

Questions for the Record
Senate Judiciary Committee
Senator Thom Tillis

Questions for Mr. Donald Karl Schott

- 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: No.

- 2. Please define judicial activism. Is judicial activism ever appropriate?**

Response: I do not have a personal definition of the term judicial activism. In my reading I have seen the term used by others, and believe it usually refers to circumstances in which a judge makes decisions based on his or her personal views, and not based on binding legal authorities. Using that definition, judicial activism is not ever appropriate.

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

Response: As stated by the Supreme Court “[d]ue respect for the decisions of a coordinate branch of Government demands that [a federal court] invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds.” *United States v. Morrison*, 529 U.S. 598, 607 (2000). In addition, a court should attempt to interpret the statute in a way that avoids a finding of unconstitutionality, if such an interpretation is consistent with the plain meaning of the statute. *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005).

- 4. What is a fundamental right? From where are these rights derived?**

Response: For purposes of the substantive due process doctrine, a fundamental right is a right which is “objectively, ‘deeply rooted in this Nation’s history and tradition,’ and ‘implicit in the concept of the word liberty,’ such that ‘neither liberty nor justice would exist if they were sacrificed’”. *Washington v. Glucksberg*, 521 US 702, 720-721 (1997) (internal citations omitted).

- 5. 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: The First Amendment does offer protection to private citizens and businesses in their exercise of sincerely held religious beliefs. *See, e.g., Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993). In addition to this constitutional protection, the United States Supreme Court has recently considered cases involving claims that certain government regulations infringe on religious rights in violation of the Religious Freedom Restoration Act of 1993. *See, e.g., Burwell v. Hobby Lobby*, 134 S. Ct. 2751 (2014) and *Zubik v. Burwell*, 578 U.S. __ (May 16, 2016).

- 6. 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: Neither the United States Supreme Court nor the United States Court of Appeals for the Seventh Circuit has decided the specific level of heightened scrutiny that is constitutionally required when a statute or regulation relating to firearms is challenged under the Second Amendment to the United States Constitution, but both have rejected the rational basis test. *District of Columbia v. Heller*, 554 U.S. 570, 628 n. 27 (2008) ("Obviously, the [rational basis] test could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right...."); *McDonald v. Chicago*, 561 U.S. 742 (2010); *Friedman v. City of Highland Park*, 784 F.3d 406, 410, (7th Cir. 2015); ("[I]f the Second Amendment imposed only a rational basis requirement, it wouldn't do anything.")

- 7. Do you believe it is constitutional for states to require voters to show photo identification before being eligible to cast their vote?**

Response: In *Crawford v. Marion County (Indiana) Election Board*, 553 U.S. 181 (2008), the Supreme Court upheld an Indiana law requiring voters to show photo identification before being eligible to cast their votes, concluding that the law was non-discriminatory and supported by valid, neutral justifications. It also found that the record before the court did not demonstrate a special burden on some voters that was sufficient to support petitioners' facial challenge to the law. If confirmed, I would follow this and any other binding precedent in reviewing any decision in a case challenging such a law.

8. **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 I am confirmed, I will take very seriously my obligation to manage my case load diligently and efficiently, and to “secure the just, speedy, and inexpensive determination” of all matters before me. *See Fed. R. Civ. Proc. 1*. At this time, I would anticipate that the process I would use to prioritize the consideration of cases would be dependent upon the facts and circumstances of those cases. In addition, under the Seventh Circuit's operating procedures, certain motions may require immediate resolution and if sitting as a motion judge I would prioritize those motions requiring immediate action.

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

Response: The United States Supreme Court has upheld the constitutionality of the death penalty. *See, e.g., Baze v. Rees*, 553 U.S. 35, 47 (2008) (noting that it is "settled" that "capital punishment is constitutional.") As a circuit court judge, I would not have a problem affirming a lower court order imposing such a penalty if the lower court properly followed all controlling law in making the decision to impose such a penalty.