

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

E. Scott Frost,
Nominee, U.S. District Judge for the Northern 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: The United States Constitution is altered only by amendment under Article V, and I would decide any constitutional questions according to binding precedent from the Supreme Court and Fifth Circuit.

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

Response: As a United States Magistrate Judge, I follow only the plain language of the relevant text and binding precedent from the Supreme Court and the Fifth Circuit, and would continue to do so if confirmed.

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

Response: Judicial activism occurs when a judge injects his personal beliefs or agenda into the decision-making process, or makes decisions based on what he feels should be the result, as opposed to approaching each case with an open mind and fairly and impartially applying applicable law and binding precedent to the facts of the case. I do not believe that judicial activism is ever appropriate.

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

Response: Statutes passed by Congress and signed into law by the President are presumptively valid. Only in cases where Congress has exceeded its authority under the Constitution or enacted a law that is contrary to the Constitution should a statute be held unconstitutional, and only then if resolution of the case requires reaching the constitutional question. A district

court should attempt to resolve a case without addressing constitutional issues if there is another way to decide the case.

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

Response: Fundamental rights, which derive from the Due Process Clause of the United States Constitution, are those “fundamental rights and liberties which are, objectively, ‘deeply rooted in this Nation’s history and tradition,’” and that are “‘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, 720-21 (1997) (internal citations omitted). I would follow Supreme Court and Fifth Circuit precedent in deciding issues regarding fundamental rights if confirmed.

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: In *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), the Supreme Court held that under the Religious Freedom Restoration Act of 1993, private citizens and businesses could not be substantially burdened when exercising a sincerely held religious belief. If confirmed, I would faithfully follow this and all other binding precedent from the Supreme Court and Fifth Circuit.

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 recognized a personal right to bear arms derived from the Second Amendment, and stated that some higher level of scrutiny than rational-basis review was required for deciding cases regarding that right. If confirmed, I would follow this and all binding 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: If confirmed, I would faithfully apply the Supreme Court precedent which finds that states may require voters to present photo

identification before casting ballots. *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008). *But see Veasey v. Abbott*, No. 14–41127, __ F.3d __, 2016 WL 3923868 (5th Cir. July 20, 2016) (en banc) (partially striking down Texas Voter ID law, finding that Senate Bill 14 violates Section 2 of the Voting Rights Act through its discriminatory effects).

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: If confirmed, I will continue to manage cases by ensuring that all parties understand that the applicable Rules of Civil Procedure will be followed, by being actively engaged in case management, by encouraging the parties to meet and confer as soon as possible, by utilizing early scheduling conferences in which issues such as scope of discovery are discussed, and by emphasizing my availability for conferences to resolve discovery issues prior to filing formal motions. I would also continue to use all available electronic case management tools in my district, and utilize magistrate judges by making appropriate referrals to them.

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

Response: In *Gregg v. Georgia*, 428 U.S. 153 (1976), the Supreme Court held that capital punishment is constitutional, and I would apply the precedent and settled law in this area if confirmed.