Senator Cruz Questions for the Record for Mr. John Eastman
Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts
"With Prejudice: Supreme Court Activism and Possible Solutions"
Wednesday, July 22, 2015

1. Does the Constitution have a fixed meaning for which there are correct answers to many, if not most, constitutional questions, or is the meaning of the Constitution indeterminate or capable of change?

   The Constitution has a fixed meaning in most constitutional questions that come before the Courts, particularly if one utilizes the normal tools of statutory construction and also historical research into the original public meaning at the time the Constitution's text was ratified by the people.

2. How would you define judicial activism?

   Many believe that judicial activism occurs whenever the courts invalidate an act of Congress or a state legislature. That is too simplistic. The courts are *supposed* to invalidate acts of the legislature that exceed the legislature's constitutional authority or otherwise violate constitutional provisions. It is judicial activism, however, when the Court invalidates acts of the legislature—elected directly by the people—by specious claims of unconstitutionality, on the basis of made-up constitutional rights that find no support in the Constitution's text or history. There is also a flip side to this—a form of judicial activism (or more precisely, judicial abdication) when the courts fail in their duty to invalidate acts of the legislature that clearly exceed the legislature's constitutional authority.

3. Do you agree with the argument of some members of the Subcommittee that the Supreme Court's decisions in *District of Columbia v. Heller*, 554 U.S. 570 (2008), *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), and *Shelby County v. Holder*, 570 U.S. __ (2013), are activist decisions?

   These kind of arguments are based on the simplistic notion of judicial activism that I described above. It is not activism for the Court to enforce the provisions of the Constitution. Indeed, the very reason the Court is independent of the political branches is so that it can perform this critically-important "checks and balances" function. *Heller* is not activist because it faithfully interprets the Second Amendment and the fundamental right to keep and bear arms that the amendment recognizes. So, too, with *Citizens United*, which faithfully interprets the First Amendment to protect both the freedom of speech and freedom of association against attempts by those in power to breach those freedoms, which are so critically important to the ongoing health of our republican form of government. And *Shelby County* merely ended an anomaly in our civil rights laws (namely, that they applied only in certain parts of the country) that had long outlived the original circumstances that warranted such an anomaly. The Court did not foreclose Congress from re-adopting the law; it merely required that, were it to do so, it had to be based on evidence of ongoing civil rights violations that warranted subjecting some states to different treatment under the law than others.

Senator Cruz Questions for the Record for Mr. John Eastman
Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts
"With Prejudice: Supreme Court Activism and Possible Solutions"
Wednesday, July 22, 2015

4. Is the Court's decision in *Obergefell v. Hodges*, 576 U.S. __ (2015), an activist decision? If so, why?

   Obergefell is one of the most activist decisions the Supreme Court has ever issued, on a par with *Roe v. Wade.* Nowhere does the text of the Constitution—certainly not as understood by those who drafted and ratified it, but also as it has been understood for the 220 years since the original constitution was ratified and the 150 years since the 14th Amendment was ratified—can one even remotely find a rule that mandates re-defining of the institution of marriage to include same-sex relationships, contrary to the understanding of marriage that has existed in every state in the Union since before the nation's founding, and throughout the world for all of recorded history.

5. Can you identify other Supreme Court decisions that qualify as activist decisions as you have defined judicial activism?

   The most egregiously activist decision the Supreme Court ever issued is *Roe v. Wade*, which made up out of whole cloth a right to "privacy" that encompassed the "right" to kill one's unborn children, contrary to the explicit guarantee in the Declaration of Independence that the right to life is an unalienable right. Other decisions include the infamous *Dred Scott v. Sanford* (which refused to recognize perfectly valid acts of Congress dealing with the exclusion of slavery in the territories), and more recently, decisions such as *Boumediene v. Bush*, in which the Court ignored limits on its own jurisdiction constitutional imposed by Congress *and* intruded on the core commander-in-chief powers that the Constitution assigns to the President; *U.S. v. Windsor*, in which the Court invalidated Congress's codification of the universal, long-standing understanding of marriage; and *Furman v. Georgia*, in which the Court held that the death penalty, as applied, was unconstitutional. One of the most notorious recent decisions on the "judicial abdication" side of the judicial activism line is *N.F.I.B. v. Sebelius*, in which the Court, in a fractured decision, effectively rewrote the Affordable Care Act as a tax and then upheld it, despite its patent unconstitutionality. Of course, *Buck v. Bell* (1927), in which the Court *upheld* a forced sterilization of the disabled statute; *Plessy v. Ferguson* (1896), in which the Court upheld state racial segregation laws that were clearly contrary to the Equal Protection Clause of the 14th Amendment; *Muller v. Oregon* (1908), in which the Court upheld a state law restricting the number of hours a woman could work; and *Kelo v. City of New London, Connecticut* (2005), in which the Court effectively wrote the "public use" requirement for eminent domain out of the Fifth Amendment, rival it on the judicial abdication front.

6. On the issue of judicial activism, what distinguishes *Heller*, *Citizens United*, and *Shelby County* from *Obergefell* and the other activist decisions that you have identified?

   Heller and *Citizens United* are rooted in clear text of the Constitution – the 2nd and 1st Amendments, respectively. *Obergefell* imports an entirely new meaning to the

Constitution's text, with the result that the Court substituted its judgment for that of more than 50 million voters on the pretext of unconstitutionality.

7. Do you believe that most Justices on the Supreme Court accept or adhere to the idea that the Constitution has a fixed and discernable meaning in most cases?

   At the time of this hearing, I would say that there were only 3 Justices—Justices Scalia, Thomas, and Alito—who adhered fairly consistently to the idea that the Constitution had a fixed meaning in most cases, and that the original meaning was as binding on the Court as it was on the other branches of government.

8. If the Court no longer accepts or adheres to that idea, then is it time to reconsider whether the Justices should have life tenure?

   I would go further. If the Court no longer adheres to the idea that the Constitution must govern in every case, then we have to call into question why we even have a judiciary that is unaccountable to the people. The entire basis for the legitimacy of an unelected judiciary is that it is designed to uphold the higher law of the Constitution. If it no longer believes itself bound by the Constitution, why in the world would "we the People" let it substitute its judgment for that of the elected branches of government.

9. How serious is the problem of judicial activism on the Supreme Court and does it warrant constitutional reforms to make the Court more accountable to the people?

   It is an extremely significant problem. The founders wanted a judiciary that was independent and somewhat insulated from popular opinion, so that it could stand as a guarantor of the constitutional rights of minority segments of the citizenry against the occasionally wayward majority. But they also recognized that anyone with power would be tempted to abuse that power, so they envisioned checks and balances even with respect to the judiciary. In particularly, they envisioned that the power of impeachment would be an adequate check on abuses of power in the judiciary. Unfortunately, that has not turned out to be the case, so other remedial measures need to be considered.

10. Is there anything else that you would like to add that has not been addressed here or at the hearing?

Questions for the Record
Senator Orrin G. Hatch
Senate Judiciary Committee
Subcommittee on Oversight, Agency Action, Federal Rights, and Federal Courts
Hearing: "With Prejudice: Supreme Court Activism and Possible Solutions"
Wednesday, July 22, 2015

Questions for John Eastman, Professor of Law, Chapman University, and Ed Whelan, President, Ethics and Public Policy Center

1. What can Congress do, short of a constitutional amendment, to rein in an overbearing or out-of-control Supreme Court?

   The founders envisioned three principal checks on the judiciary: 1) Congress's power to limit the jurisdiction of the courts; 2) the Senate's role in confirming judicial nominees; and 3) the power of impeachment. Each of these has proved insufficient to the task, but less as a function of political will than flawed design. Serious efforts to revive each of these powers as the "check and balance" on the judiciary for which they were designed should be considered. For example, the Senate ought never vote to confirm a judicial nominee who has manifested an intent not to be bound by the Constitution's text and original public meaning. And the House should revive the impeachment power as a serious check on judicial abuse—in line with the founders view that abuse of office was the kind of "high crime and misdemeanor" for which the impeachment clause was written.

2. Are there any trends in recent Supreme Court decisions that you find particularly troubling? Do you believe the Court is becoming more assertive of its own power, or are recent overreaches merely a continuation of a long trend?

   Two recent decisions reflect the twin sides of the problem. The first, *Obergefell v. Hodges,* involves the Court making up out of whole cloth a constitutional mandate to redefine marriage to a gender neutral institution, contrary to the way that institution has been understood throughout all of human history. The second, *NFIB v. Sebelius,* involves the Court failing in its duty to policy the limits that the Constitution places on the exercise of power by the elected branches of government. Both undermine the rule of law, and effectively substitute the Court's judgment for the judgment made by "We the People" in adopting and continuing unchanged the Constitution.

3. What are your thoughts on term limits for Justices? Some have proposed eighteen-year terms, with new appointments spaced two years apart. Do you believe this proposal

would help rein in the Court? Do you think it would make the Court more or less politicized?

Although I appreciate efforts designed to rein in the Court, I do not think term limits would help much (if at all) with the kinds of problems I have identified above and in my testimony. A series of justices who fail to recognize that the Constitution, rather than then their own opinions, is the Supreme Law of the Land, is no better than long-sitting justices adhering to that same view.

4. What lessons do you take from the recent Term regarding the characteristics or qualities Presidents should look for when selecting Supreme Court Justices?

   The President should take into account only two things: First, is the nominee fully committed to faithfully applying the Constitution to every matter that comes before the Court, even when (particularly when) the outcome required by the Constitution may be at odds with the Justice's own personal views; and second, is the nominee intellectually capable of performing that task.

5. In your view, what approaches to judging best limit a judge's ability to impose his or her personal policy preferences on the country? Are there certain theories or doctrines of interpretation that you believe are most legitimate and most consistent with our Constitution's separation of powers?

   The theory of interpretation that must guide any judge is the one that the Constitution actually requires, namely, that the Constitution is the Supreme Law of the Land, and the judges are bound by a solemn oath to God to uphold it. Any other theory or doctrine of interpretation is simply a pretext for substituting the judge's own ideological preferences for the actual language of the Constitution.

###