

Written Questions of Senator Jeff Flake

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Nominee, to be United States District Judge for the Southern District of New York

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

Response: All good judges should possess the ability to apply the law fairly and impartially to all cases. At the same time, they should be mindful of their duty to exercise judicial restraint, thus deciding only the issues in controversy while following applicable precedent. Furthermore, they should exude dignity, professionalism, civility and respect for the rule of law, and ensure that parties conduct themselves appropriately.

a. How does your record reflect these qualities?

Response: My written decisions at the state trial and appellate levels reflect my commitment to fair and impartial application of the laws, as well as to judicial restraint. My reputation in the New York City legal community reflects the standard of professionalism that all good judges should meet.

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: District court judges are constrained to follow prevailing legal precedent on all matters in which the Supreme Court or their particular court of appeals has spoken. In a number of cases, the Supreme Court has looked at the original intent behind various constitutional provisions. If confirmed, I would apply all such precedent.

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

Response: I would follow Supreme Court precedent that has addressed the issue of original meaning. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570 (2008).

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 enumerates certain powers that the federal government may exercise, yet it also places limits on government by reserving unenumerated powers to the states or the people and prohibiting the federal and state governments from exercising certain other powers. Additionally, the Constitution divides the executive, legislative, and judicial powers among the three branches of government while also requiring certain

governmental actions to be approved by another branch. For instance, laws cannot be established by Congress until presented to the President, who may sign or veto the bill.

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

Response: The Judicial Branch is charged with the task of interpreting the law. Thus, if an executive action does not comport with a duly enacted statute, if a statute violates a constitutional provision, or if Congress has exceeded its authority in enacting a statute, the Judicial Branch contributes to the system of checks and balances by invalidating such an action or statute.

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 explained that, unlike the federal laws previously considered in other Commerce Clause cases, the laws at issue in *Morrison* and *Lopez* lacked a sufficient connection to commercial or economic activity that substantially affected interstate commerce. They were therefore invalidated.

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

Response: According to *Lopez*, the federal government's authority under the Commerce Clause is limited to three categories: first, it "may regulate the use of the channels of interstate commerce"; second, it "may regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce" even if threatened only by "intrastate activities"; and third, it may "regulate those activities having a substantial relation to interstate commerce, i.e., . . . that substantially affect interstate commerce." 514 U.S. at 558–59.

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

Response: No. Under the Supreme Court's interpretation, Congress's Commerce Clause power does not extend to every transaction involving the exchange of money.

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

Response: According to Chief Justice John Marshall, it was “neither necessary nor proper” for the drafters of the Tenth Amendment “to define the powers retained by the States,” which proceed “not from the people of America, but from the people of the several States,” *Sturgis v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 193 (1819), because states retained all the powers they initially had which were not granted to the federal government. Accordingly, the Supreme Court has recognized that the Tenth Amendment guarantees to the state its police power to regulate such matters as health, safety, welfare, and morals within the state, including regulation of contractual relationships, tort law, property rights, land use, corporate law, education, professional and business licensing, and public safety.