

Written Questions of Senator Jeff Flake
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Nominee, United States District Judge for the Central District of California
U.S. Senate Committee on the Judiciary
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1. What qualities do you believe all good judges possess?

Response: I believe all good judges are prepared, fair and impartial, respectful, even-tempered, decisive, courteous, patient persons who faithfully apply binding precedent.

a. How does your record reflect these qualities?

Response: During the course of my seven years as a judge, I have consistently been entrusted with trying the most serious cases in our district. Many times the litigants have entrusted me with deciding the guilt or innocence of the accused, believing me to be a fair and impartial judge. My colleagues throughout the State of California have chosen me as a leader. As a result, I have been selected to participate in statewide committees addressing criminal law issues. I have also been chosen by Los Angeles Superior Court's Presiding Judge to manage three courthouses and 24 judges. The Chief Judge of the California Supreme Court has appointed me to serve as a Justice *Pro Tempore*, showing that he had confidence in my intellect and abilities as a judge. In addition, the current Chief Judge of the California Supreme Court has appointed me as a special master in a death penalty case, the most serious type of criminal case. I believe these actions establish that the litigants, my colleagues and judges of higher courts recognize my commitment to the rule of law, my preparedness and my temperament.

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 in interpreting the meaning of words and phrases in the Constitution, a district court should look to the plain meaning of the words or phrases and to binding precedent. The original intent and original meaning, which may at times overlap, can be helpful in determining the meaning of words and phrases in the Constitution.

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

Response: I define original meaning originalism as Constitutional analysis looking to the original public meaning of the Constitution at the time of the drafting of the Constitution.

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 federal government is one of limited and enumerated powers. One important way that our Constitution places limits on the government is through its reservation of powers to the states in the Tenth Amendment. For example, Article 1, Section 8, and Supreme Court precedent empowers Congress to regulate instrumentalities of interstate commerce, channels of interstate commerce, and activities that substantially impact interstate commerce. However, as in *Lopez* and *Morrison*, if the activity that Congress is regulating does not fall within one of these categories, then it is beyond Congress’ power to regulate such activity.

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

Response: The United States Supreme Court is tasked with evaluating the constitutionality of statutes. The Supreme Court has, through its decisions, held that Congress has, on occasion, exceeded its limited authority. See, e.g., *United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000). The Supreme Court has also determined whether the President’s actions exceed his authority under the Constitution. See, e.g., *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 585-89 (1952).

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: The Supreme Court did not overrule its past Commerce Clause decisions in striking down the laws in *Lopez* and *Morrison*. Rather it distinguished prior Commerce Clause decisions. I would follow all applicable Supreme Court decisions, including *Lopez* and *Morrison*, if presented with such an issue, regardless of my personal beliefs.

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

Response: As articulated in *Lopez*, Congress is limited in its regulation of activities under its Commerce Clause power to those activities regarding the use of the channels of interstate commerce, the instrumentalities of interstate commerce and those activities which substantially affect interstate commerce. *Lopez*, 514 U.S. at 558-59. All other activities lie outside the scope of Congress’ Commerce Clause authority under current Supreme Court authority.

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

Response: The Supreme Court has not held that any exchange of money, by itself, is subject to Congress' Commerce Clause power. Such activity would be analyzed under the test listed above.

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

Response: The federal government is one of limited and enumerated powers. The Tenth Amendment places residual authority in the hands of the states. As a result, all powers not delegated to the federal government by the Constitution, nor prohibited by the Constitution to the states are thereby guaranteed to the states. For example, the Supreme Court has held that the federal government may not require state law enforcement officers conduct background checks on prospective handgun purchasers or require states to enact legislation to dispose of radioactive waste within their borders. *See, e.g., Printz v. United States*, 521 U.S. 898, 933-34 (1997); *New York v. United States*, 505 U.S. 144, 176, 188 (1992).