

Nominations Hearing

July 29, 2014

Questions from Senator Lee

Questions for David J. Hale (nominated for W.D. Ky.)

- 1. Mr. Hale, do you believe that the Constitution protects rights not expressly specified in the Constitution? If so, what is the textual vehicle for that — substantive due process, the Privileges or Immunities Clause, or elsewhere?**

Response: If confirmed, I would faithfully follow Supreme Court and Sixth Circuit precedent regarding the protection of rights not expressly specified in the Constitution. For example, the Supreme Court has interpreted the substantive due process clause to include certain rights not specified in the Constitution. In *Washington v. Glucksberg*, 521 U.S. 702 (1997), the Court held that a right is fundamental for the purposes of the substantive due process doctrine when it is “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.” *Id.* at 720-21 (internal citations and quotations omitted).

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

Response: I understand that the Supreme Court has not found a comprehensive right to privacy in the Constitution, but has referred to privacy in holdings regarding the guarantees of the Bill of Rights. If confirmed, I would follow applicable Supreme Court and Sixth Circuit precedent regarding privacy issues.

- 2. Mr. Hale, what are the limits on Congress’s Commerce Clause power?**

Response: In *United States v. Lopez*, 514 U.S. 549 (1995) (internal citations omitted), the Supreme Court held that a statute criminalizing firearm possession in a local school zone exceeded Congress’ Commerce Clause power. The Supreme Court enumerated three broad categories of activity which Congress may regulate pursuant to the Commerce Clause: 1) “the use of the channels of interstate commerce”; 2) “the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities”; and 3) “activities having a substantial relation to interstate commerce.” *Id.* at 558 (internal citations omitted); *see also United States v. Morrison*, 529 U.S. 598 (2000). If confirmed, I would follow the *Lopez* and *Morrison* holdings, as well as all other binding precedent of the Supreme Court and Sixth Circuit.

- a. Do you believe that Congress has at any time overstepped its authority under that provision since *Wickard*, other than in *Lopez* and *Morrison*?**

Response: I am not aware of any cases, other than *Lopez* and *Morrison*, where the Supreme Court has struck down a statute because it determined that Congress exceeded its Commerce Clause power. If confirmed, I would follow applicable Supreme Court and Sixth Circuit precedent regarding Congress's power to regulate under the Commerce Clause.