

Nominations Hearing, April 24, 2013

Questions for the Record from Senator Lee

Questions for Jennifer Dorsey

- 1. You served as a judicial extern for Judge Stephen Reinhardt on the Ninth Circuit Court of Appeals. Do you consider him a judicial role model?**

Response: My experience externing in the Ninth Circuit Court of Appeals was brief and occurred when I was still a law student. During that time, I recall that Judge Reinhardt had a tireless work ethic, a quality I personally admire, but I lacked the perspective to consider him a judicial role model. Now, having practiced and appeared before many judges over the past 16 years, my judicial role models are those I am more familiar with on a regular basis, including many Nevada judges who are well prepared, treat the attorneys and litigants in their courtrooms with dignity and respect, and diligently apply the law in articulately drafted decisions.

- 2. In a law review note you wrote in 1997, you stated that Judge Reinhardt is “often deemed the most liberal judge in the federal judiciary.” If confirmed, would you seek to likewise establish a reputation as one of the most liberal judges in the federal judiciary?**

Response: No.

- 3. In the law review note you wrote in 1997, you stated: “A refusal by the Court to legalize the practice of physician-assisted suicide will not sit well with contemporary constitutional jurisprudence—particularly the decisions in *Roe*, *Casey*, *Cruzan*, and *Romer*. In these cases, the Court was willing to forge ahead to create a just outcome without regard to the usual decisional restraints.” In your law review note, you use the term “just results” or “just outcome” a few times.**

- a. What role do judges have in ensuring that the result or outcome of a particular decision is just, and how should judges go about determining which result is just and which is unjust?**

Response: A judge ensures that a result or decision is “just” by thoroughly knowing the facts of the individual case at bar, carefully researching the state of the law, and faithfully applying the applicable, binding legal precedent.

4. Elsewhere in your law review note, you write: “As *Roe*, *Cruzan* and *Romer* illustrate, when public policy and sentiment dictate, just results follow. In light of these decisions, the Court’s recognition of the right to die with physician assistance would be in good company.”

- a. As it turns out, the position you advocated for in your law review note was rejected by the Supreme Court. Do you repudiate the reasoning you used in your law review note?

Response: I wrote that article nearly 17 years ago, as a law student. The goal of the piece was not to advocate any position but to analyze the then-current state of the law on physician-assisted suicide and to address some of the potential rationales the Supreme Court might identify in its ultimate ruling, relying heavily on the reasoning articulated by the Ninth Circuit decision in *Compassion in Dying v. State of Washington*, 79 F.3d 790 (1996). As you point out, this decision was reversed, and the Supreme Court held in *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997), that there is no fundamental liberty interest in physician-assisted suicide. When I wrote my law review note, the Supreme Court had not yet answered this question. I recognize that *Glucksberg* is now the law of the land. If confirmed as a district court judge, I would faithfully apply all binding precedent from the United States Supreme Court, including *Glucksberg*.

- b. If not, would it be fair to say that although as a judge you would follow the Supreme Court’s precedent, your own personal constitutional jurisprudence is at odds with that of a majority of the Supreme Court?

Response: My law review article does not reflect my personal constitutional jurisprudence, but rather was intended to analyze circuit court decisions that have since been reversed by the Supreme Court. These Supreme Court decisions are now binding on all lower federal courts, including the court to which I have been nominated. My personal constitutional jurisprudence—as further informed by my years of practical experience as a litigator and appellate advocate—is that a judge must remain mindful of the judiciary’s limited role in our Constitutional system to apply the well-researched law to the facts of each particular case and serve as a check and balance on the other branches of government.

5. In your law review note, you discuss Justice Scalia’s approach (as embodied in statements he had made) to the issue of physician assisted suicide. You conclude that he would be unlikely to vote in favor of a ruling that struck

down state laws banning physician suicide. Your view, as expressed in the article, is that (contrary to Justice Scalia’s position) courts should in fact strike down laws banning physician assisted suicide. You characterize Justice Scalia’s position—with which you disagree—as one that finds support “in doctrines of judicial restraint and enumerated rights.” It seems plain from reading your law review note that you consider the doctrines of “judicial restraint and enumerated rights” to be subservient to “just outcomes.”

- a. Do you retract and disavow your law review note, and if not, how can we conclude that you would prioritize the judicial restraint and the constitutional doctrine of enumerated rights given your criticism of those doctrines in your law review note?**

Response: Thank you for the opportunity to further clarify my article. The piece was not intended to state an opinion on the constitutionality of physician-assisted-suicide bans beyond analyzing the circuit court opinions that held that such bans were unconstitutional. The purpose of my note also was not to criticize or advocate any position or doctrine. I do not consider the doctrines of judicial restraint and enumerated rights to be subservient to “just outcomes,” nor did I intend to espouse that belief. I fully recognize that a judge’s role in our Constitutional system is a limited one, bound by the Constitution and the principles of *stare decisis* and judicial restraint. If confirmed, I would remain faithful to those principles.

- 6. Your biography evidences little experience in the courtroom. As I understand it, your questionnaire describes your legal work as pre-litigation preparation and research, discovery, motion practice and trial or other resolution. You state that you have participated in six trials. And you have no criminal experience.**

- a. Do you have any other legal experience of which the Committee should be aware and which you believe would prepare and qualify you to be a federal judge?**

Response: During my 16-year legal career, in addition to having tried six cases in court, I have also tried private arbitration matters and been a part of the trial team in approximately nine other trials. My career in complex civil litigation has given me a broad and varied background in complicated legal issues and the complexities of the legal process in both state and federal court. Although only a small number of these matters make it to trial, most still require extensive preparation at all stages, including the investigation stage, the complaint-and-answer stage, and many rounds of discovery

coordination and pretrial motions. In each litigation matter, I am in court frequently for hearings or other conferences regardless of whether the case ultimately resolves before trial. In addition, many of the cases I have handled are class actions, which bring unique considerations (such as class certification), or involve unique procedures (like multi-district litigation or the administration of class action settlements). I have been the co-author of the Nevada chapter of the ABA's *Survey of State Class Action Law* each year since 1999.

My appellate practice has further qualified me to perform the work of a district court judge because it has allowed me to more extensively evaluate a wide range of judicial decisions on pre- and post-trial matters. I was the primary drafter of the (successful) Respondents' Brief on the Merits in *Forsyth v. Humana, Inc.*, 525 U.S. 299 (1999), an 84,000-member health-care-fraud class action, in which the Supreme Court decided a preemption issue. Since then, I have written and argued numerous appeals in the Nevada Supreme Court and the Ninth Circuit Court of Appeals.

Although my practice has been concentrated in the areas of complex civil litigation and appeals, I worked as an extern in the Ventura County District Attorney's Office in 1995, where I had the opportunity to observe criminal trials and work on numerous pretrial matters, and during my last two years of law school, I worked as a law clerk drafting dozens of criminal appeals under the supervision of court-appointed attorneys working with the California Appellate Project. Admittedly, these experiences occurred many years ago and while I was still a law student, but I am confident that federal criminal law is an area that I could learn quickly with the strong work ethic and diligence I have brought to my civil practice. I believe that all of these experiences have prepared and qualified me to be a federal district court judge.

7. What role do the text and original meaning of a constitutional provision play in interpreting the Constitution?

Response: When interpreting the text of the Constitution, a district court judge should look to binding precedent from the United States Supreme Court and his or her Court of Appeals. If the answer cannot be determined from precedent, a judge should look to the text of the Constitution, employing the plain and ordinary

meaning of its express language. If the plain meaning cannot be determined or is unclear, original intent may be helpful in ascertaining the meaning of Constitutional provisions.

8. What role does our Constitution’s federalist structure—its enumerated powers doctrine and reservation of rights to the states—play in interpreting Constitutional provisions that affect federal powers?

Response: Our Constitution’s federalist structure emphasizes the limitations on the three branches of federal government. As the Supreme Court has articulated, “[t]he limited and enumerated powers granted to the Legislative, Executive, and Judicial Branches of the National Government . . . underscore the vital role reserved to the States by the constitutional design.” *Alden v. Maine*, 527 U.S. 706, 713 (1999). The Tenth Amendment “confirms the promise implicit in the original document,” reiterating, “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” *Id.* (quoting U.S. Const. amend. X). The Supreme Court has observed: “As Justice Story put it, ‘this amendment is a mere affirmation of what, upon any just reasoning, is a necessary rule of interpreting the constitution.’” *New York v. U.S.*, 505 U.S. 144, 155 (1992) (quoting 3 J. Story, *Commentaries on the Constitution of the United States* 752 (1833)). The Supreme Court has emphasized the benefits of this structure when evaluating the constitutionality of federal laws. *See, e.g., Printz v. U.S.*, 521 U.S. 898 (1997); *New York v. U.S.*, 505 U.S. 144, 157 (1992) (collecting authority).

a. Are there government powers that are exclusively the province of the states, and if so, which ones?

Response: Yes. The Tenth Amendment expressly reserves certain powers in the States, and “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.” *New York v. U.S.*, 505 U.S. at 155. Reserved rights are those traditionally left to State control, such as the police power to regulate the health, safety, and welfare of the general public.

9. How would you decide a case in which there is no precedent on point and the litigant has asserted a claim based on a novel theory of constitutional law?

Response: When deciding a case in which there is no precedent on point and the litigant has asserted a claim based on a novel theory of constitutional law, the judge must apply all applicable law to the facts. If faced with such a situation, I would look first to the text of that constitutional provision, applying its plain and

ordinary meaning. In some cases, it might also be appropriate to consider the history and original intent of the constitutional provision to determine its meaning. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570 (2008). I would also look to the body of legal precedent from the United States Supreme Court and the relevant circuit court interpreting and applying the subject constitutional provision in analogous cases or cases considering same or similar theories under other constitutional provisions for guidance. If no such precedent is available, I would consider decisions by other circuit courts or district courts; though decisions by other circuit and district courts would not be binding precedent, I would consider them to the extent they contained persuasive reasoning.

a. Would you look to sources outside the text of the Constitution in deciding such a case?

Response: As a district court judge, I would only consider sources outside the text of the Constitution to the extent that binding precedent from the Supreme Court or the relevant circuit court indicated that such a source ought to be considered. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570 (2008).

10. Justice Scalia has written that, “The meaning of terms on the statute books ought to be determined, not on the basis of which meaning can be shown to have been understood by a larger handful of the Members of Congress; but rather on the basis of which meaning is (1) most in accord with context and ordinary usage, and thus most likely to have been understood by the whole Congress which voted on the words of the statute (not to mention the citizens subject to it), and (2) most compatible with the surrounding body of law into which the provision must be integrated.”¹

a. Do you agree with this approach and why or why not?

I agree that the starting point of statutory interpretation is always the text of the statute itself, and I would follow precedent from the Supreme Court and the relevant circuit court with respect to statutory interpretation.

¹ *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 528 (Scalia, J., concurring).