

Written Questions of Senator Ted Cruz

Pamela Chen

Nominee, United States District Judge for the Eastern 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 is based on strict adherence to the rule of law and *stare decisis*, i.e., deciding cases based solely on the application of precedent as established by the Supreme Court and Courts of Appeals to the facts before the court. I have tremendous respect for all of the Justices of the Supreme Court and the Supreme Court as an institution. There is no single Supreme Court Justice whose judicial philosophy I can say 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 looked to the original intent and meaning of the Constitution in interpreting its provisions. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570, 577-619 (2008) (interpreting the Second Amendment); *Crawford v. Washington*, 541 U.S. 36, 42-56 (2004) (interpreting Sixth Amendment's Confrontation Clause); *Alden v. Maine*, 527 U.S. 706, 712-30 (1999) (interpreting Constitution with respect to states' sovereign immunity). If confirmed, I would follow Supreme Court and applicable Circuit precedent when applying the Constitution to specific cases or controversies.

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: If confirmed as a judge, I would not overrule precedent, though if a decision that is precedent during my confirmation process was subsequently overruled by the Supreme Court or the Second Circuit, I would be bound to follow the new precedent.

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: Because challenges similar to the one presented in *Garcia v. San Antonio Metro Transit Authority* could arise in cases before me if I were confirmed, I do not think that it is

appropriate for me to comment on the Supreme Court's reasoning in that decision. I would apply all binding precedent regardless of any personal views I may have regarding a decision.

I note, however, that notwithstanding the above-referenced statement from *Garcia*, the Supreme Court has repeatedly affirmed the judiciary's role in deciding whether constitutional limitations apply to exercises of federal power. *See, e.g., New York v. United States*, 505 U.S. 144 (1992) (striking down a provision of the Low-Level Radioactive Waste Policy Act as exceeding Congress's enumerated powers and being inconsistent with the Tenth Amendment).

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 identified "three broad categories of activity" that Congress may regulate under its Commerce Clause authority: "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. Morrison*, 529 U.S. 598, 608-09 (2000) (quoting *United States v. Lopez*, 514 U.S. 549, 558-59 (1995)) (citations and internal quotes omitted). In *Morrison* and *Lopez*, the Supreme Court struck down federal statutes that regulated intrastate, non-economic criminal conduct, finding that neither statute regulated "activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." *Lopez*, 514 U.S. at 561, 564-67; *see Morrison*, 529 U.S. 608-611. In *Morrison*, the Court stated that "*Lopez*'s review of Commerce Clause case law demonstrates that in those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor." 529 U.S. at 611. If confirmed, I would follow Supreme Court and applicable Circuit precedent on this issue.

Presidential Power

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

Response: While I have not researched this issue in depth, courts may enforce limits on the exercise of executive authority where such actions violate the Constitution or exceed the authority granted to the Executive Branch by Congress, with certain exceptions, *e.g.*, where the "case and controversy" requirement is not satisfied or Congress has precluded judicial review.

Individual Rights

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

Response: The Supreme Court has held 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, 720-21 (1997) (citations omitted). Substantive due process analysis begins with “a ‘careful description’ of the asserted fundamental liberty interest.” *Id.* at 721 (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)). If confirmed, I would follow Supreme Court and applicable Circuit precedent on this issue.

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

Response: A classification that “jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic” is subject to heightened scrutiny under the Equal Protection Clause. *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992); *see, e.g., Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 728-29 (2003) (heightened scrutiny applied to gender-based classification under Family Medical Leave Act); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440-41 (1985) (strict scrutiny applies to laws that “impinge on personal rights protected by the Constitution” and classifications based on race, alienage, national origin or gender). *See also Troxel v. Granville*, 530 U.S. 57, 65 (2000) (substantive component of Due Process Clause “provides heightened protection against government interference with certain fundamental rights and liberty interests.”) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997)). If confirmed, I would follow Supreme Court and applicable Circuit precedent on this issue.

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: Because challenges similar to the one presented in *Grutter v. Bollinger* could arise in cases before me if I were confirmed, I do not think that it is appropriate for me to comment on the Supreme Court’s statement in that decision. As a district court judge, I would apply *Grutter v. Bollinger* and all other Supreme Court precedent.

Written Questions of Senator Jeff Flake

Pamela Chen

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

U.S. Senate Committee on the Judiciary

January 25, 2013

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

Response: I believe that the qualities of a good judge are an unwavering faithfulness to the rule of law and *stare decisis*, integrity, fairness, objectivity, open-mindedness, independence, decisiveness, even temperament and respect for all parties.

a. How does your record reflect these qualities?

Response: As a government attorney and prosecutor for the past 22 years, I have demonstrated my commitment to adhering to the rule of law, enforcing the law in a fair, even-handed and responsible manner, and treating all parties and individuals who come in contact with the justice system with respect and dignity.

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 looked to the original intent and meaning of the Constitution in interpreting its provisions. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570, 577-619 (2008) (interpreting the Second Amendment); *Crawford v. Washington*, 541 U.S. 36, 42-56 (2004) (interpreting Sixth Amendment's Confrontation Clause); *Alden v. Maine*, 527 U.S. 706, 712-30 (1999) (interpreting Constitution with respect to states' sovereign immunity). If confirmed, I would follow Supreme Court and applicable Circuit precedent when applying the Constitution to specific cases or controversies.

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

Response: I understand the term "original meaning originalism" to refer to the theory that the Constitution should be interpreted based on the meaning that it would have been given at or around the time of its adoption, as determined by historical documents and information, such as the ratification debates, the *Federalist Papers*, interpretation and construction of the Constitution around the time of its ratification and analogous State constitutions from that period. *See, e.g., District of Columbia v. Heller, supra*, 554 U.S. at 577-619.

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 places limits on the government in multiple ways, including: specifying the authority of each of the three branches of government, *U.S. Const. art. 1-3*; providing for individual rights that cannot be abridged by the government, *e.g.*, *U.S. Const. amend. 1-9, 13-15, 19, 26*; and limiting the powers of the federal government to those enumerated in the Constitution, *U.S. Const. amend. 10*. See *Alden v. Maine*, 527 U.S. 706, 713-14 (1999) (discussing constitutional limitations on the federal government).

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

Response: In our constitutional system of government, the role of the judiciary is important but limited. The judiciary is responsible for ensuring the fair, impartial and consistent application of laws passed by Congress, as well as the constitutionality of these laws and the actions of the Executive Branch.

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 Supreme Court's decisions in *Lopez* and *Morrison* are binding precedent and I would faithfully apply them if confirmed as a district court judge. The Supreme Court did not overturn precedent in *Lopez* or *Morrison*. Rather, the Court factually distinguished *Lopez* and *Morrison* from earlier Commerce Clause decisions based on the intrastate, non-economic nature of the activities at issue in *Lopez* and *Morrison*. See, *e.g.*, *Lopez*, 514 U.S. at 560-61 (“Even *Wickard* [*v. Filburn*, 317 U.S. 111 (1942)], which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that possession of a gun in a school zone does not.”); *Morrison*, 529 U.S. at 611 (“*Lopez*'s review of Commerce Clause case law demonstrates that in those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor.”). As a district court judge, I would apply all Supreme Court and applicable Circuit precedent.

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 identified “three broad categories of activity” that Congress may regulate under its Commerce Clause authority: “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. Morrison*, 529 U.S. 598, 608-09 (2000) (quoting *United States v. Lopez*, 514 U.S. 549, 558-59 (1995)) (citations and internal quotes omitted).

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

Response: I am not aware of any Supreme Court decision that holds that every transaction involving the exchange of money is subject to Congress's Commerce Clause power.

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

Response: The 10th Amendment does not specify what powers are guaranteed to the state; rather, it 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." There is a long history of Supreme Court cases that identify state powers protected by the 10th Amendment. *See, e.g., New York v. United States*, 505 U.S. 144, 155 (1992) (noting that 10th Amendment jurisprudence dates back to 1816).