

Response of Derrick Kahala Watson
Nominee to be United States District Judge for the District of Hawaii
to the Written Questions of Senator Amy Klobuchar

- 1. If you had to describe it, how would you characterize your judicial philosophy? How do you see the role of the judge in our constitutional system?**

Response: My judicial philosophy is characterized by the timely and fair resolution of all cases, accomplished after deliberate consideration of the relevant authorities and precedent. It also calls for patience and respect for all counsel and litigants, whether or not represented. A federal judge in our system of government must similarly respect the decisions of the executive and legislative branches and acknowledge the judiciary's limited role in reviewing those decisions.

- 2. What assurances can you give that litigants coming into your courtroom will be treated fairly regardless of their political beliefs or whether they are rich or poor, defendant or plaintiff?**

Response: Throughout my twenty-two year career as an Assistant United States Attorney and private practice attorney, I have always advanced the interests of clients based on the facts and applicable law. Clients' political beliefs have never been a factor or even been known to me, and I have represented plaintiffs and defendants alike. While in private practice, I devoted significant time to the representation of pro bono clients who would not have otherwise been able to afford the services of my law firm. If confirmed, I intend to continue to apply such principles of fairness and equity to all those who appear before me.

- 3. In your opinion, how strongly should judges bind themselves to the doctrine of stare decisis? How does the commitment to stare decisis vary depending on the court?**

Response: The public at large is entitled to predictability, fairness and reliability from its federal courts. The principle of stare decisis is critical to meeting these expectations and should be applied wherever possible by every federal district court.

Response of Derrick Kahala Watson
Nominee to be United States District Judge for the District of Hawaii
to the Written Questions of Senator Chuck Grassley

- 1. It appears you have very limited experience with criminal law matters, focusing exclusively in civil matters. How will you get up to speed on criminal matters that will come before you, if confirmed?**

Response: I have already started to observe the criminal calendars of the District of Hawaii, to consult with criminal Assistant United States Attorneys within my office and to read the substantive materials provided to nominees by the Federal Judicial Center. If confirmed, I will reach out to the federal bench within the District of Hawaii for guidance on particular and common criminal law issues and continue to study criminal law and procedure as best I can to prepare for taking the bench myself.

- 2. How will you use the Sentencing Guidelines to guide you in criminal cases?**

Response: The Sentencing Guidelines, calculations based on the guidelines and departure justifications, if any, are among those issues which I will have to study in earnest. I generally intend to give the Guidelines great weight.

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

Response: While many qualities are important, the most important attribute of a judge is to apply the law fairly to all parties, whether or not represented by counsel. I believe that I possess this ability.

- 4. 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 federal district judge should be patient, considerate, respectful and decisive. I believe I possess each of these traits.

- 5. 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, I would follow the controlling precedent from higher courts, even if I personally disagreed with those decisions.

6. **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: If the interpretation of a statute was a matter of first impression, I would first look to the plain language of the statute itself to determine its meaning. If the plain language was unambiguous, no further search is necessary. If the language, however, was ambiguous, and there was no controlling precedent from the United States Supreme Court or Ninth Circuit Court of Appeals, principles of statutory construction should be employed, potentially including reference to legislative history. If the issue of first impression did not involve a statute and was again without controlling precedent, guidance may be found in the non-controlling case law of other jurisdictions.

7. **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: I would follow and apply the precedent of the United States Supreme Court and the Ninth Circuit Court of Appeals, even if I personally believed that such precedent had been wrongly decided.

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

Response: Statutes should not be held unconstitutional unless they clearly violate the Constitution, based on United States Supreme Court and Ninth Circuit Court of Appeals precedent, and cannot be reasonably interpreted as constitutional, or are enacted without authority.

9. **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?**

Response: No, it is not proper to rely on foreign law or the world community in determining the meaning of the Constitution.

10. **As you know, the federal courts are facing enormous pressures as their caseload mounts. If confirmed, how do you intend to manage your caseload?**

Response: I intend to manage a heavy docket in a number of ways, including promptly adjudicating dispositive motions, aggressively calendaring pretrial and trial dates and only continuing such dates when necessary, utilizing the case management, discovery and alternative dispute resolution services of the District of Hawaii’s three

excellent federal magistrate judges, and encouraging the use of private mediation and arbitration in appropriate cases.

- 11. 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: Responsible judges play a significant role in the pace and conduct of litigation. Together with federal magistrate judges, federal district judges should explore the possibility of early settlement, set and continually monitor an aggressive pretrial and trial schedule that does not allow for date slippage, absent good cause, and hear and decide dispositive motions at the earliest opportunity.

- 12. 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 intend to reach decisions after listening to, weighing, and testing the parties' written and oral submissions, conducting independent research of the relevant law and employing court-appointed experts where appropriate. I anticipate that learning the criminal law and procedure will be the most difficult aspect of my transition. I intend to work hard to overcome this challenge and have already started on this path by observing the criminal calendars of the District of Hawaii, speaking with criminal Assistant United States Attorneys within my office and reading the substantive materials provided to nominees by the Federal Judicial Center.

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

Response: I received the questions on January 30, 2013 and personally drafted my answers that same day. I reviewed my answers with an official from the United States Department of Justice before submitting them to the Committee.

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

Response: Yes.

Written Questions of Senator Jeff Flake
Derrick Kahala Watson
Nominee, to be United States District Judge for the District of Hawaii
U.S. Senate Committee on the Judiciary
January 30, 2013

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

Response: All good judges should be patient, fair, courteous, respectful, even-tempered, open-minded, decisive, studious and inquisitive.

a. How does your record reflect these qualities?

Response: Over the course of my twenty-two years as an Assistant United States Attorney and private practice attorney, I believe my clients, supervisors, former partners and even adversaries would attest that I possess each of these traits.

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: Yes, original meaning should be considered.

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

Response: As exemplified by *District of Columbia v. Heller*, 128 S.Ct. 2783 (2008), there is no substitute for evaluating original meaning through historical scholarship and inquiry.

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 Constitution, including through application of the Fourteenth Amendment, restricts governmental interference most notably in the area of individual rights – including through First Amendment protections regarding expression and association, Second Amendment protections regarding gun rights, Fourth Amendment protections regarding unreasonable searches and seizures, and Fifth Amendment guarantees of due process and freedom from self-incrimination.

The Constitution also limits governmental authority by dispersing power among different branches of government, by dispersing power within branches of government (*e.g.* through different legislative bodies with different compositions and electoral rules), and by dispersing power at the federal, state and local levels, in part through the Tenth Amendment.

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

Response: The Judicial Branch contributes to checks and balances principally through the doctrine of judicial review. *See Marbury v. Madison*, 5 U.S. 137 (1803). Once confirmed for lifetime tenure, Article III judges are generally free from interference by the legislative or executive branches.

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: No, I do not agree. While *Lopez* and *Morrison* marked the first time in decades that the Court had rejected federal legislation on Commerce Clause grounds, the analytic framework employed by the Court (e.g. whether the activity "substantially affects interstate commerce," etc.) did not change from that collectively employed by its predecessors. In each case, the federal legislation at issue was struck down principally because there was no economic link or limit, and the area subject to regulation was one traditionally reserved to local government.

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

Response: The Supreme Court's articulation of Congress' Commerce Clause power in cases such as *Lopez* dictates the parameters within which the federal government must operate in order for its legislation to be constitutionally valid. More specifically, Congress must tie its actions to the protection of the instrumentalities of interstate commerce, the channels of interstate commerce or to activities substantially affecting interstate commerce. Where it does not do so, its legislation will be found invalid, as occurred in *Lopez* and *Morrison*.

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

Response: No. Though I am not aware of a case that specifically addresses it, the mere exchange of federal currency, without more, does not subject that exchange to federal Commerce Clause legislation.

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

Response: The Tenth Amendment generally reserves to the States all powers not expressly delegated by the Constitution to the United States. In recent years, the Supreme Court has applied the Tenth Amendment to protect states' rights to be free from a mandatory federal hazardous waste management scheme (*New York v. United States*, 112 S.Ct. 2408 (1992)) and to be free from federal "commandeering" of state and local officials in the execution of a federal regulatory scheme (*Printz v. United States*, 521 U.S. 898 (1997)).

**Response of Derrick Kahala Watson
Nominee to be United States District Judge for the District of Hawaii
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 philosophical approach would emphasize judicial restraint and adherence to precedent. I am not, however, a scholar of the Supreme Court and am not familiar enough with the philosophies of each of the individual justices of these Courts to identify a particular justice whose philosophy is most analogous to my own.

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: Yes, originalism and, more specifically, original meaning should be considered through historical scholarship and inquiry obtained from the parties, the court and/or amici.

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 role of a federal district court judge is to apply controlling precedent where it exists, not to seek to overrule that precedent even if the judge disagrees with it. This is the role and approach I intend to follow.

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: It would be inappropriate for a prospective nominee to express agreement or disagreement with binding precedent of the Supreme Court. If confirmed, I would be bound to follow Supreme Court precedent without regard to whatever personal views I might have regarding that precedent.

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 identified three categories of activity that Congress may regulate under its Commerce Clause authority: 1) “the use of the channels of interstate commerce;” 2) “the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may only come from intrastate activities;” and 3) “activities having a substantial relation to interstate commerce.” *United States v. Lopez*, 514 U.S. 549, 558-559 (1995). Under this formulation, it is possible that Congress’ Commerce Clause power, together with its Necessary and Proper Clause power, extends to non-economic activity.

Presidential Power

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

Response: The judicial framework for evaluating the validity of an executive order is set forth in *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 635-638 (1952) (Jackson, J. concurring). The focus of such a review includes whether the order was issued pursuant to an express or implied Congressional authorization, whether the order is closely related to that authorization, and whether the subject matter of the order concerns an area traditionally entrusted to the President (*e.g.* foreign affairs, national security).

Individual Rights

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

Response: Fundamental rights subject to substantive due process review include those fundamental rights and liberties that are deeply rooted in the Nation’s history and traditions, such as the right to marry, to have children, to bodily integrity and to privacy. *See Washington v. Glucksberg*, 521 U.S. 702, 720-721 (1997).

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

Response: Suspect classifications entitled to heightened scrutiny under the Equal Protection Clause include those based on race, national origin, gender, alienage and legitimacy.

Do you "expect that [25] 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 as a federal district judge, I would be bound to apply all controlling precedent regarding the use of affirmative action in public higher education, regardless of any personal expectations that I might have.