

Written Questions of Senator Ted Cruz
Beverly O'Connell
Nominee, United States District Judge for the Central District of California
U.S. Senate Committee on the Judiciary
January 25, 2013

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: The term "judicial philosophy" varies widely and is very personal to judges, so I cannot say which Supreme Court Justice's judicial philosophy most mirrors mine. Over the course of my seven years as a judge, my judicial philosophy has been to be prepared, to respect all litigants who enter my courtroom, to fairly and impartially judge the cases that come before me, and to faithfully apply binding precedent. It is my role to apply the law to the facts in a fair and impartial way and decide only the issues properly before the court.

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 believe that in interpreting the meaning of words and phrases in the Constitution, a district court should look to the plain meaning of the words or phrases and to binding precedent. The original intent and original meaning, which may at times overlap, can be helpful in determining the meaning of words and phrases in the 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 as a district court judge, it would be my obligation to follow all applicable precedent. Stare decisis is a bedrock principle of our justice system. Only the Supreme Court and Circuit Courts can re-visit their precedent, and only in limited circumstances.

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: *Garcia v. San Antonio Metro Transit Auth.*, 469 U.S. 528 (1985) held that the San Antonio Metropolitan Transit Authority operations were not immune from the minimum wage overtime requirements of the Fair Labor Standards Act. Regardless of whether I agreed or

disagreed with that holding or the quotation in the question, I would follow all applicable Supreme Court precedent if I were confirmed.

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

Response: I would follow all applicable precedent in analyzing such an issue if I were to be confirmed. For example, in *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000), the Supreme Court has limited Congress' Commerce Clause power in connection with specific non-economic activities.

Presidential Power

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

Response: The ability of a President to issue executive orders or actions is limited to his powers delineated in the Constitution or validly granted by statute. *See, e.g., Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 585-89 (1952). The United States Supreme Court has the authority to determine whether Presidential actions are authorized by the Constitution and federal statutes and thus permissible, or whether Presidential actions exceed such authority and are thus impermissible. If confirmed as a district court judge, I would follow all applicable Supreme Court authority.

Individual Rights

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

Response: The United States Supreme Court has articulated the analytical framework for determining whether something is a "fundamental right" for purposes of the Due Process Clause. *See, e.g., Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). If confirmed, I would follow all applicable Supreme Court authority and Circuit Court authority.

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

Response: The Supreme Court has held that certain rights, such as the right to access to criminal proceedings or the right to vote, are "fundamental," thereby subjecting laws which impinge upon them to strict scrutiny under the Equal Protection Clause. The Supreme Court has also held that laws which burden a suspect class, such as race, are also subject to strict under the Equal Protection Clause. *See, e.g., Shaw v. Hunt*, 517 U.S. 899, 901 (1996). I would research the controversy in front of me and apply all binding precedent to determine whether a classification should be subject to heightened scrutiny under the Equal Protection Clause.

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 I were confirmed as a district judge, I would apply *Grutter*, and all other controlling precedent in the area of race conscious factors in higher education regardless of my personal expectations.

Written Questions of Senator Jeff Flake
Beverly O'Connell
Nominee, United States District Judge for the Central District of California
U.S. Senate Committee on the Judiciary
January 25, 2013

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

Response: I believe all good judges are prepared, fair and impartial, respectful, even-tempered, decisive, courteous, patient persons who faithfully apply binding precedent.

a. How does your record reflect these qualities?

Response: During the course of my seven years as a judge, I have consistently been entrusted with trying the most serious cases in our district. Many times the litigants have entrusted me with deciding the guilt or innocence of the accused, believing me to be a fair and impartial judge. My colleagues throughout the State of California have chosen me as a leader. As a result, I have been selected to participate in statewide committees addressing criminal law issues. I have also been chosen by Los Angeles Superior Court's Presiding Judge to manage three courthouses and 24 judges. The Chief Judge of the California Supreme Court has appointed me to serve as a Justice *Pro Tempore*, showing that he had confidence in my intellect and abilities as a judge. In addition, the current Chief Judge of the California Supreme Court has appointed me as a special master in a death penalty case, the most serious type of criminal case. I believe these actions establish that the litigants, my colleagues and judges of higher courts recognize my commitment to the rule of law, my preparedness and my temperament.

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: I believe that in interpreting the meaning of words and phrases in the Constitution, a district court should look to the plain meaning of the words or phrases and to binding precedent. The original intent and original meaning, which may at times overlap, can be helpful in determining the meaning of words and phrases in the Constitution.

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

Response: I define original meaning originalism as Constitutional analysis looking to the original public meaning of the Constitution at the time of the drafting of the Constitution.

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 federal government is one of limited and enumerated powers. One important way that our Constitution places limits on the government is through its reservation of powers to the states in the Tenth Amendment. For example, Article 1, Section 8, and Supreme Court precedent empowers Congress to regulate instrumentalities of interstate commerce, channels of interstate commerce, and activities that substantially impact interstate commerce. However, as in *Lopez* and *Morrison*, if the activity that Congress is regulating does not fall within one of these categories, then it is beyond Congress’ power to regulate such activity.

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

Response: The United States Supreme Court is tasked with evaluating the constitutionality of statutes. The Supreme Court has, through its decisions, held that Congress has, on occasion, exceeded its limited authority. *See, e.g., United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000). The Supreme Court has also determined whether the President’s actions exceed his authority under the Constitution. *See, e.g., Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 585-89 (1952).

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 Supreme Court did not overrule its past Commerce Clause decisions in striking down the laws in *Lopez* and *Morrison*. Rather it distinguished prior Commerce Clause decisions. I would follow all applicable Supreme Court decisions, including *Lopez* and *Morrison*, if presented with such an issue, regardless of my personal beliefs.

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

Response: As articulated in *Lopez*, Congress is limited in its regulation of activities under its Commerce Clause power to those activities regarding the use of the channels of interstate commerce, the instrumentalities of interstate commerce and those activities which substantially affect interstate commerce. *Lopez*, 514 U.S. at 558-59. All other activities lie outside the scope of Congress’ Commerce Clause authority under current Supreme Court authority.

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

Response: The Supreme Court has not held that any exchange of money, by itself, is subject to Congress' Commerce Clause power. Such activity would be analyzed under the test listed above.

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

Response: The federal government is one of limited and enumerated powers. The Tenth Amendment places residual authority in the hands of the states. As a result, all powers not delegated to the federal government by the Constitution, nor prohibited by the Constitution to the states are thereby guaranteed to the states. For example, the Supreme Court has held that the federal government may not require state law enforcement officers conduct background checks on prospective handgun purchasers or require states to enact legislation to dispose of radioactive waste within their borders. *See, e.g., Printz v. United States*, 521 U.S. 898, 933-34 (1997); *New York v. United States*, 505 U.S. 144, 176, 188 (1992).