

Response of William H. Orrick, III
Nominee to be United States District Judge for the Northern District of California
to the Written Questions of Senator Ted Cruz

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, if I am fortunate enough to be confirmed as a district court judge, would be to conduct myself in a way that enhances respect for the rule of law. I would be just and speedy in decision-making, as Federal Rule of Civil Procedure 1 suggests, and respectful to everyone in my courtroom. I would remain cognizant that I am in a court of limited jurisdiction, and not attempt to exercise authority on issues over which I have no jurisdiction. Most importantly, I would insure a fair hearing in each case so that I understand the facts and then apply controlling precedent and the law in an even-handed way to reach the result. I would explain my decision clearly so that the litigants understand the basis of my reasoning.

I have great respect for all of the justices on the Warren, Burger and Rehnquist Courts, but I have a special admiration for Justice Potter Stewart. Justice Stewart was my father's closest friend, and "Uncle Justice" to me and my sisters. He is the paragon for any judge: he decided cases based on the facts, not a preconceived ideology; he wrote clearly; and he was kind and respectful to all who came before him.

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: As a district judge, I would follow precedent from the United States Supreme Court and, if there is none, from the Ninth Circuit in order to interpret the Constitution. In this regard, if I am adjudicating a case of first impression, Justice Scalia's opinion for the Court in *District of Columbia v. Heller*, 540 U.S. 570 (2008), the case involving the application of the Second Amendment to a gun control ordinance of the District of Columbia, provides a clear example of the need to understand the meaning of the words used in the text at the time of enactment, the public understanding of the text of the Constitution in the period after its enactment or ratification, and the applicable Supreme Court precedent in order to reach a decision.

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: I am bound to follow precedent and will do so if confirmed. Of course, if a decision that is precedent today is overturned, I would follow the precedent that exists at the time of my ruling.

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 a district court judge, I would be bound to follow all applicable Supreme Court precedents, including *Garcia*, regardless of my personal views. In *Garcia*, the Court reversed recent precedent, *National League of Cities v. Usery*, 426 U.S. 833 (1976), and held that Congress' action in affording the protections of the wage and hour provisions of the Fair Labor Standards Act to State employees was permitted under the Commerce Clause. The Court discussed the shifting rationales prior cases had used to decide similar issues under the Commerce Clause, which only underscores the importance of a district court judge conducting a fact-based inquiry and faithfully applying the then applicable precedent.

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

Response: If I am fortunate enough to be confirmed as a district court judge, I will be bound to follow the relevant precedent of the Supreme Court and Ninth Circuit, and I will do my best to do so. In *U.S. v. Lopez*, 514 U.S. 549, 559 (1995), the Court described the three categories in which Congress could legislate under the Commerce Clause: regulation of channels of interstate commerce; regulation of instrumentalities of interstate commerce; and regulation of economic activities which "substantially affect" interstate commerce. If I am confirmed and am confronted with a case concerning the application of Commerce Clause legislation to non-economic activity, I will faithfully follow *Lopez* and other applicable precedent regarding the scope of those limitations.

Presidential Power

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

Response: The three part framework for determining the judicially enforceable limits on the President's authority to issue executive orders and executive actions is described in Justice Jackson's concurring opinion in *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952), and has been applied repeatedly since. First, when the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum. Second, when the President acts in absence of Congressional action, he can only rely on his independent powers but can derive authority from congressional inertia, indifference or quiescence. Finally, if the President acts in a way that is incompatible with the will of Congress, his power is at its lowest ebb and the Court can sustain his action only by disabling Congress from acting.

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, 719-721 (1997), the Supreme Court described when a right is "fundamental" for purposes of the substantive due process doctrine. The right, which must be carefully defined, must be deeply rooted in our nation's history and tradition and implicit in the concept of ordered liberty so that neither liberty nor justice would exist if the right was sacrificed. If confronted with the issue of whether a claimed right is "fundamental," I would faithfully follow applicable precedent to determine the result.

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

Response: The Supreme Court has stated that heightened scrutiny under the Equal Protection Clause applies when a statute classifies individuals "by race, alienage, or national origin" or "based on gender." *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440-447 (1985). The Court's analysis in *City of Cleburne*, in which it considered and rejected the use of heightened scrutiny for people who suffered from mental retardation, is instructive in this regard. If confirmed, I will follow applicable precedent in determining when a classification should be subjected to heightened scrutiny under the Equal Protection Clause.

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 have any expectations one way or the other regarding the future necessity for racial preferences in public higher education.

Written Questions of Senator Jeff Flake

William H. Orrick, III

Nominee, to be United States District Judge for the Northern District of California

U.S. Senate Committee on the Judiciary

February 1, 2013

1. 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: As a district judge, I would follow precedent from the United States Supreme Court and, if there is none, from the Ninth Circuit in order to interpret the Constitution. If I am adjudicating a case of first impression, Justice Scalia's opinion for the Court in *District of Columbia v. Heller*, 540 U.S. 570 (2008), the case involving the application of the Second Amendment to a gun control ordinance of the District of Columbia, provides a clear example of the need to understand the meaning of the words used in the text of the Constitution at the time of enactment, the public understanding of the text in the period after its enactment or ratification, and the applicable Supreme Court precedent in order to reach a decision.

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

Response: As I indicated above, I would look to precedent and follow the example of the types of authorities considered by the Court in *Heller* to determine the original meaning of the text involved.

2. 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: There are three fundamental ways in which the Constitution places limits on government. The Constitution establishes a system of checks and balances to give each of the three branches of government the ability to restrain the actions of the other in appropriate circumstances. Within this system, the judiciary maintains the power to invalidate the unconstitutional or illegal acts of government. The Constitution also grants to the States those powers not enumerated in the Constitution under the 10th Amendment. And, through the Bill of Rights and other provisions, the Constitution creates individual rights belonging to the people that the government cannot abridge.

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

Response: As noted above, the judiciary plays a critical role in adjudicating the constitutionality and legality of the acts of the Executive and Legislative branches of government.

3. **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: Neither *Lopez* nor *Morrison* overruled any existing precedents involving the Commerce Clause. Central to the decisions in both cases, as the Court noted in *Morrison*, 529 U.S. 598, 610, 613 (2000), was the noneconomic, criminal nature of the conduct at issue and the lack of a jurisdictional element establishing that the federal cause of action is in pursuance of Congress' power to regulate interstate commerce.

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

Response: I do not have an opinion separate from the precedents set by the Supreme Court and Ninth Circuit on the limits to the actions the federal government may take pursuant to the Commerce Clause. In *U.S. v. Lopez*, 514 U.S. 549, 559 (1995), the Court described the three categories in which Congress could legislate under the Commerce Clause: regulation of channels of interstate commerce; regulation of instrumentalities of interstate commerce; and regulation of economic activities which "substantially affect" interstate commerce. If I am confirmed and confronted with a case concerning the application of Commerce Clause legislation to non-economic activity, I will faithfully follow *Lopez* and other applicable precedent to determine the scope of those limitations.

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

Response: No.

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

Response: The 10th Amendment states, "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." I do not have an opinion separate from the language of the 10th Amendment and the precedents established by the Supreme Court and Ninth Circuit about the specific powers not included in the Constitution that are guaranteed to the states. The Court has been specific that the 10th Amendment prohibits the federal government from "commandeering" the state legislative process and state officials. For example, in *New York v. United States*, 505 U.S. 144 (1992), the Supreme Court invalidated a statute that required states either to develop legislation on how to dispose of

low-level radioactive waste generated within the state or to take title to it. This attempt to commandeer the state's legislative process was found to violate the 10th Amendment. In *Printz v. United States*, 521 U.S. 898 (1997), the Court invalidated the Brady Handgun Act's requirement that state and local law-enforcement officials conduct background checks on handgun purchasers within 5 business days of an attempted purchase. The Court found that this constituted commandeering of state officials and was also a violation of the 10th Amendment. If confirmed as a district judge, I would follow applicable precedent in determining whether the 10th Amendment applies to guarantee a particular power to the states.