

Written Questions of Senator Ted Cruz
Mark Barnett
Nominee, United States Judge for the Court of International Trade
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: I would characterize my judicial philosophy as being committed to the rule of law, such that every party appearing before me would be treated respectfully, receiving a fair and impartial hearing, leading to the prompt resolution of the dispute. If I am fortunate enough to be confirmed, in reviewing agency determinations, I would apply the appropriate standard of review and not seek to remake the agency determination or substitute my views for an agency determination that meets that standard of review. I believe that many of the Justices throughout the Warren, Burger, and Rehnquist Courts had judicial philosophies analogous with mine.

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: The original meaning of the words and phrases in the Constitution are relevant to any interpretation of the Constitution along with the interpretation given to those words and phrases in precedential decisions of the Supreme Court and, for the Court of International Trade, the Court of Appeals for the Federal Circuit. If confirmed, I would apply such original meanings consistent with relevant binding precedent to the case before me without regard to the form in which it might be categorized.

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: If I am confirmed to be a Judge on the United States Court of International Trade, I would follow applicable precedent (regardless of timing) from the Supreme Court and the Court of Appeals for the Federal Circuit. It would not be my role to overrule such precedent.

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: The quotation appears at the end of a discussion of the intent of the Framers of the Constitution regarding the manner in which the Constitution preserves certain aspects of State sovereignty. To that end, the Court noted that, with rare exceptions, the Constitution does not contain an enumeration of rights retained by the States and that “[a]part from the limitation on federal authority inherent in the delegated nature of Congress’ Article I powers, the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself.” 469 U.S. at 550. If I am confirmed, I would follow all precedential decisions from the Supreme Court and the Court of Appeals for the Federal Circuit regardless of my personal views of such decisions.

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 found that the Commerce Clause in conjunction with the Necessary and Proper Clause does not support federal regulation of certain non-economic activities. For example, in *United States v. Lopez*, 514 U.S. 549 (1995), the Court held that a law making it a federal offense to knowingly possess a firearm in a school zone exceeded Congress’s Commerce Clause authority (without discussing the Necessary and Proper Clause) and in *United States v. Morrison*, 529 U.S. 598 (2000), the Court held that a law providing a federal civil remedy for victims of gender-motivated violence is unconstitutional, in part, because the law did not concern economic activity (without discussion of the Necessary and Proper Clause). In determining whether a particular regulation of non-economic activities came within the realm of Congress’s Commerce Clause, either directly or in conjunction with the Necessary and Proper Clause, I would follow any applicable precedent of the Supreme Court and the Court of Appeals for the Federal Circuit.

Presidential Power

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

Response: The Constitution and properly enacted laws may place judicially enforceable limits on the President’s ability to issue executive orders or to take executive actions. For example, in the area of unfair trade law, in the Uruguay Round Agreements Act, Congress provided statutory authority for the President, acting through the U.S. Trade Representative and the Secretary of Commerce, to take executive action to come into conformity with the rulings and recommendations of the World Trade Organization Dispute Settlement Body. 19 U.S.C. § 3538. Although the President may have discretion as to the manner in which he will take such executive action (e.g., reweigh the facts, obtain additional facts, exercise discretion in a different manner), any such action must otherwise be consistent with U.S. law and the action is reviewable by U.S. courts. In determining the parameters of any judicially enforceable limits contained in the Constitution and/or federal law, I would act consistently with any binding precedent of the Supreme Court and the Court of Appeals for the Federal Circuit.

Individual Rights

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

Response: In *Wash. v. Glucksberg*, 521 U.S. 702, 720 (1997), the Supreme Court summarized many of the fundamental rights protected by the substantive due process clause, saying:

In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the "liberty" specially protected by the Due Process Clause includes the rights to marry, *Loving v. Virginia*, 388 U.S. 1 (1967); to have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); to direct the education and upbringing of one's children, *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); to marital privacy, *Griswold v. Connecticut*, 381 U.S. 479 (1965); to use contraception, *ibid*; *Eisenstadt v. Baird*, 405 U.S. 438 (1972); to bodily integrity, *Rochin v. California*, 342 U.S. 165 (1952), and to abortion, *Casey, supra*. We have also assumed, and strongly suggested, that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment. *Cruzan*, 497 U.S. at 278-279.

Of direct relevance to me as a nominee for the Court of International Trade (CIT) is the binding precedent of the Court of Appeals for the Federal Circuit's holding in *Nec Corp. v. United States*, 151 F.3d 1361 (1998), affirming a CIT holding that engaging in foreign commerce is not a fundamental right protected by the notions of substantive due process.

If I am confirmed, I would follow the applicable precedent of the Supreme Court and the Court of Appeals for the Federal Circuit in determining the scope of fundamental rights protected by the substantive due process doctrine.

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

Response: The Supreme Court has applied heightened levels of scrutiny under the Equal Protection Clause when laws categorize on the basis of suspect classifications such as race, religion, national origin, and sex, and when laws infringe on a fundamental right. The Supreme Court has applied rational-basis tests when the law categorizes on some other basis. Regardless of the test or the label applied to the test, if confirmed, I would follow the applicable precedent of the Supreme Court and Court of Appeals for the Federal Circuit with regard to the interpretation of the Equal Protection Clause.

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: I have no personal expectations with regard to the issue of racial preferences in public higher education 15 years from now.

Written Questions of Senator Jeff Flake
Mark Barnett
Nominee, United States Judge for the Court of International Trade
U.S. Senate Committee on the Judiciary
January 25, 2013

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

Response: In my view, all good judges possess a commitment to the rule of law and the application of that law in a fair and impartial manner. A judge should not place his or her personal beliefs or views above the law. I believe that I possess the commitment to the rule of law that would allow me to be a fair and impartial judge.

a. How does your record reflect these qualities?

Response: I have served in the Office of the Chief Counsel for Import Administration at the U.S. Department of Commerce for almost 18 years. My tenure has spanned three different administrations and throughout this time, I provided fair and impartial legal advice on the unfair trade laws to political decision-makers of both parties, without regard to my personal beliefs.

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 original meaning of the words and phrases in the Constitution are relevant to any interpretation of the Constitution along with the interpretation given to those words and phrases in precedential decisions of the Supreme Court and, for the Court of International Trade, the Court of Appeals for the Federal Circuit. If confirmed, I would apply such original meanings consistent with relevant binding precedent.

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

Response: I do not have my own definition of “original meaning originalism” because it is not a phrase I have used.

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 Constitution places limits on the government through the provisions of the Bill of Rights and through other constitutional provisions that create limits or conditions on the exercise of government power. The Constitution also places limits on the government through the creation of three separate branches of government, interacting with each other by means of a system of checks and balances.

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

Response: The Judicial Branch contributes to this system of checks and balances through the proper interpretation of the limits on government power contained in the Constitution and the Bill of Rights and through the proper interpretation of statutes enacted by the Legislative Branch and administered by the Executive Branch. The Judicial Branch also contributes to this system by recognizing its own constitutional limits and not intruding upon the legitimate exercise of legislative or executive powers.

- 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: In the *Lopez* and *Morrison* decisions, the Supreme Court did not overrule any of the Court's earlier Commerce Clause decisions. Thus, rather than consider whether those opinions are inconsistent with earlier Supreme Court decisions, I would approach the question guided by the language of the Court in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989):

If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.

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

Response: In *Lopez*, the Supreme Court identified three broad categories of activity that Congress may regulate pursuant to its Commerce Clause powers:

First, Congress may regulate the use of the channels of interstate commerce. [...] Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. [...] Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, [...] i.e., those activities that substantially affect interstate commerce.

514 U.S. at 558-559 (citations omitted). If confirmed, I would apply the binding precedent of the Supreme Court and the Court of Appeals for the Federal Circuit in determining the limits on federal action pursuant to the Commerce Clause.

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

Response: The fact that a transaction involves the exchange of money has not, by itself, provided a basis for subjecting the transaction to Congress's Commerce Clause power. When the exchange of money occurs in intrastate commerce, the Supreme Court has examined additional factors, such as whether the activity, by itself or in the aggregate, substantially affects interstate commerce (*Lopez*, 514 U.S. 549, 559; *Wickard v. Filburn*, 317 U.S. 111, 127-129 (1942)), to determine whether it is subject to Congress's Commerce Clause power.

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

Response: With rare exceptions, the Constitution does not contain an explicit enumeration of rights retained by the states. Similarly, the 10th Amendment does not enumerate the rights retained by the states. Instead, it makes clear that the federal government is one of limited, enumerated powers and that all other powers are reserved to the states, or the people. If confirmed, I would follow applicable precedent with regard to the scope of the 10th Amendment.