Written Questions of Senator Ted Cruz
Ketanji Jackson
Nominee, United States District Judge for the District of Columbia
U.S. Senate Committee on the Judiciary
January 25, 2013

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: If confirmed as a district court judge, my judicial philosophy would be to approach each case with professional integrity, meaning strict adherence to the rule of law and application of the law to the facts in a straightforward and transparent manner, without any bias or preconceived notion of how the matter is going to be resolved. The role of a Supreme Court Justice is different than that of a district court judge in that it often extends to the development of broader legal principles to guide the lower courts, and Justices sometimes develop substantive judicial philosophies to guide them in this task. Given the very different functions of a trial court judge and a Supreme Court Justice, I am not able to draw an analogy between any particular Justice's judicial philosophy and the approach that I would employ as a district court judge.

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: I believe that district court judges should interpret the Constitution in a manner that is wholly consistent with Supreme Court precedent. I am aware that the Supreme Court has employed originalism when interpreting various constitutional provisions. *See, e.g.*, *U.S. v. Jones*, 132 S. Ct. 945, 949 (2012) (Fourth Amendment); *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 906 (2010) (First Amendment); *District of Columbia v. Heller*, 554 U.S. 570, 576-600 (2008) (Second Amendment); *Crawford v. Washington*, 541 U.S. 36, 42-57 (2004) (Confrontation Clause); *Alden v. Maine*, 527 U.S. 706, 715-724 (1999) (Eleventh Amendment). Moreover, while the Court has primarily evaluated the original public meaning of the text of the constitutional provision at issue, *see Jones*, 132 S. Ct. at 949, 953; *Heller*, 554 U.S. at 576-77, Supreme Court cases also sometimes refer to the original intent of the Framers, *see Crawford*, 541 U.S. at 53-54, 59, 61. If confirmed as a district court judge, I would follow the analysis of binding Supreme Court precedents when applicable to the cases before me, and I would apply those precedents without regard to any personal view of how the Constitution should be interpreted.

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: District court judges must strictly apply precedents and cannot overrule them under any circumstances.

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: In *Garcia*, the Supreme Court assessed whether Congress's application of federal wage and hour protections to municipal employees pursuant to the Fair Labor Standards Act contravened any constitutional limit on federal power. I do not believe that it is appropriate for me to express any personal view of the *Garcia* case or the policy matter that the quoted statement addresses. If confirmed as a district court judge, I would strictly adhere to the binding precedents of the Supreme Court in this area, including cases in which the Court has interpreted the Tenth Amendment as a limit on Congress's power for the protection of state sovereign interests. *See, e.g., Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992).

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 not categorically excluded non-economic activity from Congress's reach under the Commerce Clause, in conjunction with its Necessary and Proper Clause power. *See United States v. Morrison*, 529 U.S. 598, 613 (2000); *see also Gonzales v. Raich*, 545 U.S. 1, 37 (2005) (Scalia, J., concurring) ("Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce."). Nevertheless, the Court has thus far generally "upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." *Morrison*, 529 U.S. at 613; *see also United States v. Lopez*, 514 U.S. 549, 561 (1995). In this regard, the Court has held that the Commerce Clause authorizes the regulation of 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. at 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.

Presidential Power

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

Response: The Supreme Court has addressed the scope of the President's power to issue executive orders or undertake executive actions, with and without congressional authorization. *See Youngstown Sheet & Tube Co. v, Sawyer*, 343 U.S. 579 (1952); *see also Medellin v. Texas*, 552 U.S. 491 (2008); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Dames & Moore v. Regan*, 453

U.S. 654 (1981). Broadly speaking, "[t]he President's authority to act, as with any exercise of governmental power, 'must stem either from an act of Congress or from the Constitution itself.'" *Medellin*, 552 U.S. at 524 (citation omitted). The judicially enforceable limits on the President's ability to act thus include circumstances in which the President acts without express constitutional or statutory authority, or when the executive action impermissibly interferes with the functions that the Constitution assigns to another branch of government, or when the executive action otherwise violates a constitutional or statutory provision.

Individual Rights

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

Response: The Supreme Court has generally defined fundamental rights protected by substantive due process as those liberties that are "deeply rooted in this Nation's history and traditions," *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977), and among the "fundamental" rights that the Supreme Court has recognized are the rights of family autonomy, custody, travel, access to courts, and voting. District courts should interpret the Constitution in a manner that is wholly consistent with Supreme Court precedents, and if confirmed, I would follow Supreme Court precedent with respect to the evaluation of rights for the purpose of any substantive due process case, as I would with any other Supreme Court case.

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

Response: The Supreme Court has established that certain classifications—primarily distinctions that the government makes based on suspect classifications such as race, national origin, and gender, or classifications that significantly burden a fundamental right—are subject to a heightened level of scrutiny under the Equal Protection Clause. *See City of Clyburne, Tex v. Cleburne Living Ctr.*, 473 U.S. 432, 440-42 (1985); *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978). District courts should interpret the Constitution in a manner that is entirely consistent with Supreme Court precedents, and if confirmed, I would follow Supreme Court precedent with respect to the evaluation of classifications and tiers of scrutiny for the purpose of the Equal Protection Clause, as I would with any other Supreme Court case.

Do you "expect that [15] 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: In *Grutter*, the Supreme Court emphasized that "race-conscious admissions policies must be limited in time," 539 U.S. at 342, and it posited that the law school involved in that case likely would be able to achieve its interest in a diverse student body, without employing such policies, in the relatively near future. I have no particular insight into the future need for, or ramifications of, the continued use of race in admissions. I am aware that the Supreme Court is currently revisiting the issue of the constitutionality of race-conscious admissions policies in public higher education, and if confirmed as a district court judge, I would apply any binding precedent in this area of the law.

Written Questions of Senator Jeff Flake
Ketanji Jackson
Nominee, United States District Judge for the District of Columbia
U.S. Senate Committee on the Judiciary
January 25, 2013

---

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.