Questions for the Record
Senator Ted Cruz

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Describe how you would characterize your judicial philosophy, and identify which U.S. Supreme Court Justice's judicial philosophy from the Warren, Burger, or Rehnquist Courts is most analogous with yours.

Response: I do not have a judicial philosophy as such. Instead, I have a view about the proper approach to judging. That approach is based on the understanding that judges decide cases on the basis of particular facts and only in properly presented cases or controversies. That approach is also rooted in a recognition that the rule of law depends on judges being impartial, faithful in their adherence to precedent, and committed to the use of traditional methods of legal interpretation of authoritative legal texts, whether statutory, constitutional or regulatory. There is no single Justice from the Warren, Burger, or Rehnquist Courts whose judicial philosophy I would feel comfortable characterizing, given the full range of opinions that each of them has issued. In particular, I would be remiss if I did not mention my great respect for Justice John Paul Stevens, for whom I clerked. He served on both the Burger and Rehnquist Courts, and he instilled in me, as he has instilled in all his clerks, a great reverence for the role that the federal judiciary plays in maintaining the rule of law.

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 intentions of those involved in drafting constitutional provisions, as well as the public meaning of those provisions at the time of their ratification, supply important, and potentially dispositive, evidence of their proper interpretation. Circuit court judges are bound by applicable Supreme Court and Circuit precedents in deciding when and how to use such evidence in interpreting particular provisions of the Constitution. Thus, I would be guided by the precedents of the First Circuit and of the Supreme Court regarding the proper weight to give to originalist evidence in any particular case that came before me.

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: As a court of appeals judge, I would have no authority to overrule a decision of the Supreme Court. While serving on a panel of the Circuit, I also would have no authority to overrule a precedent of the Circuit, at least absent intervening Supreme Court precedent that was directly controlling. In deciding whether to vote *en banc* to overrule a precedent of the Circuit, I would be required to make that decision in a manner consistent with applicable precedents regarding the doctrine of *stare decisis*. That doctrine sets forth the limited considerations – such as whether a prior line of case law has become "unworkable" or whether it has generated reliance -- that may bear on the decision to overrule a 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: Federalism is a cornerstone of the constitutional structure, and the Supreme Court has made clear that there are judicially enforceable, federalism-based limits on federal governmental power in a number of cases that were decided after *Garcia v. San Antonio Metro Transit Auth.*, 469 U.S. 528, 552 (1985). *See, e.g.*, *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995); *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 488 U.S. 1041 (1992). I would faithfully apply all of these precedents, and any others that were relevant, in deciding any case that came before me that sought to enforce federalism-based limits on federal governmental power.

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. Morrison*, 529 U.S. 598, 610-611, 613 (2000), and *United States v. Lopez*, 514 U.S. 549 (1995), the Supreme Court invalidated statutes that it held went beyond Congress's commerce power. In doing so, the Court stressed the non-economic nature of the activity that Congress sought to regulate in those cases. The Supreme Court did not hold in either case that Congress's power under the Commerce Clause could never reach non-economic activity. In a concurring opinion in *Gonzalez v. Raich*, 545 U.S. 1 (2005), Justice Scalia reviewed the Supreme Court's precedents in this area, including *Morrison* and *Lopez*. He stated "Congress may regulate even non-economic activity if that regulation is a necessary part of a more general regulation of interstate commerce." Id. at 37 (Scalia, J., concurring). In reviewing any case that might come before me concerning Congress's commerce power, as with any other issue, I would carefully review the precedents of the Supreme Court and of my Circuit. I would faithfully apply them to the particular facts at issue in that case.

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

Response: Any executive order or executive action that is undertaken by the President must be premised on a valid grant of authority, whether constitutional or statutory. *See Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). In making such determinations, it is important to inquire whether the President is acting (1) with express or implied authorization from Congress, (2) on the basis of his independent constitutional powers in the face of congressional silence, or (3) in a manner that is incompatible with the express or implied will of Congress. *Id.* at 635-638. In addition, even if an executive order and executive action is otherwise authorized by statute or the Constitution, it will still be invalid if, for example, it infringes a constitutional limitation on governmental power, such as a provision of the Bill of Rights.

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

Response: The Supreme Court reviewed its prior precedents in this area in *Chavez v. Martinez*, 538 U.S. 706 (2003). It stated that the Court had held that "the Due Process Clause also protects certain 'fundamental liberty interest[s]' from deprivation by the government, regardless of the procedures provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Id.* at 715. The *Chavez* Court further stated that the only "fundamental rights and liberties" qualifying for such protection are those "which are 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty[.]'" *Id.* at 716 (quoting *Washington* v. *Glucksberg*, 521 U.S. 702, 721 (1997)). *Chavez* further stated that *Glucksberg* requires a "'careful description'" of the asserted fundamental liberty interest for the purposes of substantive due process analysis; vague generalities . . . will not suffice. 521 U.S., at 721." If confirmed, I would apply this precedent, and any other applicable Supreme Court and First Circuit precedent, in deciding a properly presented case or controversy, based on the particular facts at issue, that claims protection of a fundamental right for purposes of the substantive due process doctrine.

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

Response: The Supreme Court has subjected a limited set of classifications to heightened scrutiny. For example, in the case of gender discrimination, the Court has held that "intermediate" scrutiny applies. *See, e.g., Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 730-31 (2003), while in the case of race discrimination, the Court has held that "strict" scrutiny applies. *See, e.g., Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). If confirmed, on this issue, as on any issue, I would follow the precedents of the Supreme Court and of the First Circuit.

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 decision in *Grutter v. Bollinger*, 539 U.S. 343 (2003) is binding Supreme Court precedent, and a Circuit judge must apply it faithfully in any case that implicates it. If confirmed, any expectations I might have in this area would not be relevant to my judicial decisionmaking. If any case concerning the constitutionality of such preferences were to come before me as a Circuit judge in a properly presented case or controversy, I would determine their lawfulness by faithfully applying the precedents of the Supreme Court, including its recent decision in *Fisher v. University of Texas*, 570 U.S. __ (2013), and of the First Circuit.