

Questions for the Record
Senator Ted Cruz

André Birotte, Jr.

Nominee: United States District Judge for the Central District of California

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 have not had the opportunity to preside as a trial judge other than in limited jurisdiction small claims matters; as such I do not have a specific judicial philosophy per se. However if I am fortunate enough to be confirmed as a judge, I would strive to know and follow the relevant law and precedent of the Supreme Court and the Ninth Circuit Court of Appeals. I would seek to be impartial and fair in all cases and to all litigants, I would judge each case on its individual merit and I would work hard and seek to be as prepared as possible for every hearing. Finally, I would seek to provide a forum where litigants feel that their matter was given a full and fair hearing with a reasoned and timely ruling. With respect to analogous philosophies, I simply do not have enough personal knowledge of the opinions of the Justices of the Warren, Burger and Rehnquist Courts to be able to determine which of the Justices’ philosophies would be 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: Yes. The Supreme Court has used originalism to interpret the Constitution in certain instances. For example, the Supreme Court looked to the original public meaning of the Second Amendment in *District of Columbia v. Heller*, 554 U.S. 570 (2008). If confirmed, I will faithfully apply the *Heller* decision and all other binding precedent of the United States Supreme Court and the Ninth Circuit Court of Appeals.

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, there are no circumstances under which I would overrule binding 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: If confirmed, I would apply *Garcia* and all other binding precedents of the United States Supreme Court, regardless of whether I agreed or disagreed with them.

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 United States Supreme Court “identified three broad categories of activity that Congress may regulate under its commerce power.” According to *Lopez*, the federal government first “may regulate the use of the channels of interstate commerce,” second, “may regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce,” and third, may “regulate those activities having a substantial relation to interstate commerce.” *Id.* at 558-59. If confirmed, I would follow the binding precedent of the United States Supreme Court and the Ninth Circuit Court of Appeals when addressing questions concerning Congress' Commerce Clause power.

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

Response: The President's authority to issue executive orders and take executive actions is limited by the Constitution and federal statutes. In *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952) the United States Supreme Court held that the President's authority to issue an executive order or take executive action “must stem from either an act of Congress or from the Constitution itself.” If confirmed, I would follow United States Supreme Court and Ninth Circuit Court of Appeals precedent with regard to the scope of executive orders and actions.

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

Response: The United States Supreme Court has held that a right is fundamental for the purposes of the substantive due process doctrine where it is “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) (internal citations and quotations omitted). If confirmed, I would follow United States Supreme Court and Ninth Circuit Court of Appeals precedent regarding whether a right is fundamental for purposes of the substantive due process doctrine.

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

Response: According to United States Supreme Court precedent, a classification should be subjected to heightened scrutiny when it differentiates based on factors such as race, alienage, national origin, gender, or illegitimacy. *See, e.g., City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985). If confirmed, I would follow United States Supreme Court and Ninth Circuit Court of Appeals precedent in deciding issues under the Equal Protection Clause.

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: I do not have a personal expectation regarding the future use of racial preferences in public higher education. If confirmed, I would apply *Grutter v. Bollinger*, 539 U.S. 306 (2003), *Fisher v. University of Texas* 113 S. Ct. 2411 (2013) and any other United States Supreme Court and Ninth Circuit precedent regarding the consideration of racial preferences in public higher education.