold v. Connecticut laid the foundation for Roe v. Wade. From your perspective, is Roe v. Wade settled law?**

Response: The Supreme Court’s decision in *Roe v. Wade*, 410 U.S. 113 (1973), has not been overturned. Moreover, the Supreme Court has reaffirmed the holding in *Roe* that

“[r]egardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.” *Planned Parenthood v. Casey*, 505 U.S. 833, 879 (1992). The Supreme Court holding in *Gonzales v. Carhart*, 550 U.S. 124 (2007), in which the court rejected a facial challenge to the Partial-Birth Abortion Ban Act of 2003, is also binding precedent. These precedents of the Supreme Court are entitled to respect under the doctrine of stare decisis. If confirmed as a district judge, I would faithfully follow the binding precedent of the Supreme Court and the United States Court of Appeals for the Ninth Circuit.

4. **Do you agree that the ruling in Baker v. Nelson precludes the federal courts from hearing cases regarding state definitions of marriage? Do you think that US v. Windsor contradicts the Court’s previous ruling in Baker?**

Response: In *Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185 (1971), the Minnesota Supreme Court held that a state law limiting marriage to persons of the opposite sex did not violate the United States Constitution. The United States Supreme Court dismissed appellant Baker’s appeal “for want of a substantial federal question.” *Baker v. Nelson*, 409 U.S. 810 (1972). In *United States v. Windsor*, 133 S. Ct. 2675 (2013), the United States Supreme Court held the federal Defense of Marriage Act to be unconstitutional. In doing so, the court recognized that the “regulation of domestic relations” is “an area that has long been regarded as a virtually exclusive province of the States.” *Id.* at 2691 (quoting *Sosna v. Iowa*, 419 U.S. 393, 404 (1975)). However, the court acknowledged that state power to define and regulate marriage was subject to Congress’ authority “in enacting discrete statutes [to] make determinations that bear on marital rights and privileges” and “subject to constitutional guarantees.” 133 S. Ct. at 2690 & 2692 (internal quotation marks omitted). Earlier this year, the Supreme Court granted certiorari in *Obergefell v. Hodges*, to determine whether the Fourteenth Amendment to the U.S. Constitution requires states to issue marriage licenses to same sex couples and to recognize same sex marriages lawfully licensed and performed out-of-state. *See* 135 S. Ct. 1039 (Jan. 16, 2015). The Supreme Court’s resolution of these issues will be binding on all other federal courts. If fortunate enough to be confirmed as a district judge, I would faithfully follow the binding precedent of the Supreme Court and the United States Court of Appeals for the Ninth Circuit with respect to these issues.

5. **How do you reconcile the 2nd Amendment basic right under the Constitution to keep and bear arms made applicable to states under the 14th Amendment in McDonald v. City of Chicago with the more recent crop of lower federal court rulings upholding gun control laws, such as laws requiring gun registration, laws making it illegal to carry guns near schools and post offices, and laws banning bottom loading semi-automatic pistols for protection?**

Response: The Supreme Court has held that “the Second Amendment protects an individual right to keep and bear arms, *District of Columbia v. Heller*, 554 U.S. 570 (2008), that is fully applicable to the states and municipalities, *McDonald v. City of Chicago*, 561 U.S. 742, 750 (2010).” *Fyock v. Sunnyvale*, 779 F.3d 991, 996 (9th Cir.

2015). However, the Supreme Court has also stated that the right conferred by the Second Amendment is “not unlimited, just as the First Amendment’s right of free speech was not.” *Heller*, 554 U.S. at 595. The Ninth Circuit has employed the following two-prong test in determining whether a firearms regulation comports with the Second Amendment: (1) the court should ask “whether the challenged law burdens conduct protected by the Second Amendment;” and (2) if so, what level of scrutiny should be applied. *Fyock*, 779 F.3d at 996 (citing *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013)). If I am confirmed, I would follow the binding precedent of both the United States Supreme Court, including the decisions in *Heller* and *McDonald*, and the United States Court of Appeals for the Ninth Circuit in analyzing the scope of the rights conferred by the Second Amendment if confronted with a case presenting that issue.

6. Do you support suspending capital punishment sentencing pending the Supreme Court’s decision on the use of lethal injection drugs in Oklahoma?

Response: Because this question calls for my opinion regarding a legal issue that is currently the subject of litigation, I do not believe it would be appropriate for me to address it. If confirmed as a district judge, I would continue to adhere to the precedent of the Supreme Court and the United States Court of Appeals for the Ninth Circuit regarding all issues with respect to capital punishment.

7. What is your philosophy on judicial precedent and would you apply prior binding case law that resulted in a court decision that you personally disagree with?

Response: During my career as a United States Magistrate Judge I have faithfully applied and followed the controlling precedent of the United States Supreme Court and the United States Court of Appeals for the Ninth Circuit regardless of any personal beliefs. I would continue to do so if fortunate enough to be confirmed.

8. You gave seven speeches on the topic of judicial independence. In at least one of those speeches, you stated, “The main check the judicial branch has on the others is the power to declare statutes or executive acts unconstitutional, though sometimes we judges might check the political branches in a softer way, merely by interpreting a statute in light of constitutional values or by ruling that a regulation of executive act isn’t authorized by statute.” When you refer to “constitutional values,” it appears as though you support the notions of the constitution as a living document and a non-textualist approach to statutory interpretation. Will you please explain your philosophy on judicial interpretation?

Response: This quote is from a short excerpt from remarks given by Supreme Court Justice Sandra Day O’Connor which I have read, with attribution, to high school students participating in the American Legion’s California’s Boys State program. I believe the Justice’s remarks employed language that high school students could quickly understand and made an important point about our constitutional democracy, the rule of law and judicial independence. Justice O’Connor’s speech may be found in its entirety at 59 *Florida Law Review* 1 (January 2006). If I am fortunate enough to be confirmed, I would

address any issues presented to me that could only be resolved on constitutional grounds by first considering the language of the provision at issue. My analysis of the text would be guided by precedent of the United States Supreme Court and the United States Court of Appeals for the Ninth Circuit. I would resolve the constitutional question, if necessary, in accord with the plain meaning of the provision's language and that binding precedent.

9. **You also said, “Chief Justice John Marshall, who spent thirty-five years trying to nurture a culture where the political branches were, by and large, willing to acquiesce in the judicial branch’s interpretation of the law. They don’t always acquiesce, but fortunately, most of the time, politicians don’t challenge the courts to come enforce their judgments themselves, as Andrew Jackson did in the wake of the Supreme Court’s decision in *Worcester v. Georgia*. Creating a culture in the early Republic where, usually, courts’ judgments were enforced by the other branches of government is an accomplishment that entitles John Marshall to take his place in the fresco of great lawgivers” This quote flies in the face of the checks and balances of government that is a cornerstone of the Constitution and suggests that you support judicial strong arming. Does this quote embody your judicial philosophy on checks and balances and the role of the judicial branch?**

Response: This quote is also from remarks given by Supreme Court Justice Sandra Day O’Connor. Although I am not certain of her intent, I believe that it praises the role Chief Justice John Marshall played in establishing the federal judiciary as one part of a system of ordered liberty in a young American constitutional democracy. With respect to my judicial philosophy, I believe that the system of checks and balances among the three branches serves a critical role in our constitutional form of government.

10. **Is it necessary within our system of checks and balances for all branches to challenge unconstitutional acts of the other branches?**

Response: It is the role of the courts to decide cases and controversies that are properly brought before the court and, in doing so, where necessary, to interpret the laws and Constitution of the United States in accord with binding precedent. It is not the role of the judicial branch to “challenge” the allegedly unconstitutional acts of the other two branches of government. That is left to parties who have standing to raise the particular constitutional challenge in court.

11. **In the same quote from above, you mention the case of *Worcester v. Georgia*, where the Supreme Court issued an order that would have caused the release from prison of Samuel Worcester, a Christian missionary to the Cherokee Indians, who was imprisoned pursuant to a Georgia law that the Supreme Court declared unconstitutional. President Andrew Jackson refused to enforce the Supreme Court’s ruling and it appears that you disagree with his actions, is that fair to say?**

Response: No. In fact, the federal government was not a party in *Worcester* and the Supreme Court's ruling in that case imposed no obligation on the President. Moreover, Georgia essentially complied with the court's order by releasing the petitioners. To the extent anyone today may see virtue or vice in the notion of the executive branch refusing to enforce an order of the Supreme Court, such thought would have no effect on my duty as a federal judge to faithfully uphold the law and to order only what the law requires.

12. Along the same lines, are there cases where you believe a President, Congress, and/or other officeholders should have properly refused to acquiesce to a Court order?

Response: I believe the rule of law is absolutely vital to our system of ordered liberty. Willful disobedience of a lawful court order is completely at odds with that belief. Adherence to the rule of law is critical. Without it, our constitutional democracy – with its system of checks and balances among the three branches – would break down.