

Written Questions of Senator Jeff Flake

Shelly Dick

Nominee, United States District Judge for the Middle District of Louisiana

U.S. Senate Committee on the Judiciary

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

Response: I believe there are several facets and characteristics that are fundamental to a sound judicial philosophy, including thoughtfulness, careful deliberation, thorough research and commitment to the rule of law and the principle of stare decisis.

a. How does your record reflect these qualities?

Response: In my private practice I endeavored always to carefully understand the nature and scope of the legal issues presented and to thoroughly research applicable legal doctrines and the rule of law in formulating the advice given or the position advocated. In my role as an administrative hearing officer for the Louisiana Workforce Commission I was thorough in my research, thoughtful and careful in my deliberations, and I faithfully applied controlling precedent and the rule of law in the cases that came before me.

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: The first step in the construction of any constitutional provision is the plain language of the provision itself. If the plain language is subject to different interpretations or is ambiguous then it is appropriate to consider the original intent of the drafters. As stated by the United States Supreme Court in 1838 “the proper mode of considering [an] article of the constitution, in relation to the judicial power, is to take the constitution as a whole, and keep constantly in mind the grand design and intention of its framers”. *State of Rhode Island v. Massachusetts*, 37 U.S. 657, 673 (1838). If confirmed as a District Court judge I will look to and apply the constitutional construction guidelines enunciated by the United States Supreme Court and the United States Court of Appeals for the Fifth Circuit.

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

Response: I am not a student of the different doctrinal forms of originalism. However after reading United States Supreme Court case law in preparation for providing a response to this question, it is my understanding that original meaning originalism refers to the view that “[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from

technical meaning.” *United States v. Sprague* 282 U.S. 716, 731 (1931). According to Justice Scalia, “[n]ormal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation.” *Dist. of Columbia v. Heller*, 554 U.S. 570, 576-77 (2008).

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 United States Constitution grants limited and enumerated powers to the federal government. Article I, Section 8 of the United States Constitution grants certain enumerated powers to Congress. The Bill of Rights limits the powers of Congress. Likewise Articles II and III set forth the scope of the presidential and judicial powers respectively. The powers not conferred upon the federal government are expressly reserved to the States by the Tenth Amendment.

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

Response: The fundamental role of the judicial branch is to protect and uphold the United States Constitution. Although congressional acts are presumed constitutional, *U.S. v. Morrison*, 529 U.S. 598, 607 (2000), it is the role of the judicial branch to determine whether an act of Congress is violative of the United States Constitution. *Marbury v. Madison*, 1 Cranch 137 (1803).

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 United States Supreme Court distinguished prior Commerce Clause case law in *Lopez* and *Morrison* but the court did not expressly overrule its prior precedent.

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

Response: If confirmed as a District Court judge it will be my obligation to follow the precedent of the United States Supreme Court and the United States Court of Appeals for the Fifth Circuit. According to recent United States Supreme Court precedent Congress may regulate interstate commerce in three areas: “First, Congress can regulate the channels of interstate commerce. Second, Congress has authority to regulate and protect the instrumentalities of interstate commerce, and persons or things in interstate commerce. Third, Congress has the power to regulate activities that substantially affect interstate commerce.” *Gonzales v. Raich*, 545 U.S. 1, 16-17 (2005) (citations omitted).

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

Response: No.

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

Response: The Tenth Amendment reserves to the States all powers that the States did not delegate to the federal government by way of the Constitution. In *New York v. United States*, 505 U.S. 144, 156 (1992), Justice O’Connor explained: “If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress.” The United States Supreme Court has held that the Tenth Amendment prohibits Congress from requiring States to “make or enforce” specific laws. *New York v. United States*, 505 U.S. 144, 156 (1992) and *Printz v. United States*, 521 U.S. 898 (1997). The United States Supreme Court has also determined that the Tenth Amendment confirms that Congress may not abrogate a State’s sovereign immunity. *Alden v. Maine*, 527 U.S. 706 (1999).