

Written Questions of Senator Ted Cruz
Richard Taranto
Nominee, United States Circuit Judge for the Federal Circuit
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: I would characterize my judicial philosophy as a thorough commitment to the rule of law. This requires scrupulous attention to record facts, respect for jurisdictional limits and the role of the particular court within the judicial system as a whole and within the overall constitutional system, and adherence to the duty to apply and interpret all governing law, whether constitutional, statutory, regulatory, or otherwise, with impartiality, neutrality, fidelity, reason, appreciation for complexities, clarity of explanation, and all possible expedition.

At my hearing, when asked a related question by Senator Lee, I first put aside living Justices (active or retired), as it seems inadvisable for me, a lower court nominee, to single out and comment on any such Justice's work. I then identified the second Justice Harlan as a Justice whose overall record, to the extent I am familiar with it, seems to me to embody to a remarkable degree the aspects of judging that I prize.

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: Although a Westlaw search indicates that no Supreme Court majority opinion has used the term "originalism" except in quoting titles of references, the Supreme Court has, in its constitutional interpretations, used originalism in the sense of the original public meaning, which can be discerned from various sources, including the use of the terms at issue in pre-adoption and post-adoption legal sources and by those who participated in the drafting and ratifying of the Constitution or its amendments. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570 (2008); *Crawford v. Washington*, 541 U.S. 36 (2004).

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: A court of appeals cannot overrule a precedent of the Supreme Court, and a panel of the Federal Circuit cannot overrule a precedent of the en banc court or, indeed, of a previous panel. For a Federal Circuit judge, overruling of en banc or panel precedents is a matter for the en banc court. Such overruling must be rare, given the values of stability, consistency, and predictability in our system of law. Exceptional circumstances can justify overruling, however,

as when another decision conflicts with a precedent, there is seriously harmful confusion or lack of clarity on the issue, or the precedent has become prohibitively unworkable.

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: The quoted statement from *Garcia* is part of a Supreme Court precedent that lower courts are bound to follow. But the quoted statement by its terms is limited: *e.g.*, the statement itself does not decide a particular issue concerning state sovereign interests; and it refers only to "judicially created limitations on federal power," and does not place beyond judicial enforcement any particular protection of state sovereign interests that is properly found in the Constitution. The Supreme Court has repeatedly held state sovereign interests to be judicially protected. *See, e.g., Bond v. United States*, 131 S. Ct. 2355 (2011); *New York v. United States*, 505 U.S. 144 (1992); *Printz v. United States*, 521 U.S. 898 (1997).

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

Response: I am not aware of a Supreme Court decision holding that non-economic activity always falls outside the Commerce Clause power in conjunction with the Necessary and Proper Clause power. *United States v. Lopez*, 514 U.S. 549, 564-67 (1995), and *United States v. Morrison*, 529 U.S. 598, 617-19 (2000), did not so hold, although they relied heavily on the non-economic nature of the conduct at issue in invalidating the statutes at issue. Justice Scalia, in his concurrence in *Gonzales v. Raich*, 545 U.S. 1, 33 (2005), reviewed prior decisions and concluded that "Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce." *Id.* at 37. The subsequent decision in *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012), does not say otherwise.

Presidential Power

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

Response: I am not aware of Supreme Court precedent laying out a comprehensive approach to defining the judicially enforceable limits on the President's ability to issue executive orders or executive actions. The Supreme Court has reviewed such orders on a number of occasions. *E.g., Little v. Barreme*, 2 Cranch 170 (1804); *The Prize Cases*, 67 U.S. 635 (1863); *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915); *Korematsu v. United States*, 323 U.S. 214 (1944); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Dames & Moore v. Regan*, 453 U.S. 654 (1981). That review has involved inquiries into whether the President has acted pursuant to the powers granted to the President directly by the Constitution or pursuant to powers

granted by statute, or has violated the Bill of Rights and other provisions of the Constitution that constrain both sources of power. But particularly as to the scope of Constitution-granting authority, and the scope of any justiciability limits on judicial review, the Supreme Court has resolved particular cases and sketched general approaches but consciously avoided providing clear comprehensive rules. *See, e.g., Dames & Moore*, 453 U.S. at 661-62, 668-69.

In any case that would come before me involving issues of the validity of presidential action, I would fully consider such law and precedents as would be uncovered, and arguments made, in a full adversarial presentation.

Individual Rights

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

Response: The Supreme Court has recited a number of “fundamental rights and liberty interests” subject to protection under substantive due process. *Washington v. Glucksberg*, 521 U.S. 702, 719-20 (1997) (“rights to marry; to have children; to direct the education and upbringing of one’s children; to marital privacy; to use contraception; to bodily integrity; and to abortion”; the Court has “also assumed, and strongly suggested,” protection for “the traditional right to refuse unwanted life saving medical treatment”) (citations omitted).

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

Response: The Supreme Court has discussed several considerations in determining whether particular classifications should be subjected to heightened scrutiny. *See, e.g., Bowen v. Gilliard*, 483 U.S. 587, 602-03 (1987) (considering whether disadvantaged class has ““been subject to discrimination ... [or] exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group ... [or are] a minority or politically powerless”” and whether ““the statutory classification “directly and substantially” interfere[s] with family living arrangements and thereby burden[s] a fundamental right””); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 441-47 (1985) (discussing reasons for heightened scrutiny of classifications by race, alienage, national origin, and sex, and reasons for denying heightened scrutiny of classifications by age; denying heightened scrutiny of classifications based on mental retardation). The Court has explained, moreover, that any heightened scrutiny must be affirmatively justified against the background of “[t]he general rule ... that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.” *Cleburne*, 473 U.S. at 440.

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 quoted statement of what the Supreme Court “expect[ed]” in 2003 is precedent binding on lower courts. If that statement is invoked in a future case, its significance for the case

would be a subject of argument. I do not think that it would be appropriate for me to address such significance in advance of a particular case in which the question arose.

Written Questions of Senator Jeff Flake

Richard Taranto

Nominee, United States Circuit Judge for the Federal Circuit

U.S. Senate Committee on the Judiciary

January 25, 2013

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

Response: Good judges have a commitment to treating the parties with respect and complete impartiality in applying the law to the facts. Good judges should have a temperament embodying the ideal of neutrality in adjudication while conveying full appreciation for the real-world interests of the litigants. That means treating all parties with respect, striving to understand their positions thoroughly, paying scrupulous attention to the record, faithfully understanding and applying the relevant precedents and sources of law, and explaining decisions clearly. For a court of appeals judge, it also means being collegial and efficient in working with fellow judges.

a. How does your record reflect these qualities?

Response: My work for decades has been overwhelmingly appellate work, partly for the federal government but mostly in private practice, representing a wide range of clients on a variety of topics. The work has required broad knowledge, mastery of complexities of fact and law, extensive collaboration with other lawyers that depends on thoroughness of analysis and clarity of discussion, and reflective and reasoned presentations to courts in writing and orally. Those requirements are closely related to the qualities I have mentioned as important to being a good judge. I believe that the extended success of my appellate career confirms that my work has embodied these qualities.

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: Although a Westlaw search indicates that no Supreme Court majority opinion has used the term “originalism” except in quoting titles of articles, the Supreme Court has, in its constitutional interpretations, relied on originalism in the sense of the original public meaning, which can be discerned from various sources, including the use of the terms at issue in pre-adoption and post-adoption legal sources and by those who participated in the drafting and ratifying of the Constitution or its amendments. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570 (2008); *Crawford v. Washington*, 541 U.S. 36 (2004).

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 government created by the Constitution is controlled in part by its democratic character (which has increased through amendments): the President and Congress are subject to election, and therefore to voter discipline on re-election. *See National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566, 2579 (2012) (opinion of Chief Justice). As the Supreme Court has repeatedly explained, control of the government created by the Constitution, for protection of individual liberty, also is achieved in significant part by the two basic structural features of the Constitution: the separation of powers within the federal government, allowing each branch to check the others in varying ways; and the federalist principle underlying the specific enumeration of powers granted to the federal government, preserving ungranted powers to the States. *See id.* at 2577-79; *Free Enterprise Fund v. Public Company Account Oversight Bd.*, 130 S. Ct. 3138 (2010) (discussing separation of powers limits and several precedents); *Bond v. United States*, 131 S. Ct. 2355 (2011) (discussing federalism limits and several precedents). Moreover, partly as adopted originally, but then even more in post-1789 amendments, the Constitution places a host of specific limits on governmental action, both federal and state, such as those found in the Bill of Rights and the Civil War Amendments. One aspect of the checks and balances system is the role played by the federal judiciary in enforcing (within limits on its own power) constitutional limits on governmental action.

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

Response: As noted, the Judicial Branch contributes vitally to the system of checks and balances by enforcing (within the limits on its own power) both structural and individual-rights limits on government action.

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 specific congressional actions held beyond the Commerce Clause power in *Lopez* and *Morrison*, which addressed activities the Court characterized as non-economic conduct that is typically a state-law matter and has too weak a connection to interstate commerce or to regulation of interstate commerce, had not previously been presented in earlier precedents of the Court. The Court found the differences material for Commerce Clause purposes, with the dissents accepting the differences in fact but arguing against a difference in result. *See*

also *National Federation*, 132 S. Ct. at 2623-24 (opinion of Ginsburg, J., joined on Commerce Clause issue by Justices Breyer, Sotomayor, and Kagan) (noting distinctive characteristics of *Lopez* and *Morrison*). The precedents of *Lopez* and *Morrison*, involving certain facts, and previous Commerce Clause precedents, involving easily distinguishable facts, are all binding on lower courts.

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 not definitively identified the limits to the actions the federal government may take pursuant to the Commerce Clause. The Court has said that the Commerce Clause power is “broad” but “has limits.” *Maryland v. Wirtz*, 392 U.S. 183, 196 (1968). It has identified certain laws as beyond those limits. Thus, the Court held that Congress exceeded those limits when it regulated certain non-economic conduct that is typically a state-law matter and has too weak a connection to interstate commerce or to regulation of interstate commerce (gun possession in a school zone, gender-motivated violence). *Lopez, supra; Morrison, supra*. More recently, in *National Federation, supra*, five Justices concluded that Congress could not command the activity of purchasing health insurance and thus found the individual mandate of the Affordable Care Act beyond the Commerce Clause (with five Justices then upholding the provision under the Taxing Power). On the other hand, the Court has held that the Commerce Clause power “‘is not confined to the regulation of commerce among the states,’ but extends to activities that ‘have a substantial effect on interstate commerce’” and, in addition, “is not limited to regulation of an activity that by itself substantially affects interstate commerce, but also extends to activities that do so only when aggregated with similar activities of others.” *National Federation*, 132 S. Ct. at 2585-86 (opinion of Chief Justice). How this case law applies to a particular congressional enactment is a matter for consideration in the context of a particular case.

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 opinion declaring that the exchange of money is automatically subject to the Commerce Clause power, and as a logical matter such a conclusion does not follow from the Supreme Court’s standards focusing on channels or instrumentalities of, or substantial effects on, interstate commerce.

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

Response: The Supreme Court has specifically invoked the 10th Amendment as a basis for invalidating a congressional directive to a state legislature to pass certain laws (*New York v. United States*, 505 U.S. 144 (1992)) and a congressional “commandeering” of state executive entities to force them to spend money and time executing federal laws

(*Printz v. United States*, 521 U.S. 898 (1997)). More recently, in *Bond v. United States*, 131 S. Ct. at 2366, the Supreme Court treated an argument founded on the 10th Amendment as embracing the argument that a challenged federal action was beyond the powers granted to the federal government, construed in light of the federalism principle built into the Constitution: “The principles of limited national powers and state sovereignty are intertwined. While neither originates in the Tenth Amendment, both are expressed by it. Impermissible interference with state sovereignty is not within the enumerated powers of the National Government, see *New York*, 505 U.S., at 155–159, and action that exceeds the National Government's enumerated powers undermines the sovereign interests of States. See *United States v. Lopez*, 514 U.S. 549, 564 (1995).” From that perspective, the powers guaranteed by the 10th Amendment are any powers not otherwise limited by the Constitution (as through Article I, Section 10, or the Bill of Rights or the Civil War Amendments) and that are outside, and not displaced by, the grants to the federal government when those grants are themselves construed in light of federalism interests.