

Response of Analisa Torres
Nominee to be United States District Judge for the Southern District of New York
to the Written Questions of Senator Jeff Flake

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

Response: All good judges are good listeners. They are also even-handed, have the courage to do what they believe is right, speak and write clearly, are patient and respectful, and adhere to the rules of evidence and the substantive law.

a. How does your record reflect these qualities?

Response: I believe that my work for thirteen years as a New York State judge, presiding over hundreds of trials and other proceedings, has demonstrated these qualities and capabilities.

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: If confirmed, I would take my instruction on issues of constitutional interpretation from Supreme Court and Second Circuit precedents applicable to each case and not from any particular theory of constitutional interpretation. I note, however, that the Supreme Court has applied originalism in cases including *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008).

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

Response: I understand the term “original meaning originalism” to express a theory of constitutional interpretation which holds that the text of the Constitution should be interpreted based upon what people living at the time the Constitution was drafted would have understood the text’s ordinary meaning to be.

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 Supreme Court has recognized the separation of powers framework and the system of checks and balances established by the Framers, acknowledging that there are provisions of the Constitution which provide “structural protections against abuse of power [that are] critical to preserving liberty.” *Bowsher v. Synar*, 478 U.S. 714, 730 (1986).

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

Response: The judicial branch contributes to the system of checks and balances, by using its constitutional authority to limit the power of the executive and legislative branches when they exceed their authority.

- 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 *Lopez*, the Supreme Court distinguished, but did not overrule, prior Commerce Clause decisions. Both *Lopez* and *Morrison* constitute controlling authority. If confirmed, I would apply them as binding precedent.

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

Response: The Supreme Court has "identified three broad categories of activity that Congress may regulate under its commerce power. 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[.]" *United States v. Lopez*, 514 U.S. 549, 558-559 (1995) (citations omitted). If confirmed, I would apply the analysis set forth in *Lopez* and other applicable precedents of the Supreme Court and the Second Circuit, in order to determine whether an activity is covered by the Commerce Clause.

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

Response: No. The Commerce Clause gives Congress power to regulate economic matters that transcend state lines, not to monitor every dollar that changes hands.

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

Response: The Tenth Amendment states that the "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." This means that the power of the national government is specifically

delineated by the Constitution, as amended, but all power not so delineated is reserved to the states or the people. The Tenth Amendment preserves state authority over the police power, historically understood as the health, safety, welfare, and morals of the people within its jurisdiction.