

**Responses of Robert E. Bacharach  
Nominee to be United States Circuit Judge for the Tenth Circuit  
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 is that a judge’s function is to apply the law to the facts in every case without regard to his or her own feelings, sympathies, or ideology. To carry out this important function, the judge should work hard to determine what the law actually is rather than what he or she believes it should be. I cannot single out one Supreme Court Justice whose judicial 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 original meaning of the constitutional text can often provide a valuable interpretive tool. When the judge examines the original meaning, he should select a methodology based on its relative utility in resolving the particular issue before the court.

**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: Generally, I think the principle of stare decisis weighs against a court’s repudiation of its own precedents. If the Tenth Circuit Court of Appeals is sitting *en banc*, however, the court could overrule its earlier precedent if it conflicts with another of its precedents or a Supreme Court decision.

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 language represents a determination by a majority of the Supreme Court in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). And in a published decision, the Tenth Circuit Court of Appeals relied on the quoted language in *Garcia* to uphold the constitutionality of 7 U.S.C. § 1926(b). *Glenpool Utility Services Authority v. Creek County Rural Water District No. 2*, 861 F.2d 1211, 1215 n.1 (10<sup>th</sup> Cir. 1988). I believe it would be inappropriate for me to comment on the wisdom of the quoted language inasmuch as it was embraced by a majority of the Supreme Court and has been applied in a published decision

of the Tenth Circuit Court of Appeals. I would follow *Garcia*, regardless of whether I agreed or disagreed with it, as I would any Supreme Court precedent.

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

Response: This issue could come before me if I am fortunate enough to be confirmed. *See, e.g., United States v. Riccardi*, 405 F.3d 852, 866 (10<sup>th</sup> Cir. 2005) (discussing the effect of a statute's regulation of economic or non-economic conduct on whether it could be sustained under the Commerce Clause). As a result, it would be inappropriate for me to offer an advisory opinion on the reach of the Commerce Power (aided by the Necessary and Proper Clause) to non-economic activity.

Presidential Power

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

Response: Generally, the three judicially-enforceable limits are: (1) the United States Constitution's textual sources of executive power, (2) the scope of Congress's grants of authority to the executive branch, and (3) the affirmative limits in the Constitution, including the Bill of Rights. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952) ("The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself."); *id.* at 637-38 (Jackson, J., concurring) (discussing reliance on the executive's own constitutional powers); Henry Monaghan, *The Protective Power of the Presidency*, 93 Colum. L. Rev. 1, 68 n.325 (1993) ("Of course all executive orders here or elsewhere are subject to the Bill of Rights limitations." (citation omitted)).

Courts are charged with the responsibility to limit presidential action – in the absence of a congressional delegation of power – to the President's powers enumerated in Article II of the Constitution. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. at 587-88 (holding that an exercise of executive power could not be sustained under the President's constitutional power to act as the Commander in Chief or to take care that the laws are faithfully executed).

Congress can also grant additional authority to the President so long as it is acting within its own enumerated powers and it provides the Executive with an "intelligible principle" to guide the exercise of the power. *Albuquerque v. United States Department of Interior*, 379 F.3d 901, 914 (10<sup>th</sup> Cir. 2004) (citation omitted). And, when exercising powers given by Congress, the President must abide by the statutory limits on his authority. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585-86 (1952).

Finally, even when the President acts under his own constitutional sources of power or a congressional delegation of legislative power, the courts must ensure that the executive action does not encroach on an individual's rights protected in the Constitution, including the first ten amendments. *See, e.g., United States v. United States District Court*, 407 U.S. 297, 314-21

(1972) (holding that the Attorney General, while exercising the President's constitutional powers, violated the Fourth Amendment).

### Individual Rights

#### **When do you believe a right is “fundamental” for purposes of the substantive due process doctrine?**

Response: A right is considered “fundamental” for purposes of the substantive due process doctrine when the right is “implicit in the concept of ordered liberty” based on examination of the nation’s “history, legal traditions, and practices.” *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (citations omitted).

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

Response: When a classification targets a suspect class (such as race) or a quasi-suspect class (such as gender) or involves a fundamental right, the court applies heightened scrutiny under the Equal Protection Clause. *See, e.g., KT & G Corp. v. Attorney General*, 535 F.3d 1114, 1137 (10<sup>th</sup> Cir. 2008) (suspect class and fundamental right); *Oklahoma Education Association v. Alcoholic Beverage Laws Enforcement Commission*, 889 F.2d 929, 932 (10<sup>th</sup> Cir. 1989) (quasi-suspect class).

#### **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: Yes. I am not expressing a personal opinion, but I do not believe it would be appropriate for me to disagree with a majority opinion by the Supreme Court.

**Responses of Robert E. Bacharach  
Nominee to be United States Circuit Judge for the Tenth Circuit  
to the Written Questions of Senator Jeff Flake**

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

Response: All good judges possess humility, intelligence, a strong work-ethic, and the ability to listen.

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

Response: I have demonstrated these qualities through my work as a law clerk for then-Chief Judge William J. Holloway, Jr. of the Tenth Circuit Court of Appeals (2 years), a litigation attorney in private practice (12½ years), and a United States Magistrate Judge (13½ years).

**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: When the constitutional text is unclear, the original meaning of the constitutional text can provide judges with a valuable tool of interpretation. In these cases, judges should consider the original meaning of the Constitution's words and phrases.

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

Response: I define "original meaning originalism" as a view that judges should focus on sources that tend to show how a rational person at the time the relevant provision was adopted would have interpreted the constitutional text.

**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 Tenth Amendment limits the federal government by restricting it to the powers expressly delegated to it, and the Bill of Rights and other constitutional provisions prevent the federal government from encroaching on the rights given to individuals.

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

Response: The Judicial Branch contributes to this system of checks and balances by protecting against excesses of power by the legislative and executive branches.

When presented with a case properly challenging a legislative or executive action as exceeding the limits set forth in the Constitution, it is the duty of the courts to invalidate the challenged action as unconstitutional.

**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: If I am fortunate enough to be confirmed, I would be bound to apply the Supreme Court's decisions in *Lopez* and *Morrison* and could be called upon to address the continued viability of certain Supreme Court decisions predating those cases. For example, after *Lopez*, the Tenth Circuit Court of Appeals addressed the consistency of that decision with a prior Supreme Court decision (*Scarborough v. United States*, 431 U.S. 563 (1977)). *United States v. Patton*, 451 F.3d 615, 636 (10<sup>th</sup> Cir. 2006); see *Alderman v. United States*, \_\_\_ U.S. \_\_\_, 131 S. Ct. 700, 702-03 (2011) (Mem.) (Thomas, J., dissenting) (stating that some courts, including the Tenth Circuit Court of Appeals, have had to decide whether *Lopez* conflicts with their interpretation of *Scarborough*). Because the issue could reappear in the Tenth Circuit Court of Appeals, I believe it would be inappropriate for me to remark on the consistency of *Lopez* and *Morrison* with earlier Supreme Court decisions.

**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 indicated that Congress's authority under the Commerce Clause has three components:

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).

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

Response: No.

**5. What powers do you believe the 10<sup>th</sup> Amendment guarantees to the state? Please be specific.**

Response: Under the Tenth Amendment, the states retain all powers that are not delegated to the federal government or prohibited to the states by the Constitution. The federal government's powers are specifically enumerated in the Constitution. All other powers are reserved to the states unless they are forbidden by the Constitution from exercising such powers. *See* U.S. Const. Amend. X. As James Madison explained in Federalist 45, the state's reserve of unenumerated powers is "indefinite." *The Federalist* No. 45, at 292-93 (James Madison) (Clinton Rossiter ed. 1961). Thus, a comprehensive list would be impossible.