

Senator Vitter
Questions for the Record

Travis Randall McDonough

Nominee, United States District Judge for the Eastern District of Tennessee

- 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 response to this question, I briefly reviewed the opinion of the United States Supreme Court (“Supreme Court”) in NLRB v. Canning. My understanding of the case follows. The Recess Appointments Clause (the “Clause”) makes an exception to the President’s duty to obtain the advice and consent of the Senate prior to appointing certain federal officeholders. The Clause empowers the President “to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.” In Canning, the Supreme Court held that a break of three days between Senate sessions “is too short a time to bring a recess within the scope of the Clause” and concluded that the President did not have the power to make recess appointments during such a break. The Court went on to hold that a break of fewer than 10 days but more than three days is presumptively too short to trigger the Clause. If confirmed and, if faced with this issue, I will apply this governing precedent of Canning, as well as other precedent of the Supreme Court and the United States Court of Appeals for the Sixth Circuit (the “Sixth 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?**

It appears that this issue is the subject of a pending petition to the Supreme Court for a writ of certiorari from the decision in Jackson Women’s Health Organization v. Currier, 760 F.3d 448 (5th Cir. 2014). If the Supreme Court grants the petition and rules on that case, and if I am confirmed, I will follow any precedent the Supreme Court establishes in the case, as well as additional binding precedent of the Supreme Court and the Sixth Circuit.

- 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?**

I am not aware of any Supreme Court decision overruling the holding of Roe v. Wade. If confirmed, therefore, I will be bound to apply the precedent of that case, as well as other Supreme Court and Sixth Circuit precedent governing the issue, including Gonzales v. Carhart, 550 U.S. 124 (2007), and Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992), regardless of any personal opinions concerning such precedent.

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 DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014), the Sixth Circuit recognized Baker v. Nelson as binding Supreme Court precedent that precluded a lower court from considering whether a state's refusal to recognize same-sex marriage is contrary to the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment. The Sixth Circuit also held that U.S. v. Windsor did not contradict the Supreme Court's decision in Baker v. Nelson. DeBoer at 400. The Supreme Court subsequently granted certiorari in the DeBoer case. If confirmed, I will faithfully apply the binding precedent of the Sixth Circuit and the Supreme Court.

5. **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: I have been a practicing member of the bar and a litigator for nearly two decades, and I understand firsthand the critical importance of an impartial judge who applies precedent and the text of the law without regard for his or her political ideology. A judge who grounds decisions in personal political preferences rather than the law commits a breach of the obligations of judicial office. I have a great deal of respect for our federal system of justice and understand that, for that system to continue to work and for the citizens to continue to have confidence in that system, I must, if confirmed, make decisions that are based solely on the facts and governing law.

6. **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: In District of Columbia v. Heller, the Supreme Court held that the Second

Amendment was violated by the District of Columbia's "ban on handgun possession in the home" and the District's "prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense." 554 U.S. 570, 635 (2008). In McDonald v. City of Chicago, the Supreme Court confirmed that the Fourteenth Amendment makes this Second Amendment protection applicable against actions of states. 561 U.S. 742, 791 (2010). I am not familiar with the lower federal court rulings to which the question refers. If confirmed, I will apply binding precedent from the Supreme Court and the Sixth Circuit concerning Second Amendment protections. Decisions from other district courts are not binding precedent on the United States District Court for the Eastern District of Tennessee.

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

Response: It is my understanding that the Supreme Court recently heard argument on the constitutionality of Oklahoma's method of carrying out capital punishment in Glossip v. Gross. It is also my understanding the Supreme Court stayed the executions of the petitioners in that matter. While I do not believe that, under these circumstances, it would be appropriate for a judicial nominee to comment on the particular issues at hand, if confirmed, I will apply the law announced by the Supreme Court in that case and other binding precedent of the Sixth Circuit to cases involving the same issues. It is my understanding that neither the Supreme Court nor the Sixth Circuit have issued binding precedent generally preventing district courts from announcing a sentence of capital punishment.