

Questions for the Record

July 11, 2012 Nominations Hearing

Senator Mike Lee

Questions for Mr. Durkin

- 1. Do you believe that Congress has implied powers beyond those enumerated in the Constitution?**

Response: No. Congress has only such powers as are enumerated in the Constitution.

- a. If so, which ones? And which provisions of the Constitution account for these implicit rights?**

Response: Please see answer above.

- b. If not, how would you approach the multitude of legislation that Congress has enacted without reference to an appropriate authorizing provision of the Constitution?**

Response: I am not aware of any requirement that Congressional legislation contain language with a specific authorizing provision from the Constitution. If there is such a requirement under controlling precedent, I would follow it.

- i. Would you strike down laws not properly authorized by the Constitution?**

Response: Yes.

- 2. Do you believe that the Constitution protects rights not specified in the Constitution?**

Response: No. The Constitution does not protect rights it does not specify.

- a. Do you believe that the Constitution provides for a right of privacy?**

Response: The Constitution does not contain specific language relating to a right to privacy, but a number of Supreme Court cases have found rights for citizens which can be characterized as privacy interests. As a district court judge, I would follow the precedent of the Supreme Court.

- b. If so, which provision of the Constitution provides for that right?**

Response: Please see answer to #2a.

3. **Do you believe there the Constitution provides for substantive due process—that is to say, that the Constitution does not allow the government to infringe certain fundamental rights regardless of the procedural guarantees that might be afforded?**

Response: The Supreme Court has held that the Constitution allows that certain fundamental rights of citizens cannot be infringed, even if that citizen is afforded procedural safeguards. As a district court judge I am obligated to follow Supreme Court precedent.

- a. **Which do you believe are protected under substantive due process?**

Response: The Supreme Court has held that “the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation’s history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.” *Washington v. Glucksberg*, 521 U.S. 702, 720-721 (1997) (citations and internal quotation marks omitted).

- b. **If you believe such rights are protected, is it also your belief that *Lochner v. New York*, 198 U.S. 45 (1905) was correctly decided and should be the state of the law? *Lochner*, to paraphrase, was a case in which the Court held unconstitutional a New York statute that prohibited employment of bakery employees for more than 10 hours a day or 60 hours a week.**

Response: The *Lochner* case has been the subject of significant Supreme Court jurisprudence since it was decided. I believe those cases have effectively overruled *Lochner*. I would follow the current precedent of the Supreme Court in this area.

- c. **If you believe substantive due process protects some personal rights such as a right to abortion, but not economic rights such as those at stake in *Lochner*, on what basis do you distinguish these types of rights for constitutional purposes?**

Response: As a district court judge, my role would be to follow the precedent of the Supreme Court in all areas, including rights protected by substantive due process.