

**Response of Kenneth John Gonzales
Nominee to be United States District Judge for the District of New Mexico
to the Written Questions of Senator Chuck Grassley**

1. **At a Teacher Training Conference on Bullying, you stated, “But all of us in this room know that reducing crime and keeping communities safe requires so much more. We know that it takes a lot more than police, prosecutors and prisons to make a community safe. We need people who watch out for each other and who have a stake in their community. We need an economic base that keeps people engaged and relatively free from need.” Additionally, at the 3rd Annual Gangs, Drugs and Prosecution Conference in 2011, you stated, “we cannot investigate and prosecute our way out of the violent crime problems that plague our communities. Law enforcement has to be augmented by education, prevention, and treatment if it’s going to be successful.”**
 - a. **Crime prevention is certainly an objective of all responsible citizens and of government. As a prosecutor you supported partnerships between state authorities, individuals, and families to prevent and reduce crime. Are there limitations on what the government can do in this area, particularly the federal government, and if so, what are the boundaries?**

Response: Yes. One significant limitation is the amount of resources needed for law enforcement purposes exceeding the amount available. Yet we have prosecuted many serious offenders and obtained convictions and significant sentences. Many of the most effective crime fighting and prevention strategies come from a community level, and often start with very limited resources. In most instances, the missing ingredients are leadership and vision. I have been very fortunate to have served as United States Attorney for many reasons. One of the significant aspects of the position, like so many other public leadership positions, is the ability to mobilize agencies and organizations, stimulate partnerships and pool limited resources toward a common objective in the area of public safety and crime prevention. But this can only be done by being very respectful of (1) jurisdictional lines, particularly those of state, local and Tribal governments, and (2) the legitimate local view that local agencies and organizations can best address some local challenges.

- b. **If confirmed as a federal judge, what would be your approach or involvement with crime prevention initiatives? Please describe the powers and limitations that would guide you.**

Response: As an Assistant United States Attorney and as the United States Attorney, I have spent many hours speaking to hundreds of middle and high school students on

the importance of making positive choices. I have explained to these young people that many choices they make, e.g., whether to use illegal drugs, join gangs, graduate from high school, go to college or the military, can have very long-lasting results, both positive and negative. They can be proud of making positive choices but they have to live with and accept the consequences of making negative choices. I use the opportunity to empower and challenge each student to take control of their lives by making positive choices. If confirmed, I hope to continue to challenge young people so long as doing so does not violate the Code of Judicial Standards or interfere with my duties on the bench.

- c. In sentencing, what weight would you give to a person's background – such as family status, economic standing, or other perceived social disadvantages?**

Response: I would not give any weight to a person's background, such as family status, economic standing, or other perceived social disadvantages.

- 2. At the Binational Mexico-U.S. Federal Prosecutors Working Group Meeting in 2011, you spoke of the inability to seize guns in the same way the government can seize drugs – noting “we can take drugs away from criminals simply because it is illegal to possess drugs. We cannot do that with guns.”**

- a. What is your understanding of the rights afforded by the Second Amendment?**

Response: As the Supreme Court has explained, “the Second Amendment conferred an individual right to keep and bear arms.” *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008).

- b. If you are confirmed, will you commit to protect an individual's right to possess a firearm?**

Response: Yes.

- 3. You once remarked, “It is only when all individuals—regardless of race, gender, ethnicity, religion, national origin and sexual orientation—have access to the great promise of equal opportunity that we will be able to say we have created the more perfect union envisioned by the framers of the Constitution.” What is your understanding of the current state of law, as to the level of review for these classifications, under the Equal Protection Clause?**

Response: The Supreme Court has ruled that a statute that classifies by race, alienage, or national origin will be subjected to strict scrutiny and sustained only if it serves a compelling state interest, explaining “[t]hese factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others.” *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 440 (1985). Strict scrutiny also will be applied “when state laws impinge on personal rights protected by the Constitution,” *id.*, including laws that burden First Amendment rights by “prefer[ring] one religion over another,” *Larson v. Valente*, 456 U.S. 228, 246 (1982). The Court applies intermediate scrutiny to review discriminatory practices based on sex. *See., e.g., Clark v. Jeter*, 486 U.S. 450, 461 (1988) (applying intermediate scrutiny to strike down Pennsylvania statute of limitations in paternity actions); *United States v. Virginia*, 518 U.S. 515, 532-33 (1996) (applying intermediate review and invalidating gender-based exclusion of women at military college). With respect to the appropriate level of scrutiny for classifications based on sexual orientation, I am aware that the issue currently is before the Supreme Court in *United States v. Windsor* and *Hollingsworth v. Perry*. If confirmed, I will follow all applicable Supreme Court and 10th Circuit precedent in this and other areas.

4. How will you use the Sentencing Guidelines to guide you in criminal cases?

Response: If confirmed, I would apply the Sentencing Guidelines in every criminal case. Since the Supreme Court’s ruling in *United States v. Booker*, 543 U.S. 220 (2005), the Sentencing Guidelines are no longer mandatory but are advisory on the sentencing judge. Nevertheless, controlling Supreme Court precedent requires the Sentencing Guidelines be applied correctly and a miscalculation amounts to procedural error and will be reversed. *Gall v. United States*, 552 U.S. 38 (2007). After applying the Sentencing Guidelines, a sentencing judge may vary from the correctly-calculated Guideline sentence to fashion a sentence that is sufficient but not greater than necessary to promote the purposes set forth in 18 U.S.C. 3553(a).

5. Some have contended that a judge should have empathy for those who appear before them. My concern is that when someone suggests a judge should have empathy, they are really suggesting the judge should place their thumb on the scales of justice to tilt it in the favor of the proverbial little guy. In your personal opinion, is it ever the role of a judge to favor one party over another?

Response: It is never appropriate for a judge to favor one party over another.

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

Response: The most important attribute of a judge is the ability to adhere faithfully to the rule of law and apply it impartially. I believe I possess this attribute.

- 7. 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: A judge must have an even, calm and humble temperament, which, in my mind, includes a variety of qualities, including a deep respect for the rule of law, for the neutral role of the judge, for the position and for everyone in the courtroom, be they litigants, witnesses, jurors, court staff, or members of the public. It also includes patience, courtesy, and an ability to listen attentively. I believe I meet this standard and can apply it if confirmed.

- 8. 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.

- 9. 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: In deciding a case of first impression relating to a statutory or constitutional provision, I would look first to the express language and consider its plain and ordinary meaning. If necessary, I would apply any existing and closely-related or analogous precedent from the Circuit and Supreme Court for guidance.

- 10. 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 decisions of the Supreme Court and Court of Appeals are binding precedent on the District Court. If confirmed, I would apply it regardless of my personal view of its correctness.

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

Response: A Congressional statute is presumptively constitutional, but can be found to be unconstitutional if it violates a particular provision of the Constitution or if Congress, in enacting the statute, exceeded its authority as provided by the Constitution.

- 12. What assurances or evidence can you give this Committee that, if confirmed, your decisions will be grounded in precedent and the text of the law rather than any underlying political ideology or motivation?**

Response: Throughout my legal career, which thus far has spanned almost 20 years, I have demonstrated a true commitment to impartially adhere to the rule of law. If confirmed, I will continue to adhere to the rule of law and render decisions completely separate and apart from any notions of political ideology or motivation.

- 13. 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: Please see my response to Question 12.

- 14. 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? Please explain.**

Response: No. The meaning of the Constitution should be based on an application of Supreme Court and relevant Circuit Court precedent.

- 15. If confirmed, how do you intend to manage your caseload?**

Response: The caseload within the federal judiciary is growing, especially the criminal caseload in Districts all along the Southwest Border, including the District of New Mexico. The Sixth Amendment of the Constitution guarantees defendants the right to a speedy trial. If confirmed, I would manage my criminal caseload being especially mindful of each defendant’s constitutional and statutory right to a speedy trial and grant continuances only when necessary and in conformance with law. *See* 18 U.S.C. 3161(h)(7)(A). I also would utilize status conferences, set realistic schedules and deadlines and promptly make rulings to avoid unnecessary delays. In addition, I would utilize the Magistrate Judges on the Court and utilize their expertise and experience to assist in criminal and civil cases.

- 16. 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 utilize a system of status conferences, scheduling orders with realistic deadlines, and promptly rule on pending motions to ensure cases continue moving efficiently toward trial or other disposition.

- 17. You have spent your entire legal career as an advocate for your clients. As a judge, you will have a very different role. Please describe how you will reach a decision in cases that come before you and to what sources of information you will look for guidance. What do you expect to be most difficult part of this transition for you?**

Response: I have spent a substantial amount of my career as an advocate, spending the last 14 years as a federal prosecutor advocating on behalf of the United States. If I am confirmed, my role as a judge will be much different. A judge must be neutral and detached from the parties and issues, deciding cases based only on the facts and the applicable law. I am, however, confident that I can successfully make this transition.

- 18. Please describe with particularity the process by which these questions were answered.**

Response: I reviewed each question thoroughly and answered them independently based on my experience and, where necessary, on legal research of existing legal precedent and standards. Moreover, I discussed my responses to each question with representatives from the Department of Justice.

- 19. Do these answers reflect your true and personal views?**

Response: Yes.

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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 based on the importance of applying the law to the facts impartially in each individual case that comes before the Court, as well as respectfully and clearly communicating a decision orally or in writing to the parties. I am familiar with many in a long line of United States Supreme Court Justices, although I have not modeled my philosophy on any one Justice. I have practiced before many federal and state judges both at the trial and appellate levels who apply this same philosophy. I will apply the same if confirmed.

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: I have not subscribed to a particular philosophy relating to Constitutional interpretation. However, I am aware that the Supreme Court has applied originalism in cases to interpret the Constitution. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570 (2008) (examining the original meaning of Second Amendment and striking down District of Columbia statute prohibiting possession of useable handguns in home as violative of Constitution); *See also Marsh v. Chambers*, 463 U.S. 783 (1983) (examining Continental Congress' practice of opening prayer and authorization of paid chaplains and upholding Nebraska Legislative practice of opening legislative day with prayer as not violative of Establishment Clause of First Amendment of Constitution).

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, I would have no authority as a District Judge to overrule 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 United States Supreme Court's decision in *Garcia v. San Antonio Metro Transit Auth.*, 469 U.S. 528, 552 (1985), is binding precedent and, if confirmed, I would apply it regardless of whether I agree with it.

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 in *United States v. Lopez* articulated three categories of activity that Congress may regulate under the commerce power of the Constitution. 514 U.S. 549, 558 (1995). If confirmed, I would follow all Supreme Court or 10th Circuit Court of Appeals precedent regarding the scope of Congressional power under the Commerce Clause.

Presidential Power

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

Response: The judiciary evaluates whether the President exceeded Executive authority by applying the framework set forth in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (stating, "The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself").

Individual Rights

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

Response: The Supreme Court has described when a right is so fundamental so as to be protected under the Due Process Clause, stating "we have regularly observed that the Due Process Clause specifically 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, 721 (1997) (Internal citations and quotations omitted).

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

Response: The Supreme Court has ruled that a statute that classifies by race, alienage, or national origin will be subjected to strict scrutiny and sustained only if it serves a compelling state interest, explaining "[t]hese factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others." *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 440 (1985). Strict scrutiny also will be applied "when state laws impinge on personal rights protected by the Constitution." *Id.* The Court applies intermediate scrutiny to review discriminatory practices based on gender. *See, e.g., Clark v. Jeter*, 486 U.S. 450, 461 (1988) (applying intermediate scrutiny to strike down Pennsylvania statute of limitations in paternity actions); *United States v. Virginia*, 518 U.S. 515, 532-33 (1996) (applying intermediate review and invalidating gender-based exclusion of women at military college).

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 will apply controlling precedent in the area of affirmative action without regard to my personal views or expectations.