

**Response of Raymond T. Chen
Nominee to be United States Circuit Judge for the Federal 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 would be best characterized as an unwavering commitment to the rule of law. Regardless of personal views, a judge is bound by the applicable statutes and precedent, and must apply the law in a consistent, impartial manner. Furthermore, an appellate judge may not remake the record created below or substitute his views for those of the lower tribunal on a fact finding.

I have not sufficiently analyzed the philosophies of the Supreme Court justices who served on these particular Courts to single out any one as analogous to my own conception of a judge's role. At my hearing, I identified Judge Learned Hand as a judicial role model because of his insistence on judicial restraint as well as his contributions to patent 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: When interpreting the Constitution, a court applies the established tools of interpretation set forth by the Supreme Court. In several cases, including *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court has recognized the need to interpret the terms in the Constitution as they were understood at the time of the Constitution's ratification.

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 I am fortunate enough to be confirmed as a Circuit Judge for the Federal Circuit, I would be bound by Supreme Court precedent and could not overrule it. I would also be bound by prior panel and *en banc* decisions of the Federal Circuit, which that court could overrule only when it is sitting *en banc*. Exceptional circumstances may warrant *en banc* review, such as when there are conflicting decisions in the court's precedent, or when there is strong evidence that the court's precedent is based on a misreading of a statute. Also, I would follow any intervening Supreme Court decision that overruled Federal Circuit precedent.

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: In *Garcia v. San Antonio Metro Transit Auth.*, 469 U.S. 528 (1985), the Supreme Court explained that the Constitution and the structure of the Federal government protect the States' sovereign powers. If confirmed, I would follow *Garcia*, as I would any Supreme Court precedent, regardless of my personal views.

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

Response: The Commerce Clause permits Congress to regulate three areas: (1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce; and (3) activities that substantially affect interstate commerce. See, e.g., *Perez v. United States*, 402 U.S. 146, 150 (1971). If called upon to determine whether a statute exceeds Congress's Commerce Clause authority, I would faithfully follow all applicable precedent, including *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000). In both cases, the Supreme Court ruled that Congress lacked the authority to regulate certain types of non-economic activity.

Presidential Power

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

Response: In *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), the Supreme Court held that the President's ability to issue an executive order "must stem either from an act of Congress or from the Constitution itself." *Id.* at 585. Justice Jackson's concurrence provided a framework that courts continue to apply in assessing the validity of an executive order. *Id.* at 635-38. If confirmed, I would follow that precedent and other Supreme Court and Federal Circuit precedent outlining the limits of Presidential power.

Individual Rights

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

Response: The Supreme Court held that the Due Process Clause protects fundamental rights and liberties that are "objectively, '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). Included among those fundamental rights are the right to marry, to have children, to marital privacy, and to bodily integrity. *Id.* at 720.

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

Response: Under the Equal Protection Clause, strict scrutiny applies “when a statute classifies by race, alienage, or national origin.” *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985). The same is true for state laws that infringe personal rights protected by the Constitution. *Id.* Intermediate scrutiny applies to classifications regarding gender and illegitimacy, because such classifications “bear[] no relation to ability to perform or contribute to society.” *Id.* at 441.

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 view or expectation as to whether, within a certain time frame, the use of racial preferences in public higher education will continue to be necessary. If confirmed, and called upon to confront this issue, I would follow *Grutter*, as I would with any binding precedent, regardless of my own views.