

Written Questions of Senator Jeff Flake

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Nominee, United States District Judge for the District of Columbia

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

Response: A good judge has professional integrity, which includes reverence for the rule of law, total impartiality, and the ability to apply the law to the fairly determined facts of the case without bias or any preconceived notion of how the case will be resolved. A good judge also has the ability to treat everyone who appears before her with dignity and respect. She should have a calm, even-tempered, and thoughtful demeanor, and should rule efficiently and decisively. Additionally, a good judge must be an effective communicator, both orally and in writing.

a. How does your record reflect these qualities?

Response: As a result of prior legal training and professional experience, I am able to evaluate complex legal arguments and have developed excellent oral and written communication skills. In my current position, I am also required to look objectively at data and the law and to make fair and unbiased policy determinations. (Although a district court judge is not a policymaker, the skills I employ when evaluating sentencing-related facts and applying federal law are similar to the detached, objective evaluations that a good judge makes.) In addition, as a former advocate in both public and private practice, I have had the privilege of working with people from all walks of life. I understand the importance of patience in relating to other people, and I make it a priority to treat others with respect, no matter who they are.

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: I believe that district court judges should interpret the Constitution in a manner that is wholly consistent with Supreme Court precedent. The Supreme Court has relied upon the original meaning of the words and phrases in the Constitution when conducting its constitutional analysis in various cases. *See, e.g., U.S. v. Jones*, 132 S. Ct. 945, 949, 953 (2012); *District of Columbia v. Heller*, 554 U.S. 570, 576 - 600 (2008). If confirmed as a district court judge, I would follow the reasoning of binding Supreme Court precedents when applicable to the cases before me, and I would apply them without regard to any personal view of how the Constitution should be interpreted.

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

Response: "Original meaning" originalism is a form of textualism that bases constitutional interpretation on the ordinary meaning of the terms used in the Constitution as understood by average people at the time of the Founding.

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: Our entire constitutional framework is fairly characterized as having been designed to limit the power of the federal government. For example, the powers afforded to Congress are specifically enumerated (see Art I, sec. 8), and Congress is prohibited from exercising any power that is not so designated. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819) (“The principle, that [Congress] can exercise only the powers granted to it . . . is now universally admitted.”). Various constitutional provisions also specifically proscribe government action in a number of respects (see, e.g., Art I, sec. 9), including the first ten amendments, which essentially constitute a series of prohibitions against the exercise of government power in a manner that intrudes upon the liberty of individual citizens. Moreover, the Constitution places limits on the government insofar as it divides power between the states and the federal government, and also among the three branches of the federal government, to ensure that the functions of each branch are distinct and constrained and that no one branch can consolidate all power in itself. There are also numerous provisions in the Constitution that detail the authorized democratic process—e.g., provisions that require government officials to be “chosen” by the people, secure for United States citizens the right to vote, and establish specifically the manner of election and limit office holders’ duration of service. These, too, serve as significant constitutional constraints on the scope, size, and composition of government.

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

Response: The Judiciary contributes to the constitutional system of checks and balances because judges have the power to decide when, and under what circumstances, the Constitution’s limits have been reached.

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: *Lopez* and *Morrison* marked the first time in nearly 60 years that the Supreme Court invalidated a federal statute as exceeding the power of Congress under the Commerce Clause. The Court’s opinions in those cases distinguished, but did not purport to overrule, prior precedents.

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 has concluded that the Commerce Clause authorizes the federal government to regulate only three categories of activity: (1) “the use of the channels of interstate commerce,” (2) “the instrumentalities of interstate commerce, or persons or things in interstate commerce” and activities that threaten such instrumentalities, persons or things, and (3) activities that “substantially affect interstate commerce.” *United States v. Lopez*, 514 U.S. 549, 558-59 (1995). This is binding precedent, and if confirmed as a district court judge, I would strictly adhere to it as applicable to any case before me without regard to any personal opinion about the scope of Congress’ power under the Commerce Clause.

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 text of the Tenth Amendment says that the states retain all powers “not delegated to the United States by the Constitution, nor prohibited by it to the States.” Without specifically defining the full scope of the authority that is reserved for the states by virtue of the Tenth Amendment, the Supreme Court has indicated that the states’ residual powers are “significant” and “inviolable,” *New York v. United States*, 505 U.S. 144, 156, 188 (1992), and also that “[t]he principles of limited national powers and state sovereignty are intertwined,” *Bond v. United States*, 131 S. Ct. 2355, 2366 (2011). Moreover, the Court has characterized the powers that the Tenth Amendment reserves for the states as a “mirror image” of the powers that the Constitution grants to the federal government. *New York*, 505 U.S. at 156 (“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.”). District court judges are bound by the Supreme Court’s precedents regarding the scope of state power under the Tenth Amendment, and if confirmed as a district court judge, I would faithfully apply the Supreme Court’s precedents in this area, as I would any other Supreme Court case.