

Written Questions of Senator Jeff Flake
Raymond P. Moore
Nominee, to be United States District Judge for the District of Colorado
U.S. Senate Committee on the Judiciary
January 30, 2013

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

Response: I believe that all good judges are fundamentally fair and even handed in their treatment of litigants, open minded with respect to the arguments and positions of the litigants, well prepared, and observant of the rule of law.

a. How does your record reflect these qualities?

Response: Over my career, I have represented and advocated strongly for the rights of a wide range of clients, including large corporations, the United States, and indigent individuals. And with respect to individuals, my clients have ranged from the most highly educated to the illiterate. I submit that the ability to interact with, understand and advocate for such diverse clients and interests is suggestive of the ability to be fair, open minded and even handed. I submit that my selection as an Alternate Employment Dispute Resolution Coordinator for the Tenth Circuit Court of Appeals is also suggestive of the ability to be fair and balanced in my treatment of individuals. I have always been well prepared in my dealings with the court and others, and commit to continuing to be so. And having been an advocate from several perspectives, I am mindful of the role that the rule of law plays in proper decisions of a judge.

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: As with all matters, if established precedent exists as to the proper meaning or scope of a Constitutional provision, such precedent would be binding. Absent that, the Constitution should be interpreted according to the plain meaning of its terms. If the plain meaning is uncertain or cannot be discerned, determination of the original meaning may be a proper part of an analysis to attempt to determine the intent of the framers under established rules of statutory construction.

a. If so, how would you determine the original meaning?

Response: Depending upon the term, phrase or clause at issue, resort may be made to an examination of other parts of the Constitution where similar language may have been used. I would also look to all established rules of construction for determining the correct meaning. This could include review of the debates and convention discussions, as well as writings of the framers pertinent to the issue, if any.

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 Bill of Rights, including the 10th Amendment, limits the powers of government. Additionally, the specific enumeration of the powers of the various branches of government acts as a limit on government power.

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

Response: The role of the Judicial Branch in such matters is the same as it is in all matters – to interpret and apply the law and Constitution fairly and impartially, without preconception or political motivation, and to thereby assure that constitutional limits are faithfully applied.

- 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: Over my years of practice, my approach to Commerce Clause issues has been narrow and case specific. I have not performed an academic analysis of all Commerce Clause cases and precedent. Nor have I familiarized myself with the nuances of the position of those who claim inconsistency. Both *Lopez* and *Morrison* are binding precedent and would be treated as such by me.

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

Response: I am not sufficiently familiar with the Supreme Court’s cases in this area to be able to state the limits of Commerce Clause authority applicable to all circumstances. In matters involving the limits of Commerce Clause authority, I would consider the specific issue before me, apply such binding precedent as may exist, consider the position and input of the litigants and rule narrowly on the specific issue before the court. I do recognize, however, that the Commerce Clause has limits and is not a grant of unconstrained power to the Congress.

- 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: By its terms, the 10th Amendment guarantees to the states all powers not delegated to the United States or prohibited by the states under the U.S. Constitution. My understanding is that the Supreme Court has utilized the 10th Amendment to invalidate attempts by the federal government to compel states to enforce federal regulations and programs. Beyond that, I hold to no preconceived list of powers which I would declare to be within or beyond the scope of the 10th Amendment. I would approach this issue in the same manner as any other – applying existing precedent, listening to and fairly considering the position of the parties, and ruling narrowly and without preconception on such matters as may come before me if I am fortunate enough to be confirmed.