

**Written Questions of Senator Ted Cruz**

Shelly Dick

*Nominee, United States District Judge for the Middle District of Louisiana*

U.S. Senate Committee on the Judiciary

January 25, 2013

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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: Although I have read opinions handed down by the Warren, Burger and Rehnquist Courts, I have not studied the individual justices to a degree that would enable me to accurately characterize a particular justice's philosophy as analogous to my own. I believe there are several facets and characteristics that are fundamental to a sound judicial philosophy, including thoughtfulness, careful deliberation, thorough research and commitment to the rule of law and the principle of stare decisis.

**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 am not a student of the various doctrinal forms of originalism and thus I am not equipped to comment upon the intricacies of those distinctions. However, I believe that the first step in the construction of any constitutional provision is the plain language of the provision itself. If the plain language is subject to different interpretations or ambiguous then it is appropriate to consider the original intent of the drafters. As stated by the United States Supreme Court in 1838 "the proper mode of considering [an] article of the constitution, in relation to the judicial power, is to take the constitution as a whole, and keep constantly in mind the grand design and intention of its framers". *State of Rhode Island v. Massachusetts*, 37 U.S. 657, 673 (1838). I am also aware that in *Dist. of Columbia v. Heller*, 554 U.S. 570, 634-35 (2008), Justice Scalia opined that "Constitutional rights are enshrined with the scope they were understood to have when the people adopted them". If confirmed as a District Court judge I will look to and apply the constitutional construction guidelines enunciated by the United States Supreme Court and the United States Court of Appeals for the Fifth Circuit.

**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 confirmed as a District Court judge, under no circumstance would I overrule precedent of the United States Supreme Court or the United States Court of Appeals for the Fifth Circuit.

## 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: As recognized by the United States Supreme Court in *Garcia* and other cases, the States retain all authority not divested by the United States Constitution. If confirmed as a District Court judge I would be obliged to apply United States Supreme Court precedent that addresses the limits on federal powers and state sovereignty, including *Garcia* as well as *New York v. U.S.* 505 U.S. 144 (1992), *Printz v. U.S.* 521 U.S. 898 (1997), *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) and *Alden v. Maine*, 527 U.S. 706 (1999).

**Do you believe that Congress' Commerce Clause power, in conjunction with its Necessary and Proper Clause power, extends to non-economic activity?**

Response: According to recent United States Supreme Court precedent, Congress may regulate purely local non-economic activity if the failure to regulate the activity at issue would "undercut" the regulation of an interstate market. *Gonzales v. Raich*, 545 U.S. 1, 18 (2005). If confirmed as a District Court judge I would be bound by the relevant precedent of the United States Supreme Court including *U.S. v. Lopez*, 514 U.S. 549 (1995), *U.S. v. Morrison*, 529 U.S. 598 (2000), and *Gonzales v. Raich*, 545 U.S. 1 (2005).

## Presidential Power

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

Response: In *Youngstown Sheet and Tube Co. v. Sawyer*, 342 U.S. 579, 585 (1952), the United States Supreme Court held that the President's authority to issue executive orders derives from either an act of congress or the Constitution. Thus, an executive order or action that is not founded upon congressional authority or the Constitution may be declared unenforceable by the judicial branch.

## Individual Rights

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

Response: For purposes of substantive due process protection, fundamental rights include those rights enumerated in the Bill of Rights and those liberties that the United States Supreme Court has found to be "deeply rooted in this Nation's history and traditions". *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).

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

Response: The Equal Protection Clause of the United States Constitution prohibits States from denying equal protection to any person. The United States Supreme Court has interpreted this as requiring that "similarly situated" persons be treated equally. *Plyler v. Doe*, 457 U.S. 202, 216 (1982). Race, alienage, national origin and gender are examples of State classifications that require heightened scrutiny. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985).

**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 am aware that in 2003, Justice O'Connor, writing for the United States Supreme Court, observed that in time the use of racial preferences in admission practices in higher education may no longer be necessary. I am aware that the United States Supreme Court is currently considering the constitutionality of affirmative action in university admissions, *Fisher v. University of Texas*, 132 S.Ct. 1536 (Feb. 21, 2012). Thus, as a prospective district court judge I believe it would be inappropriate for me to offer any opinion on the Court's statements in *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

**Written Questions of Senator Jeff Flake**

Shelly Dick

*Nominee, United States District Judge for the Middle District of Louisiana*

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

Response: I believe there are several facets and characteristics that are fundamental to a sound judicial philosophy, including thoughtfulness, careful deliberation, thorough research and commitment to the rule of law and the principle of stare decisis.

**a. How does your record reflect these qualities?**

Response: In my private practice I endeavored always to carefully understand the nature and scope of the legal issues presented and to thoroughly research applicable legal doctrines and the rule of law in formulating the advice given or the position advocated. In my role as an administrative hearing officer for the Louisiana Workforce Commission I was thorough in my research, thoughtful and careful in my deliberations, and I faithfully applied controlling precedent and the rule of law in the cases that came before me.

**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 first step in the construction of any constitutional provision is the plain language of the provision itself. If the plain language is subject to different interpretations or is ambiguous then it is appropriate to consider the original intent of the drafters. As stated by the United States Supreme Court in 1838 “the proper mode of considering [an] article of the constitution, in relation to the judicial power, is to take the constitution as a whole, and keep constantly in mind the grand design and intention of its framers”. *State of Rhode Island v. Massachusetts*, 37 U.S. 657, 673 (1838). If confirmed as a District Court judge I will look to and apply the constitutional construction guidelines enunciated by the United States Supreme Court and the United States Court of Appeals for the Fifth Circuit.

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

Response: I am not a student of the different doctrinal forms of originalism. However after reading United States Supreme Court case law in preparation for providing a response to this question, it is my understanding that original meaning originalism refers to the view that “[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from

technical meaning.” *United States v. Sprague* 282 U.S. 716, 731 (1931). According to Justice Scalia, “[n]ormal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation.” *Dist. of Columbia v. Heller*, 554 U.S. 570, 576-77 (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 United States Constitution grants limited and enumerated powers to the federal government. Article I, Section 8 of the United States Constitution grants certain enumerated powers to Congress. The Bill of Rights limits the powers of Congress. Likewise Articles II and III set forth the scope of the presidential and judicial powers respectively. The powers not conferred upon the federal government are expressly reserved to the States by the Tenth Amendment.

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

Response: The fundamental role of the judicial branch is to protect and uphold the United States Constitution. Although congressional acts are presumed constitutional, *U.S. v. Morrison*, 529 U.S. 598, 607 (2000), it is the role of the judicial branch to determine whether an act of Congress is violative of the United States Constitution. *Marbury v. Madison*, 1 Cranch 137 (1803).

- 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 United States Supreme Court distinguished prior Commerce Clause case law in *Lopez* and *Morrison* but the court did not expressly overrule its prior precedent.

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

Response: If confirmed as a District Court judge it will be my obligation to follow the precedent of the United States Supreme Court and the United States Court of Appeals for the Fifth Circuit. According to recent United States Supreme Court precedent Congress may regulate interstate commerce in three areas: “First, Congress can regulate the channels of interstate commerce. Second, Congress has authority to regulate and protect the instrumentalities of interstate commerce, and persons or things in interstate commerce. Third, Congress has the power to regulate activities that substantially affect interstate commerce.” *Gonzales v. Raich*, 545 U.S. 1, 16-17 (2005) (citations omitted).

**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 10<sup>th</sup> Amendment guarantees to the state? Please be specific.**

Response: The Tenth Amendment reserves to the States all powers that the States did not delegate to the federal government by way of the Constitution. In *New York v. United States*, 505 U.S. 144, 156 (1992), Justice O’Connor explained: “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.” The United States Supreme Court has held that the Tenth Amendment prohibits Congress from requiring States to “make or enforce” specific laws. *New York v. United States*, 505 U.S. 144, 156 (1992) and *Printz v. United States*, 521 U.S. 898 (1997). The United States Supreme Court has also determined that the Tenth Amendment confirms that Congress may not abrogate a State’s sovereign immunity. *Alden v. Maine*, 527 U.S. 706 (1999).