

Written Questions of Senator Jeff Flake
Derrick Kahala Watson
Nominee, to be United States District Judge for the District of Hawaii
U.S. Senate Committee on the Judiciary
January 30, 2013

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

Response: All good judges should be patient, fair, courteous, respectful, even-tempered, open-minded, decisive, studious and inquisitive.

a. How does your record reflect these qualities?

Response: Over the course of my twenty-two years as an Assistant United States Attorney and private practice attorney, I believe my clients, supervisors, former partners and even adversaries would attest that I possess each of these traits.

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, original meaning should be considered.

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

Response: As exemplified by *District of Columbia v. Heller*, 128 S.Ct. 2783 (2008), there is no substitute for evaluating original meaning through historical scholarship and inquiry.

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, including through application of the Fourteenth Amendment, restricts governmental interference most notably in the area of individual rights – including through First Amendment protections regarding expression and association, Second Amendment protections regarding gun rights, Fourth Amendment protections regarding unreasonable searches and seizures, and Fifth Amendment guarantees of due process and freedom from self-incrimination.

The Constitution also limits governmental authority by dispersing power among different branches of government, by dispersing power within branches of government (*e.g.* through different legislative bodies with different compositions and electoral rules), and by dispersing power at the federal, state and local levels, in part through the Tenth Amendment.

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

Response: The Judicial Branch contributes to checks and balances principally through the doctrine of judicial review. See *Marbury v. Madison*, 5 U.S. 137 (1803). Once confirmed for lifetime tenure, Article III judges are generally free from interference by the legislative or executive branches.

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: No, I do not agree. While *Lopez* and *Morrison* marked the first time in decades that the Court had rejected federal legislation on Commerce Clause grounds, the analytic framework employed by the Court (e.g. whether the activity "substantially affects interstate commerce," etc.) did not change from that collectively employed by its predecessors. In each case, the federal legislation at issue was struck down principally because there was no economic link or limit, and the area subject to regulation was one traditionally reserved to local government.

- 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's articulation of Congress' Commerce Clause power in cases such as *Lopez* dictates the parameters within which the federal government must operate in order for its legislation to be constitutionally valid. More specifically, Congress must tie its actions to the protection of the instrumentalities of interstate commerce, the channels of interstate commerce or to activities substantially affecting interstate commerce. Where it does not do so, its legislation will be found invalid, as occurred in *Lopez* and *Morrison*.

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

Response: No. Though I am not aware of a case that specifically addresses it, the mere exchange of federal currency, without more, does not subject that exchange to federal Commerce Clause legislation.

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

Response: The Tenth Amendment generally reserves to the States all powers not expressly delegated by the Constitution to the United States. In recent years, the Supreme Court has applied the Tenth Amendment to protect states' rights to be free from a mandatory federal hazardous waste management scheme (*New York v. United States*, 112 S.Ct. 2408 (1992)) and to be free from federal "commandeering" of state and local officials in the execution of a federal regulatory scheme (*Printz v. United States*, 521 U.S. 898 (1997)).