

**Response of Brian J. Davis  
Nominee to be United States District Judge for the Middle District of Florida  
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 embodies a reverence for the law, a respect for litigants and counsel and a commitment to impartially resolving disputes. It includes an understanding of the constitutional limitations on judicial authority, the necessity of clarity and promptness in rulings and the importance of personal and professional integrity. I cannot identify a single United States Supreme Court Justice whose judicial philosophy is most analogous with mine, though I suspect most would agree with the values embodied in 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: The Supreme Court has used both “original intent” and “original public meaning” analyses in interpreting the Constitution. I believe therefore that both methodologies are appropriate tools. If confirmed as a District Court Judge I would follow Supreme Court and applicable 11<sup>th</sup> Circuit Court of Appeals precedent in the application and interpretation of 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: The principle of *stare decisis* would always militate against overruling precedent. As a District Court Judge in Florida, if confirmed, I would follow all applicable precedent unless there had been intervening 11<sup>th</sup> Circuit Court of Appeals or Supreme Court decisions reversing the precedent in question.

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 possibility of similar controversies to those at bar in *Garcia v. San Antonio Metro Transit Auth.*, 469 U.S. 528 (1985), appearing before me make it inappropriate for me to express an opinion regarding the decision’s holding or rationale. Regardless of any opinion I might hold, if confirmed as a District Court Judge, I would follow and apply the case as binding precedent.

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

Response: *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), make clear that the Commerce Clause only permits congressional regulation of the channels of interstate commerce, the instrumentalities of interstate commerce and activity substantially related to interstate commerce. Because *Lopez* and *Morrison* are binding United States Supreme Court authority defining the parameters of the Constitution's Commerce Clause, I would be obliged to follow and apply those authorities as a District Court Judge if confirmed.

Presidential Power

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

Response: The executive power of the President is granted and limited by the Constitution and by congressional enactment. When a question arises as to the scope of presidential authority in a case within the jurisdiction of the federal courts, the judicial branch of our government is empowered to resolve the question. *Youngstown Sheet & Tube Company v. Sawyer*, 343 U.S. 579 (1952). I would, if confirmed, resolve questions of executive authority based upon United States Supreme Court precedent.

Individual Rights

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

Response: For purposes of the substantive due process doctrine the Supreme Court has determined 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, 720-721 (1997) (internal citations and quotations omitted).

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

Response: Heightened scrutiny under the Equal Protection Clause is required when a law's classification abridges a suspect class, fundamental right or liberty interest. The Supreme Court has required the most heightened scrutiny for classifications based on race or alienage, and a heightened but intermediate level of scrutiny for classifications based on gender or illegitimacy.

**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: My expectation, if any, regarding the use of racial preferences should not and would not impact my intention and duty to apply the holding of *Grutter v. Bollinger*, 539 U.S. 306 (2003) as long as it remains binding authority of the United States Supreme Court.

**Written Questions of Senator Jeff Flake**

Brian J. Davis

*Nominee, to be United States District Judge for the Middle District of Florida*

U.S. Senate Committee on the Judiciary

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- 1. 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: Yes.

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

Response: Supreme Court precedent authorizes a reasoned examination of historical context as gleaned from reliable records, publications, contemporary state constitutions and interpretations given during the Constitution's adoption as a tool to determine original meaning. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570 (2008).

- 2. 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 division of power inherent in the Constitution's creation of separate specifically limited branches of federal government, the reservation to states of authority not within the federal government's enumerated powers, and the first ten amendments to the Constitution protecting individual rights are among the most salient ways our Constitution places limits on the government.

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

Response: By its Article III powers the judiciary, as a separate branch of government, decides the constitutionality of the President's and Congress' exercise of power. By precluding constitutionally unauthorized action, courts limit the legislative and executive branches to their constitutionally established roles of making and implementing laws, respectively.

- 3. 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's decisions in *Lopez* and *Morrison* are factually distinguishable from previous applications of the Commerce Clause to federal legislation, and neither *Lopez* nor *Morrison* overruled those earlier decisions.

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

Response: The United States Supreme Court currently defines the limits to the actions the federal government may take pursuant to the Commerce Clause by only permitting Congress to: 1) regulate the use of the channels of interstate commerce; 2) regulate and protect the instrumentalities of interstate commerce or persons or things in interstate commerce; and 3) regulate those activities having a substantial relation to interstate commerce. *United States v. Lopez*, 514 U.S. 549 (1995), *United States v. Morrison*, 529 U.S. 598 (2000).

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

Response: No United States Supreme Court decision has ever held that all exchanges of money are subject to regulation by Congress pursuant to the Commerce Clause.

- 4. What powers do you believe the 10<sup>th</sup> Amendment guarantees to the state? Please be specific.**

Response: Because by design the Constitution fails to specify powers granted to the states but rather defines the states' powers as those not delegated to the federal government, a definitive list of states' powers is not possible. *See U.S. Const. Amend. X*. Through such a construct the authority of the federal government is specifically limited and that of the states broadly empowered. Powers regarding taxation, domestic relations and policing have been identified by the Supreme Court as among those guaranteed to the states.