

Written Questions of Senator Ted Cruz

Troy Nunley

Nominee, United States District Judge for the Eastern District of California

U.S. Senate Committee on the Judiciary

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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: My judicial philosophy is that judges should be fair and impartial to all litigants who appear before them regardless of their backgrounds. Additionally, judges must possess integrity and be courteous and respectful to the litigants, staff and the public who enter our courtrooms on a daily basis. As a state court judge for the past 11 years, I have conducted myself in such a manner while actively listening to the litigants and while being transparent in my rulings. I cannot identify a specific Supreme Court Justice whose philosophy is most analogous to mine.

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 believe that the text of the Constitution and the intent of the original authors in drafting the Constitution are both extremely important in interpreting constitutional provisions. If confirmed as a federal district court judge I would decide cases with strict adherence to the text of the Constitution, the text of relevant federal statutes, and controlling precedent.

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: The role of a federal district court judge is to follow Supreme Court precedents and Circuit Court precedents within the particular circuit. If confirmed as a district court judge I would be fully committed to following United States Supreme Court precedent and Ninth Circuit precedent without regard to my personal beliefs.

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: In *Garcia*, the Court held that Congress has the power to regulate the wage and hour standards applicable to employees of state and local governments. If confirmed as a district court judge I would be bound to follow Supreme Court precedent, therefore it would be inappropriate

to give my personal opinion of said case. However, I am also aware that in subsequent cases including *United States v. Lopez*, 514 U.S. 549 (1995), the Supreme Court has reaffirmed and enforced the constitutional limits on Congressional authority.

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

Response: In *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), the Supreme Court held that Congress may regulate activity that "substantially affects" interstate commerce. See *Lopez*, 514 U.S. at 559. When the activity at issue is an intrastate noncommercial, noneconomic activity (as in *Lopez* and *Morrison*) the Supreme Court is less deferential and requires that the activity have a direct and substantial impact on interstate commerce. In such instances the effect of noneconomic activity can not be aggregated in order to fall under the commerce clause power. If confirmed as a federal district court judge I would be bound to follow Supreme Court precedent and the relevant decisions of the Ninth Circuit Court of Appeals.

Presidential Power

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

Response: The President's authority to issue executive orders must stem from the Constitution or a federal statute. These limits are judicially enforceable. For example in *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952) the Supreme Court invalidated an order seizing and operating most of the nation's steel mills. The Supreme Court stated: ". . . The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself." See *Youngstown*, 343 U.S. at 585. If confirmed as a district court judge I would follow Supreme Court precedent.

Individual Rights

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

Response: In *Washington v. Glucksberg*, 521 U.S. 702, 720-721 (1997), the Supreme Court held that the ". . . the Due Process Clause specially protects those fundamental rights and liberties which are objectively, deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." (Citations and internal quotation marks omitted). If confirmed as a district court judge I would follow Supreme Court precedent and the relevant decisions of the Ninth Circuit Court of Appeals.

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

Response: Pursuant to controlling Supreme Court precedent, classifications are subject to heightened scrutiny under the Equal Protection Clause when they are based on race, gender, national origin, and alienage. Heightened scrutiny will also be applied if the classification interferes with fundamental rights such as first amendment rights, the right to privacy or the right to travel. If confirmed as a district court judge I would follow Supreme Court precedent and the relevant decisions of the Ninth Circuit Court of Appeals.

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: If confirmed as a district court judge I would strictly follow and apply *Grutter* and all Supreme Court precedents in this area regardless of my individual expectations.

Written Questions of Senator Jeff Flake
Troy Nunley
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1. What qualities do you believe all good judges possess?

Response: All good judges should possess qualities of fairness, integrity, transparency, respect for the rule of law and proper judicial temperament.

a. How does your record reflect these qualities?

Response: Throughout the eleven years I have been a superior court judge, I have given all litigants who appear before me their day in court and an opportunity to be heard without regard to my personal beliefs. I have rendered decisions guided by principles of impartiality, transparency and a healthy respect for judicial precedent.

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: Yes.

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

Response: I believe that the text of the Constitution and the intent of the original authors in drafting the Constitution are both extremely important in interpreting constitutional provisions. The text of the Constitution is constant and can only be changed by the amendment and ratification process. If confirmed as a federal district court judge I would decide cases with strict adherence to the text of the Constitution, the text of relevant federal statutes, and controlling precedent.

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 promotes the separation of powers and the system of checks and balances. In certain instances the Constitution restricts the government from directly interfering with certain areas such as expression and association. Further, the Constitution also precludes the federal government from taking action in areas reserved to state or local governments.

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 relative to the executive branch by limiting the President's ability to issue executive orders in cases where the executive order violates the Constitution or where the executive order deviates from congressional intent. Relative to the legislative branch the judicial branch can judge legislative acts to be unconstitutional when Congress exceeds its authority or infringes upon a constitutional right.

- 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* and *Morrison* the Supreme Court did not state that it was overturning earlier Commerce Clause decisions. If confirmed as a federal district court judge I would be bound to follow all Supreme Court precedent, unless the Court itself had overruled one of its prior decisions.

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

Response: Pursuant to the Commerce Clause the federal government may regulate the channels and instrumentalities of interstate commerce, as well as commercial or economic activity which has a substantial effect on interstate commerce or which in the aggregate has a substantial effect on interstate commerce. See *Morrison*, 529 U.S. at 608-609. When the federal government regulates an intrastate noncommercial, noneconomic activity (as in *Lopez* and *Morrison*) the Supreme Court is less deferential and requires that the activity have a direct and substantial impact on interstate commerce. In such instances the effects of noneconomic activity cannot be aggregated in order to fall under Commerce Clause power. If confirmed as a federal district court judge I would be bound to follow Supreme Court precedent and the relevant decisions of the Ninth Circuit Court of Appeals.

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

Response: No. In both *United States v. Lopez*, and *United States v. Morrison*, the Court made it clear that congressional power pursuant to the Commerce Clause is not absolute and is subject to limitation. As a district court judge I would be bound by Supreme Court precedent and the relevant decisions of the Ninth Circuit Court of Appeals in deciding cases involving challenges to Congress's power under the Commerce Clause.

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

Response: The Tenth Amendment reserves to the States or to the people the “powers not delegated to the United States by the Constitution, nor prohibited by it to the States.” For example, the Supreme Court has explained that “the structure and limitations of federalism . . . allow the States great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.” See *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006). (Citations and internal quotation marks omitted).