

**Response of Gerald Austin McHugh, Jr.
Nominee, United States District Judge for the Eastern District of Pennsylvania
To the Written Questions of Senator Ted Cruz**

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: As a practicing lawyer, I have not had the occasion to develop a judicial philosophy. In writing my treatise on Pennsylvania tort law, and in teaching judges, other lawyers, and law students at the University of Pennsylvania, I have tried to follow an approach of rigorous intellectual honesty, reading cases accurately, not attempting to strain the bounds of precedent, and focusing on the specific facts of the case. I would expect to bring the same approach to the bench. Given the demands of professional practice I have not had the opportunity to focus upon the judicial philosophy of particular justices.

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: If confirmed as a district court judge, I would consider originalism where guided by appellate precedent to employ that approach. For example, in *District of Columbia v. Heller*, 554 U.S. 570 (2008) the majority of the Supreme Court employed original public meaning to interpret the Second Amendment. As a district court judge my responsibility would be to consult and follow the appellate authority applicable to the specific issue before me.

If a decision is precedent today while you're going through the confirmation process, under what circumstances would you overrule that precedent as a judge?

Response: As a district court judge, there would be no circumstance I can identify where I would be empowered to overrule an existing precedent.

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: This statement was part of a majority opinion of the Supreme Court. If I am fortunate enough to be confirmed, I would be bound to apply this and all binding precedent from higher courts.

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

Response: In *United States v. Lopez*, 514 U.S. 549, 558 (1995), the Supreme Court held that Congress may 1) "regulate the use of the channels of interstate commerce," 2) "regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate

commerce”, and 3) “regulate those activities having a substantial relation to interstate commerce.” It reiterated those principles in *United States v. Morrison*, 529 U.S. 598 (2000). As a district court judge, I would apply those decisions as well as all other binding Supreme Court precedent concerning the Commerce Clause.

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

Response: The power of the Executive Branch is conferred by both the Constitution and by specific acts of Congress. If a President, or his or her Administration, were to exceed the scope of lawful power, a federal court presented with a justiciable case or controversy would be empowered to enjoin such unlawful actions, as established by a series of cases, notably *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

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

Response: The Supreme Court has held that a right is fundamental where it is deeply rooted in our country’s history and implicit in the concept of “ordered liberty”. See e.g. *Washington v. Glucksberg*, 343 U.S. 579 (1997). If confirmed as a judge, I would apply that and all other binding precedents.

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

Response: Heightened scrutiny is the controlling standard when the classification being evaluated involves such things as race, religion, gender, or any other classification the Supreme Court has identified as “suspect,” and also controls where a classification would burden the exercise of a fundamental right. *City of Cleburne v. Cleburne Living Center*, 521 U.S. 702 (1997).

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: If an issue concerning racial preferences were before me, I would apply *Grutter* and other relevant precedent, including *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013), to the factual record before me.