

Written Questions of Senator Ted Cruz

Andrew Gordon

Nominee, United States District Judge for the District of Nevada

U.S. Senate Committee on the Judiciary

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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: Judges should faithfully follow the legal precedents of the Supreme Court and the Courts of Appeals. Judges must be fair, must not pre-judge cases or issues, and must treat all parties with respect and dignity. Federal judges must keep in mind that their jurisdiction and their role in government are limited; judges must respect, and not usurp, the roles of the legislative and executive branches. A judge must remember that he is a public servant, and that the courts belong to the citizens. I have not studied the Supreme Court Justices, so I cannot say which Justice's philosophy 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: In my 25 years of practicing law, I have not been called upon to employ originalism – or any other interpretive method -- to interpret the Constitution. When deciding a case, a district judge should begin by looking for precedents from the Supreme Court or the Courts of Appeals. If no precedent exists and the answer cannot be drawn from analogous cases, the judge should examine the plain language of the Constitution, and try to determine its meaning and how it would apply to the current case by all appropriate means. That may include discerning the original meaning of the language through historical and textual analysis, as demonstrated by the Supreme Court in *Dist. of Columbia v. Heller*, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008) and *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

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 as a judge, I would follow the precedents of the Supreme Court and the Court of Appeals.

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: As a prospective judge, I do not believe it is appropriate for me to express a personal opinion about any Supreme Court decision. *Garcia* represents a binding precedent of the Supreme Court. If I am confirmed as a judge and *Garcia* remained binding precedent, I would faithfully follow it regardless of whether I agreed 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 has held that Congress' Commerce Clause power extends to non-economic activity, but only in limited circumstances. Justice Scalia summarized the Court's precedents in this area in his concurring opinion in *Gonzales v. Raich*: "Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce." 545 U.S. 1, 37, 125 S. Ct. 2195, 2217, 162 L. Ed. 2d 1 (2005). Justice Scalia further wrote:

As *Lopez* itself states, and the Court affirms today, Congress may regulate noneconomic intrastate activities only where the failure to do so "could ... undercut" its regulation of interstate commerce. [quoting *U.S. v. Lopez*, 514 U.S. 549, 561, 115 S.Ct. 1624 (1995)]

Lopez and *Morrison* affirm that Congress may not regulate certain "purely local" activity within the States based solely on the attenuated effect that such activity may have in the interstate market. But those decisions do not declare noneconomic intrastate activities to be categorically beyond the reach of the Federal Government.

545 U.S. at 38-39, 125 S. Ct. at 2218. Because the decisions discussed by Justice Scalia remain binding precedent of the Supreme Court, I would follow them.

Presidential Power

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

Response: The federal government (including the authority of the President) "is acknowledged by all to be one of enumerated powers." *McCulloch v. Maryland*, 4 Wheat. 316, 405, 4 L.Ed. 579 (1819). "The President's power ... must stem either from an act of Congress or from the Constitution itself." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585, 72 S. Ct. 863, 866, 96 L. Ed. 1153 (1952). Thus, if the President undertakes an action that is not authorized by the Constitution or an act of Congress, and a challenge to that action is properly brought in a case within the court's jurisdiction, then a federal judge must invalidate the action as beyond the President's authority.

Individual Rights

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

Response: Historically, the Supreme Court has struggled to define which rights are “fundamental” for purposes of substantive due process analysis. Over time the Court has selectively incorporated most of the provisions of the Bill of Rights and applied them to the states under the Fourteenth Amendment. The Court also has recognized some fundamental rights not specifically named in the Constitution, including the right to privacy, the right to make decisions about procreation and contraception, and the right to private education. If called upon to address such an issue as a district judge, I would follow the precedents of the Supreme Court.

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

Response: Pursuant to Supreme Court precedent, classifications are subject to “strict scrutiny” if they categorize on the basis of race, national origin or alienage, or if they infringe upon fundamental rights. An “intermediate level” of scrutiny is used if the law under review categorizes on the basis of gender or illegitimacy. If the Supreme Court has found that additional classifications should be subjected to heightened scrutiny, I would follow those precedents.

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: This issue is presently before the Supreme Court, so there may be additional guidance on this topic in the near future. I cannot predict the outcome of that case. If confirmed as a district court judge, I would apply *Grutter* and any other binding Supreme Court decision in this area of law regardless of my expectations.

Written Questions of Senator Jeff Flake

Andrew Gordon

Nominee, United States District Judge for the District of Nevada

U.S. Senate Committee on the Judiciary

January 25, 2013

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

Response: Good judges faithfully follow the legal precedents of the Supreme Court and the Courts of Appeals. Good judges are fair, patient and careful listeners; they do not pre-judge a case or issue; they treat all parties with respect and dignity. Federal judges must remember that their jurisdiction is limited, and they must respect the roles of the legislative and executive branches of government. A judge must keep his ego in check, must remember that he is a public servant, and must remember that the courts belong to “we the people.”

a. How does your record reflect these qualities?

Response: For the past 10 years, I have devoted a significant portion of my practice to serving as a private arbitrator and mediator. I have always treated the parties and their counsel with respect, regardless of their station in life. I do not pre-judge cases or issues, I read all of the papers submitted to me, and I listen carefully to the arguments and evidence. If confirmed as a judge, I will approach cases in the same way.

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: When deciding a case, a district judge should begin by looking for precedents from the Supreme Court or the Courts of Appeals. If no precedent exists and no answer can be drawn from analogous cases, the judge should examine the plain language of the Constitution, and try to determine its meaning and how it would apply to the current case by all appropriate methods. That may include discerning the original meaning of the language through historical and textual analysis, as demonstrated by the Supreme Court in *Dist. of Columbia v. Heller*, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008) and *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

a. If so, how do you define original meaning originalism?

Response: I do not have a personal definition of “original meaning originalism.” In my 25 years of practice, I have not had to define or employ that term or technique of interpretation. Nevertheless, I have a general understanding that it focuses on the meaning that the words in the Constitution had to the public at the time of its adoption. Thus, it poses the question: “What was the ‘original public meaning’ of the text?”

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: As Madison points out in Federalist Paper 51, in the “compound republic of America,” power is surrendered by the people to “two distinct governments,” state and federal. Within each of those governmental structures, power is then subdivided among various branches and departments. “Hence a double security arises to the rights of the people.” Thus, the state and federal governments provide checks and balances against each other, and the various branches within each government provide checks and balances against each of the others. *See also, National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566, 2576, 183 L. Ed. 2d 450 (2012) (opinion of Roberts, C.J.) (“The independent power of the States also serves as a check on the power of the Federal Government: ‘By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power.’ *Bond v. United States*, 564 U.S. ----, ----, 131 S.Ct. 2355, 2364, 180 L.Ed.2d 269 (2011).”). Moreover, as Chief Justice Roberts wrote in *National Federation v. Sebelius*:

The Federal Government “is acknowledged by all to be one of enumerated powers.” [quoting *McCulloch v. Maryland*, 4 Wheat. 316, 405, 4 L.Ed. 579 (1819)] That is, rather than granting general authority to perform all the conceivable functions of government, the Constitution lists, or enumerates, the Federal Government’s powers. ... The enumeration of powers is also a limitation of powers, because “[t]he enumeration presupposes something not enumerated.” *Gibbons v. Ogden*, 9 Wheat. 1, 195, 6 L.Ed. 23 (1824). The Constitution’s express conferral of some powers makes clear that it does not grant others. And the Federal Government “can exercise only the powers granted to it.” *McCulloch*, *supra*, at 405. ... If no enumerated power authorizes Congress to pass a certain law, that law may not be enacted, even if it would not violate any of the express prohibitions in the Bill of Rights or elsewhere in the Constitution.

National Federation v. Sebelius, 132 S. Ct. at 2576.

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

Response: The jurisdiction of federal judges is limited. Judges must respect and not usurp the roles of the legislative and executive branches. However, if one branch of government usurps the role of another branch, or if the legislative or executive branch acts beyond its powers enumerated by the Constitution (or not surrendered by the people), the federal courts must rein in such action, in order to preserve the system established in our Constitution.

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: The majority, concurring and dissenting opinions in *Lopez* trace the development of the Supreme Court's Commerce Clause jurisprudence over time. Justice Kennedy recognized in his concurring opinion that "[t]he progression of our Commerce Clause cases from *Gibbons* to the present was not marked, however, by a coherent or consistent course of interpretation. . . ." 514 U.S. at 568. Thus, it is difficult to label *Lopez* and *Morrison* as "inconsistent" with earlier decisions that were not of a "coherent or consistent course." Regardless of my opinion whether *Lopez* and *Morrison* are consistent or not with prior decisions, if confirmed as a district judge and I am presented with a case raising these issues, I would faithfully follow the Constitution and the precedents of the Supreme Court.

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

Response: Pursuant to the *Lopez*, *Morrison*, and *Gonzalez v. Raich* decisions, Congress may legislate under the Commerce Clause within three "broad categories." "First, Congress may regulate the use of the channels of interstate commerce." *Lopez*, 514 U.S. at 558. "Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce..." *Id.* "Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, ... *i.e.*, those activities that substantially affect interstate commerce." *Id.* at 558-559.

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

Response: Many (but not all) transactions involving the exchange of money are subject to Congress's Commerce Clause power. For instance, the exchange of money in interstate or international commerce is clearly subject to Congress's Commerce Clause power. However, not all transactions involving the exchange of money are subject to Congress's Commerce Clause power.

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

Response: The 10th Amendment guarantees to the states all “powers not delegated to the United States by the Constitution, nor prohibited by it to the States,” nor reserved “to the people.” As James Madison wrote in The Federalist No. 45, “The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.” Thus, it would be nearly impossible to list, with specificity, every power guaranteed to the states. Nevertheless, states may exercise their police powers within their borders. For example, states are empowered to define and prosecute crimes and penalties; assess and collect taxes on income, sales and real property; issue building permits and driver licenses; administer public schools; zone property for development; and undertake many other activities.