

Response of Analisa Torres
Nominee to be United States District Judge for the Southern District of New York
to the Written Questions of Senator Amy Klobuchar

- 1. If you had to describe it, how would you characterize your judicial philosophy? How do you see the role of the judge in our constitutional system?**

Response: My judicial philosophy is to adhere to the law and apply it impartially. I share Chief Justice Marshall’s view on the role of the judge in our constitutional system, as articulated in *Marbury v. Madison*: the “province and duty of the Judicial Department is to say what the law is.”

- 2. What assurances can you give that litigants coming into your courtroom will be treated fairly regardless of their political beliefs or whether they are rich or poor, defendant or plaintiff?**

Response: During my 13 years as a New York State judge, I have treated all litigants with fairness and impartiality, without regard to their political beliefs, their level of wealth or their status as a plaintiff (or, in criminal cases, the prosecution) or a defendant. If confirmed, I would employ the same approach.

- 3. In your opinion, how strongly should judges bind themselves to the doctrine of stare decisis? How does the commitment to stare decisis vary depending on the court?**

Response: The doctrine of stare decisis is a cornerstone of American jurisprudence. Supreme Court precedent is binding on all lower federal courts. Circuit court precedent binds the district courts within a particular circuit. If confirmed, I would faithfully apply controlling Supreme Court and Second Circuit authority. A three-judge circuit court panel may not overturn circuit precedent. That may be accomplished only through the *en banc* process, when the circuit is considering a question of “exceptional importance” (see, Fed. R. App. P. 35[a]) or when one panel decision conflicts with another.

Response of Analisa Torres
Nominee to be United States District Judge for the Southern District of New York
to the Written Questions of Senator Chuck Grassley

- 1. In your original statement, you specifically distinguished “legal arguments” and “people’s feelings” as two separate factors you consider as a judge. (Again, you said you listed “not just to legal arguments made by counsel, but to peoples’ feelings.”) Yet at your hearing, you indicated that these were not separate factors, but rather it is the party’s “feelings about their positions” that you consider. I find this response somewhat confusing and for that reason would like to learn a bit more about your views on this topic. How exactly does an individual demonstrate their feelings about their positions?**

Response: I appreciate the opportunity to clarify my views on this subject. I would like to make clear that as a judge my job is to discern the law and apply it to the facts before me in a neutral and impartial way. The feelings of the litigants before me have no bearing on my determination of the governing law that I apply to a particular case. However, there are certain circumstances in which the law requires me to consider the feelings of those who come before me. For example, as a state trial judge who presides over numerous felony cases, one area in which people’s feelings figure into my decision-making is sentencing. In determining the penalty a defendant must face, I consider victim impact statements—feelings expressed by the victim while describing the effect of the crime on his or her life. In addition, before imposing sentence, I afford the defendant an opportunity to make a statement. I consider whether the defendant takes responsibility for his actions and expresses remorse for the crime.

- 2. Assuming you can ascertain what an individuals’ feelings are, how does knowing an individual’s feelings about a case or decision before you better inform your decision?**

Response: In most cases, the feelings of the parties have no bearing on my decision. As explained above, however, there are some circumstances in which they can be relevant to the correct disposition of a case under the law. For example, the degree of suffering of a victim and the absence of remorse on the part of the defendant may be aggravating factors in determining the length of the sentence.

- 3. Please provide several examples of cases you presided over in which learning the feelings of an individual affected by the case before you allowed you to reach a better decision in the outcome of the case?**

Response: I imposed the maximum sentence for robbery on a defendant who broke the collarbone and arm of an 85-year-old woman and stole the proceeds of the social security check she had just cashed, based, in part, on her victim impact statement in which she described her loss of independence as a result of the injuries. Another defendant’s statement that he and his seven-year-old female rape victim were “in

love” and that he “did not hurt her” was a factor I considered in imposing the maximum sentence. The statement of a victim of domestic violence who described the hardship she would face if her husband were incarcerated, contributed to my decision to impose a six month sentence of weekend jail, so that the defendant could keep his job and support his family. In each of these cases, I imposed the sentence that the law required, but my understanding of the impact of the defendants’ crimes and their degree of remorse helped me determine what sentence the law required.

- 4. Has knowing the feelings of an individual ever altered a decision you issued as a judge? If so, please provide the context of each case, what your ruling was, how knowledge of an individual’s feelings factored in to your decision-making process, as well as how the decision would have been different had you not learned about the individual’s feelings. If not, please describe the added-value of knowing the individual’s feelings if their feelings are not affecting the disposition of the case at hand.**

Response: Please see my answers to questions 1, 2, and 3.

- 5. Considering the above, I ask again, as a district court judge, what role would people’s feelings have in your rulings?**

Response: If confirmed, I would consider people’s feelings only to the extent that they directly bear on the proper disposition of the case under the governing law.

- 6. What is your view on the role of politics in the judicial decision-making process?**

Response: Politics must play no role in judicial decision-making.

- 7. Can you assure this Committee that, if confirmed, your decisions will remain grounded in the precedent and the text of the law rather than any underlying political ideology or motivation?**

Response: Yes.

- 8. What assurances or evidence can you give the Committee and future litigants that you will put aside any personal views and be fair to all who appear before you, if confirmed?**

Response: For thirteen years, as a New York State judge, I have handled my cases in a fair and impartial manner, without regard to my personal views. If confirmed, I would do the same.

- 9. What is the most important attribute of a judge, and do you possess it?**

Response: The most important attribute of a judge is the willingness to adhere to the law and apply it impartially. I believe I have demonstrated this attribute during my tenure as a New York State judge.

- 10. Please explain your view of the appropriate temperament of a judge. What elements of judicial temperament do you consider the most important, and do you meet that standard?**

Response: I believe that a judge must listen carefully to all litigants and treat them with politeness and patience. I believe that I meet that standard.

- 11. In general, Supreme Court precedents are binding on all lower federal courts, and Circuit Court precedents are binding on the district courts within the particular circuit. Are you committed to following the precedents of higher courts faithfully and giving them full force and effect, even if you personally disagree with such precedents?**

Response: Yes.

- 12. At times, judges are faced with cases of first impression. If there were no controlling precedent that was dispositive on an issue with which you were presented, to what sources would you turn for persuasive authority? What principles will guide you, or what methods will you employ, in deciding cases of first impression?**

Response: If the case involves statutory interpretation, I would start with the plain language of the statute. If the statute is unambiguous, I would apply it as written. If the statute is ambiguous, I would look to the legislative history to try to determine the legislative intent. I would consider the most closely analogous Supreme Court and Second Circuit precedent. If the case involves interpretation of the U.S. Constitution, I would start with the text of the provision and consider the most closely analogous Supreme Court and Second Circuit precedent.

- 13. What would you do if you believed the Supreme Court or the Court of Appeals had seriously erred in rendering a decision? Would you apply that decision or would you use your best judgment of the merits to decide the case?**

Response: The federal district court is bound by Supreme Court and Court of Appeals precedent. I would apply controlling precedent, whether I agreed with it or not.

- 14. Under what circumstances do you believe it appropriate for a federal court to declare a statute enacted by Congress unconstitutional?**

Response: Acts of Congress enjoy a presumption of constitutionality. The federal courts may declare a statute enacted by Congress unconstitutional only where Congress has exceeded its authority or where the act violates the Constitution.

- 15. In your view, is it ever proper for judges to rely on foreign law, or the views of the “world community”, in determining the meaning of the Constitution?**

Response: No.

- 16. As you know, the federal courts are facing enormous pressures as their caseload mounts. If confirmed, how do you intend to manage your caseload?**

Response: If confirmed, I would first seek the advice of experienced district court judges, in order to learn the most effective case management techniques. I would also hold regular status conferences, utilize the skills of the magistrate judges, enforce discovery deadlines, and swiftly issue decisions on dispositive motions.

- 17. Do you believe that judges have a role in controlling the pace and conduct of litigation and, if confirmed, what specific steps would you take to control your docket?**

Response: Yes. If confirmed, I would play a proactive role in overseeing the orderly pace and conduct of each litigated matter. I would take the steps listed in my answer to question 16.

- 18. As a judge, you have experience deciding cases and writing opinions. Please describe how you reach a decision in cases that come before you and to what sources of information you look for guidance?**

Response: I consider the written submissions of the parties and the oral argument, if any. If necessary, I conduct additional research to identify the relevant legal provisions and governing precedents. Then, I apply the law to the facts and in that way decide the case. I would continue to follow these practices, if confirmed as a district judge.

- 19. Please explain your understanding of the major differences you will encounter between being a state court judge and a United States District Judge. How will you prepare for and accomplish this transition?**

Response: The most significant difference between the state and federal courts is subject matter jurisdiction. In order to prepare myself to work as a district judge, I have contacted and sought the guidance of several former state judges who now serve as United States District Judges in the Southern District of New York and who have

successfully made the transition. I have also availed myself of the materials on federal law that are provided by the Federal Judicial Center. In addition, I have undertaken the study of federal civil and criminal procedure and the federal rules of evidence.

20. Please describe with particularity the process by which these questions were answered.

Response: I reviewed the questions, researched some issues, and submitted draft answers to an official at the Department of Justice, who discussed them with me. Thereafter, I put my answers in final form and submitted them to the Department for submission to the Committee.

21. Do these answers reflect your true and personal views?

Response: Yes. These answers reflect my true and personal views.

Response of Analisa Torres
Nominee to be United States District Judge for the Southern District of New York
to the Written Questions of Senator Jeff Flake

1. What qualities do you believe all good judges possess?

Response: All good judges are good listeners. They are also even-handed, have the courage to do what they believe is right, speak and write clearly, are patient and respectful, and adhere to the rules of evidence and the substantive law.

a. How does your record reflect these qualities?

Response: I believe that my work for thirteen years as a New York State judge, presiding over hundreds of trials and other proceedings, has demonstrated these qualities and capabilities.

2. Do you believe judges should look to the original meaning of the words and phrases in the Constitution when applying it to current cases?

Response: If confirmed, I would take my instruction on issues of constitutional interpretation from Supreme Court and Second Circuit precedents applicable to each case and not from any particular theory of constitutional interpretation. I note, however, that the Supreme Court has applied originalism in cases including *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008).

a. If so, how would you determine the original meaning?

Response: I understand the term “original meaning originalism” to express a theory of constitutional interpretation which holds that the text of the Constitution should be interpreted based upon what people living at the time the Constitution was drafted would have understood the text’s ordinary meaning to be.

3. In Federalist Paper 51, James Madison wrote: “In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.” In what ways do you believe our Constitution places limits on the government?

Response: The Supreme Court has recognized the separation of powers framework and the system of checks and balances established by the Framers, acknowledging that there are provisions of the Constitution which provide “structural protections against abuse of power [that are] critical to preserving liberty.” *Bowsher v. Synar*, 478 U.S. 714, 730 (1986).

a. How does the Judicial Branch contribute to this system of checks and balances?

Response: The judicial branch contributes to the system of checks and balances, by using its constitutional authority to limit the power of the executive and legislative branches when they exceed their authority.

- 4. Since at least the 1930s, the Supreme Court has expansively interpreted Congress' power under the Commerce Clause. Recently, however, in the cases of *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000), the Supreme Court has imposed some limits on that power.**

- a. Some have said the Court's decisions in *Lopez* and *Morrison* are inconsistent with the Supreme Court's earlier Commerce Clause decisions. Do you agree? Why or why not?**

Response: In *Lopez*, the Supreme Court distinguished, but did not overrule, prior Commerce Clause decisions. Both *Lopez* and *Morrison* constitute controlling authority. If confirmed, I would apply them as binding precedent.

- b. In your opinion, what are the limits to the actions the federal government may take pursuant to the Commerce Clause?**

Response: The Supreme Court has "identified three broad categories of activity that Congress may regulate under its commerce power. First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce[.]" *United States v. Lopez*, 514 U.S. 549, 558-559 (1995) (citations omitted). If confirmed, I would apply the analysis set forth in *Lopez* and other applicable precedents of the Supreme Court and the Second Circuit, in order to determine whether an activity is covered by the Commerce Clause.

- c. Is any transaction involving the exchange of money subject to Congress's Commerce Clause power?**

Response: No. The Commerce Clause gives Congress power to regulate economic matters that transcend state lines, not to monitor every dollar that changes hands.

- 5. What powers do you believe the 10th Amendment guarantees to the state? Please be specific.**

Response: The Tenth Amendment states that the "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." This means that the power of the national government is specifically

delineated by the Constitution, as amended, but all power not so delineated is reserved to the states or the people. The Tenth Amendment preserves state authority over the police power, historically understood as the health, safety, welfare, and morals of the people within its jurisdiction.

**Response of Analisa Torres
Nominee to be United States District Judge for the Southern District of New York
to the Written Questions of Senator Ted Cruz**

Judicial Philosophy

Describe how you would characterize your judicial philosophy, and identify which US Supreme Court Justice's judicial philosophy from the Warren, Burger, or Rehnquist Courts is most analogous with yours.

Response: My judicial philosophy is to adhere to the law and apply it impartially. I have not undertaken a meaningful assessment of the Supreme Court Justices' philosophies, so I am unable to say which is most analogous to mine.

Do you believe originalism should be used to interpret the Constitution? If so, how and in what form (i.e., original intent, original public meaning, or some other form)?

Response: If confirmed, I would take my instruction on issues of constitutional interpretation from Supreme Court and Second Circuit precedents applicable to each case and not from any particular theory of constitutional interpretation. I note, however, that the Supreme Court has applied originalism in cases including *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008).

If a decision is precedent today while you're going through the confirmation process, under what circumstance would you overrule that precedent as a judge?

Response: If confirmed, there would be no circumstance in which I would overrule a precedent.

Congressional Power

Explain whether you agree that "State sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power." *Garcia v. San Antonio Metro Transit Auth.*, 469 U.S. 528, 552 (1985).

Response: The holding in *Garcia v. San Antonio Metro Transit Auth.*, 469 U.S. 528, 552 (1985), is controlling authority. If confirmed, I would apply it as binding precedent, whether I agree with it or not.

Do you believe that Congress' Commerce Clause power, in conjunction with its Necessary and Proper Clause power, extends to non-economic activity?

Response: The Supreme Court has "identified three broad categories of activity that Congress may regulate under its commerce power. First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even

though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce[.]” *United States v. Lopez*, 514 U.S. 549, 558-559 (1995) (citations omitted). If confirmed, I would apply the analysis set forth in *Lopez* and other applicable precedents of the Supreme Court and the Second Circuit, in order to determine whether an activity is covered by the Commerce Clause.

Presidential Power

What are the judicially enforceable limits on the President's ability to issue executive orders or executive actions?

Response: Justice Jackson defined the judicially enforceable limits on presidential acts in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-638 (1952), and the full Supreme Court adopted the analysis set forth in his concurrence in that case. If confirmed, I would apply the *Youngstown* analysis to any cases in which I am called upon to assess the legality of presidential executive orders or actions.

Individual Rights

When do you believe a right is "fundamental" for purposes of the substantive due process doctrine?

Response: The Supreme Court has stated 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 (1997) (citations omitted).

When should a classification be subjected to heightened scrutiny under the Equal Protection Clause?

Response: The Supreme Court applies the strict scrutiny standard in evaluating suspect classifications such as race and national origin. Strict scrutiny is also applied to state action that impinges on fundamental rights under the Constitution.

Do you "expect that [15] years from now, the use of racial preferences will no longer be necessary" in public higher education? *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

Response: If confirmed, I would apply controlling precedent in the area of affirmative action in higher education, without regard to my expectations or opinions.