Responses of William J. Kayatta, Jr.,
***Nominee to be United States Circuit Judge for the First Circuit*,**
to the Written Questions of Senator Ted Cruz
U.S. Senate Committee on the Judiciary
January 28, 2013

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 not yet tempered by the experience of deciding many difficult cases. I do believe that the substantive principles brought to bear in deciding cases need be anchored in the formal expressions of those who wrote the laws as reasonably understood at the time written. There is much to say, too, for the simple hard work of employing the generally accepted tools of judging to find what is often a correct answer upon which virtually all good judges would agree (as with the many 9-0 Supreme Court decisions). In the lower courts, a lack of capability or care is more often the cause of error than is the lure of a particular judicial philosophy. I find much to admire in the careful respect accorded precedent by Justice Harlan II. I suspect that, because of the conflicting purposes bound into our Constitution, a single, unified theory of jurisprudence that always works best will not be found soon.

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 find it impossible to understand how one can interpret and apply the Constitution in a close case without first understanding how the words of the Constitution could have been reasonably understood by those for whom they were originally written.

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: As a Circuit Court Judge, I would be bound by U.S. Supreme Court precedent, and could not overrule it. I would also be bound by prior decisions of the First Circuit Court of Appeals, which I could only overrule when ruling as part of the majority in an *en banc* proceeding. In the case of *en banc* review of a prior decision in the Circuit, I would consider the important benefits of *stare decisis*, the age of the precedent, whether it is a matter of statutory or constitutional law, and the strength of the arguments tendered for correcting course.

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: I doubt that I have enough information to assess empirically the accuracy of this observation. In any event, as a judge on a court of appeals, I would not have the role of expressing agreement or disagreement with a pronouncement of the Supreme Court. Rather, my responsibility would be to understand and apply such a pronouncement.

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

Response: My understanding of the relevant Supreme Court precedent is that commerce is economic activity, and that anything that does not substantially affect interstate commerce (or its instrumentalities or channels) in the sense required by *Lopez* and *Morrison* is beyond Congress's Commerce power.

Presidential Power

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

Response: The President's powers are enumerated in the Constitution and are subject to limits imbedded in both the structured check and balances of a three branch government and the many express restrictions placed on all branches of that government. Generally, those limitations on executive action are judicially enforceable, depending in part on the clarity of the usurpation and the judicial restraint implicit in doctrines of standing and justiciability.

Individual Rights

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

Response: As Chief Justice Rehnquist noted in *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997), the "guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended" (quoting *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992)). Given that difficulty, the Court has instructed that rigor in ascertaining fundamental rights comes largely from consideration of "concrete examples involving fundamental rights deeply rooted in our legal tradition." *Id*. at 722. Certainly, as a judge on the court of appeals, I would be bound to treat as "fundamental" those rights that the Supreme Court has so designated.

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

Response: The U.S. Supreme Court has decreed strict scrutiny as the standard of review for classifications based on race, national origin, and alien status (when so treated by a state). Heightened, although not strict, levels of scrutiny have been applied in cases involving gender or illegitimacy. Also, governmental classifications that impermissibly interfere with the exercise of a fundamental right are generally subject to strict scrutiny.

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 do not read *Grutter* as stating that racial preferences are ever necessary in public higher education. Rather, the Court voiced an expectation that, fifteen years from now, "the use of racial preferences will no longer be necessary to further the interest [in student body diversity]." As an empirical matter, I do not know whether fifteen years will prove to be too long or too short.

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***Nominee to be United States Circuit Judge for the First Circuit*, to the Written Questions of Senator Jeff Flake**
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1. **What qualities do you believe all good judges possess?**

   Response: Good federal judges are untainted by hubris or a failure to understand their place in our unique and exceptional constitutional democracy. They usually possess a temperament that includes the modesty and patience required to entertain the views of their colleagues and the competing arguments of the parties, and the discipline required to harness their skills and learning in an attempt to reach an impartial decision grounded in the law and the facts.

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

      Response: It is my understanding that judges, lawyers, and clients who have worked with me over the past thirty-two years regard me as possessing these qualities. My appointment by the U.S. Supreme Court as special master to assist it in deciding an important case among three states provides some corroboration for that understanding.

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 understand "origin meaning originalism" to refer to a theory of constitutional interpretation that seeks to ascertain and apply the words of the constitution as those words were understood by reasonable people at the time the words were written.

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: Our Constitution most generally places limits on the federal government by defining the specific powers granted to the federal government, by acknowledging a retention of remaining powers by the States, by dividing the federal government into three branches capable of checking and balancing one another (with the legislative branch further subdivided), and by expressly enumerating certain individual rights to be respected and protected by all three branches.

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

   Response: The Judicial Branch serves as an impartial umpire when it is contended that either or both of the other branches have exceeded the bounds of those limitations.

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 majority opinions in both *Lopez* and *Morrison* did not purport to overrule or conflict with Supreme Court Commerce Clause rulings issued between 1937 and 1995.

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

   Response: The Court in its recent jurisprudence has sought to preserve a "distinction between what is truly national and what is truly local." *United States v. Morrison*, 529 U.S. 598, 617 (2000). In *National Federation of Independent Business v. Sebelius*, __ U.S. __, 132 S. Ct. 2566 (2012), five justices drew a distinction between acting in commerce and refraining from acting in commerce. *Lopez* and *Morrison* drew fewer bright lines, instead proffering a multi-factor consideration of factors such as jurisdictional links incorporated in a statute, the degree to which the connection between the regulated activity and interstate commerce is attenuated, and the traditional provinces of the States. There are also further limits on the actions of the federal government under the Commerce Clause, such as those contained in the Bill of Rights.

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

   Response: Certainly not every transaction involving the exchange of money is subject to Congress's Commerce Clause powers.

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

Response: The genius of the Tenth Amendment is that it adopts the approach of not listing or even defining the powers reserved to the States. Rather, as Madison observed in The Federalist No. 45, the powers retained "in State governments are numerous and indefinite." These powers presumably include, as examples only, the power to tax, broad police powers, and broad powers of regulating the legal ramifications of family relationships.