

Written Questions of Senator Ted Cruz

Katherine Polk Failla

Nominee, United States District Judge for the Southern District of New York

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 involves administering justice to litigants fairly, respectfully, promptly, and transparently. In this philosophy, the district judge has an important, albeit limited, role, *i.e.*, deciding the particular case or controversy before the judge by applying the precedent of the relevant Circuit Court of Appeals and the Supreme Court to the specific facts of the case. Additionally, judges do not second-guess legislative or executive policy judgments, but rather exist to ensure that the other branches of government do not infringe upon individual constitutional rights or exceed the powers accorded to them under the Constitution. I imagine that the majority of Supreme Court Justices from the Warren, Burger, and Rehnquist Courts sought to include these tenets in their respective judicial philosophies; for this reason, I cannot identify a particular 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: The Supreme Court has stated that “the examination of a variety of legal and other sources to determine *the public understanding* of a legal text in the period after its enactment or ratification” is a “critical tool of constitutional interpretation.” *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008) (emphasis in original).

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: Were I fortunate enough to be confirmed as a District Judge, I would not have the opportunity to overrule precedent, though I would of course recognize the abrogation of precedent where (i) the decision at issue had been overruled by intervening precedent from the Supreme Court or the United States Court of Appeals for the Second Circuit, or (ii) the decision had been abrogated by subsequent legislation.

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: If confirmed as a federal district judge, I would be bound to follow *Garcia*, as well as any subsequent precedent on this issue from the Supreme Court and the Second Circuit.

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

Response: The Supreme Court has stated that Congress may regulate in only three areas: "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, *i.e.*, those activities that substantially affect interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558-59 (1995) (citations omitted); *see also United States v. Morrison*, 529 U.S. 598, 608-09 (2000).

In *Lopez* and *Morrison*, the Supreme Court indicated that non-economic activity that has only an "attenuated effect upon interstate commerce," *Morrison*, 529 U.S. at 615, would be outside of the scope of the Commerce Clause. *Morrison*, in particular, noted that "[w]hile we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." 529 U.S. at 613.

Presidential Power

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

Response: The Supreme Court has found that "[t]he President's authority to act, as with the exercise of any governmental power, 'must stem either from an act of Congress or from the Constitution itself.'" *Medellin v. Texas*, 552 U.S. 491, 524 (2008) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952) (Jackson, J., concurring)). First, when the President "acts pursuant to an expressed or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." *Id.* (quoting *Youngstown*, 343 U.S. at 635). Second, when the President acts in the "absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain." *Id.* (quoting *Youngstown*, 343 U.S. at 637). Third, when the President takes actions that are "incompatible with the expressed or implied will of Congress, his power is at its lowest ebb and the Court can sustain his actions only by disabling the Congress from acting upon the subject." *Id.* at 524-25 (quoting *Youngstown*, 343 U.S. at 637-38).

Individual Rights

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

Response: The Supreme Court has stated that 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.'" *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (citations omitted). As in all areas of law, I would adhere to Supreme Court and Second Circuit precedent with regard to these fundamental rights.

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

Response: The Supreme Court has found "suspect" classification status with respect to, for example, race, *see McLaughlin v. Florida*, 379 U.S. 184 222 (1964), and, in certain circumstances, alienage, *see Graham v. Richardson*, 403 U.S. 365 (1971). Additionally, the Supreme Court has found "quasi-suspect" classification status with respect to, for example, gender, *see Craig v. Boren*, 429 U.S. 190 (1976), and illegitimacy, *see Lalli v. Lalli*, 439 U.S. 259 (1978).

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: The Supreme Court observed in *Grutter* that "race-conscious admissions policies must be limited in time. This requirement reflects that racial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands." *Grutter*, 539 U.S. at 342. I have no basis to know whether (and, if so, when) the Supreme Court will conclude that racial preferences are no longer "necessary to achieve student body diversity." *Id.*

Written Questions of Senator Jeff Flake

Katherine Polk Failla

Nominee, United States District Judge for the Southern District of New York

U.S. Senate Committee on the Judiciary

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

Response: I believe all good judges should possess and demonstrate respect for all parties, a willingness to listen carefully to the parties' arguments, a dedication to immersing oneself in the facts of the case and the relevant precedent, and a commitment to deciding disputed issues fairly, transparently, and promptly.

a. How does your record reflect these qualities?

Response: I believe my record as a civil practitioner and as a prosecutor – by which I mean to include both my written submissions and my interactions with counsel and judges – demonstrates a commitment to treating parties and their positions with respect, and to advocating positions that reflect a fair application of the law to the particular facts of the case.

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: The Supreme Court has stated that “the examination of a variety of legal and other sources to determine *the public understanding* of a legal text in the period after its enactment or ratification” is a “critical tool of constitutional interpretation.” *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008) (emphasis in original).

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

Response: I define original-meaning originalism as a mode of constitutional interpretation that focuses on what the specific terms in the Constitution meant at the time of its ratification.

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 divides power in several ways in an effort to prevent abuse of that power. These divisions include the division of power between federal and state governments, and, within the federal government, among the executive, legislative, and judicial branches. In addition to this separation of powers in the federal government, the Constitution also embodies a system of checks and balances, pursuant to which each branch of the government has the ability, in certain circumstances, to limit the power of another branch. Finally, the Constitution incorporates a series of amendments, including

the Bill of Rights; several of these amendments operate as further limits on the power of the federal government vis-à-vis states and individuals.

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

Response: The Judicial Branch is accorded the power to declare laws and executive orders to be unconstitutional. The Judiciary is, in turn, limited by the other two branches. Article III limits the power of the federal courts to resolving the narrow issues presented in the cases or controversies before them, and does not permit the Judiciary to exercise powers ascribed to the other two 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: In *Lopez* and *Morrison*, the Supreme Court held that Congress' power under the Commerce Clause was not unlimited and recognized certain limitations on that power in the context of the Gun-Free School Zones Act and the Violence Against Women Act, respectively. To the extent that earlier Commerce Clause decisions also recognized that there were limits on Congress' power, the decisions are not inconsistent with prior Supreme Court precedent.

The *Lopez* majority noted, in its review of Commerce Clause precedent, that "modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits." 514 U.S. at 557 (citing, *inter alia*, *United States v. Darby*, 312 U.S. 100, 119-20 (1941) (noting that Congress may regulate intrastate activity that has a "substantial effect" on interstate commerce); *Wickard v. Fillburn*, 317 U.S. 111, 125 (1942) (noting that Congress may regulate activity that "exerts a substantial economic effect on interstate commerce"). The Supreme Court has indicated that the difference in holdings between the earlier cases and *Lopez/Morrison* stemmed from the fact that, unlike the earlier cases to come before the Court, there was no discernible link to commerce. *See Lopez*, 514 U.S. at 567 ("The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce."); *Morrison*, 529 U.S. at 613 ("Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity.").

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 stated that Congress may regulate in only three areas: “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, *i.e.*, those activities that substantially affect interstate commerce.” *United States v. Lopez*, 514 U.S. 549, 558-59 (1995) (citations omitted); *see also United States v. Morrison*, 529 U.S. 598, 608-09 (2000). In addition, the Court has held, in *Printz v. United States*, 521 U.S. 898 (1997), and *New York v. United States*, 505 U.S. 144 (1992), that principles of state sovereignty inherent in the Tenth Amendment to the Constitution may limit Congress’s power under the Commerce Clause.

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

Response: If the transaction – alone or, to the extent appropriate, aggregated with similar transactions – did not implicate any of the three bases for regulation identified in *Lopez*, it would be outside of the scope of the Commerce Clause.

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

Response: The Tenth Amendment provides that “[t]he 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.” The Supreme Court has stated that “the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States.” *New York v. United States*, 505 U.S. 144, 157 (1992).

As an example, the Supreme Court has found that the authority to determine qualifications for state-court judges and other state government officials “is a power reserved to the States under the Tenth Amendment and guaranteed them by that provision of the Constitution under which the United States ‘guarantee[s] to every State in this Union a Republican Form of Government.’” *Gregory v. Ashcroft*, 501 U.S. 452, 463 (1991). The Supreme Court has also invalidated statutory provisions on Tenth Amendment grounds, in instances where the federal government has sought to “commandeer” state or local employees and officials to enforce federal statutes. *See Printz v. United States*, 521 U.S. 898 (1997) (invalidating provision of Brady Bill that required local law enforcement officers to conduct background checks of prospective gun purchasers); *New York v. United States*, 505 U.S. 144 (1992) (holding that federal government could not compel states to provide for disposal of radioactive waste within their borders).