

Responses of Edward M. Chen
Nominee to be United States District Judge for the Northern District of California
to the Written Questions of Senator Mike Lee

- 1. When encountering a statute without on-point precedent, what method of statutory analysis would you use? Why?**

Response: The central task is to determine the intent of Congress. I would first look to the express language and structure of the statute. If the language and structure are clear, generally the text would govern. If there is ambiguity, I would survey the decisional law interpreting the statute to see if there is any binding precedent or decisions which are close, if not precisely, on point. If necessary, I would utilize the conventional tools of statutory construction (which include canons of statutory interpretation, interpretive regulations, and evidence of legislative purpose).

- a. Please describe the process by which you construe statutes when precedent is not available.**

Response: Please see above answer.

- b. If there are multiple factors that you consider, please describe the manner in which you weight them.**

Response: I would place primary, if not dispositive, weight on the text of the statute and decisions construing the statute.

- 2. In his written questions, Senator Sessions asked you about a statement published in the *California Law Review*. You said that “diversity enhances the quality of decision-making” and that “[s]uch experiences inform assumptions that affect legal decisions.” In response, you said that you are “not aware of any particular experiences that informed” decisions you have made. You also said that you have made a “conscious effort to check” your personal feelings. Do you believe that, despite these efforts, your personal feelings and experiences have in any way informed determinations you have made?**

Response: I do not believe that they have affected determinations I have made as a judge. I believe my experiences and knowledge have on occasion been useful in understanding and evaluating evidence and testimony on *e.g.* financial and scientific matters with which I am familiar, but I am not aware of any personal experiences which have affected the outcome of a case.

- 3. Do you personally believe that the death penalty inherently violates the constitutional ban on cruel and unusual punishment and the guarantees of due process and equal protection?**

Response: No. The Supreme Court made clear in *Gregg v. Georgia*, 428 U.S. 153 (1976) that the death penalty does not inherently violate the Constitution.

- 4. In a speech given at the Operation Protect and Defend dinner on May 4, 2006, you referred to the “secret detention of nearly a thousand American residents held without charges.”**

- a. To what detention were you referring?**

Response: I was referring to reports of the detention of hundreds of individuals following the attacks on September 11, 2001 as part of the government’s investigations. The detentions were described, *inter alia*, in *Center for National Security Studies v. United States Department of Justice*, 215 F. Supp. 2d 94 (D.C. 2002), *aff’d in part, rev’d in part*, 331 F.3d 918 (D.C. Cir. 2003), *cert. denied*, 540 U.S. 1104 (2004) (FOIA lawsuit seeking names of detainees).

- b. How did you become aware of this “secret” detention?**

Response: I believe that I heard and read about these detentions through media reports.

- c. Do you believe that such detention violates the Constitution?**

Response: I am not familiar with the specific facts of any particular case to have any opinion as to the constitutionality of any of the detentions. Apparently, individuals were detained for various reasons, including possible immigration violations, federal criminal charges and as material witnesses, thus presenting a wide range of circumstances. I understand the constitutionality of a material witness detention (occurring years after 2001) is currently before the Supreme Court in *Abdullah Al-Kidd v. Ashcroft*, 580 F.3d 949 (9th Cir. 2009), *cert. granted*, 131 U.S. 415 (2010).

- 5. In remarks given on September 22, 2001, you suggested that the “[c]riminalization of immigration laws” were “institutionalized racism.” You clarified in the hearing that you were referring to “facially neutral laws and policies which have the effect of disproportionately affecting one racial or ethnic group even if not so intended.”**

- a. Do you believe that there is a way to criminalize illegal immigration without “disproportionately affecting one racial or ethnic group”? Please explain.**

Response: I do not know.

- b. Please explain your view of how and in what ways facially neutral laws with disparate effects constitute institutionalized racism.**

Response: I used the term “institutionalized racism” as a definitional term describing laws that have a disparate impact even though facially neutral and not motivated by intentional discrimination. I did not intend to imply that such laws are unconstitutional.

- c. As a judge, you will continually have immigration cases come before you. Given your view that the criminalization of immigration laws amounts to racism, do you feel that you could uphold laws that criminalize immigration?**

Response: I did not state that the criminalization of immigration laws amounts to racism or a conscious effort to discriminate against any particular racial or ethnic group. Nor was I suggesting these laws are unconstitutional simply because of any disparate impact resulting from their enforcement. I have no problem in upholding criminal immigration laws. As a magistrate judge, I have arraigned and held without bail hundreds of defendants charged with criminal immigration law violations.

- 6. Based on your understanding of the original intent behind the text of the Commerce Clause, do you believe that Congress has at any time overstepped its authority under that provision since *Wickard*, other than in *Lopez* and *Morrison*?**

Response: Since taking the bench, I have not had occasion to examine this issue. If confirmed as a district judge, were this issue to come before me, I would be bound by *Lopez* and *Morrison* and any other applicable precedents of the Supreme Court and the Ninth Circuit.