

Questions for the Record
Senator Ted Cruz

Gregg Jeffrey Costa
Nominee, Circuit Judge
United States Court of Appeals for the Fifth Circuit

- 1. 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: Etched into the facade of the law school I attended are the words "That they may truly and impartially administer justice." Though intended as a command for all the future lawyers entering the law school, it is a particularly apt description of a judge's duty. "Truly," meaning a judge should faithfully apply precedent and other governing legal authorities to the facts of the case. "Impartially," meaning a judge should follow the law without regard to the wealth or status of the litigants or public reaction to the decision. In terms of Supreme Court Justices, given the variety of issues that they decide, I am unable to select one whose philosophy would most closely mirror mine. I did have the great honor of serving as law clerk to Chief Justice William Rehnquist, from whom I learned a number of important lessons. Perhaps most relevant to the court of appeals position to which I have been nominated, Chief Justice Rehnquist always maintained very good relationships with his colleagues, an accomplishment attributable in large part to his sense of humor and humility.

- 2. 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: A court should consider originalist sources when interpreting a constitutional provision on which precedent has not provided an answer. Evidence concerning original public meaning is typically the most persuasive originalist evidence. See *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008).

- 3. 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 as a court of appeals judge, I would not have the authority to overrule Supreme Court precedent. A court of appeals only has authority to overrule one of its own precedents when sitting as a full court. One of the limited circumstances in which it would be appropriate for an *en banc* court to overrule circuit precedent is when such a ruling is "necessary to secure or maintain uniformity of the court's decisions." See FED. R. APP. 35. Another situation would be when an intervening Supreme Court decision has cast doubt on the circuit precedent.

4. **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 confronted with the issue presented in *Garcia*, I would be bound to follow its holding, as with all Supreme Court precedent. In other cases involving federalism issues, however, the Supreme Court has found limitations on federal power to be judicially enforceable and rejected arguments that political safeguards alone are sufficient. Compare *United States v. Morrison*, 529 U.S. 590, 616 n.7 (rejecting the dissent’s argument that *Garcia* means that the scope of federal power would be “defined solely by the political branches”), with *id.* at 649 (Souter, J., dissenting) (arguing that the “*Garcia* Court’s rejection of ‘judicially created limitations’ in favor of the intended reliance on national politics was all the more powerful . . .”); see also *Printz v. United States*, 521 U.S. 898 (1997) (finding that provisions of the Brady Bill violated state sovereign rights over a dissent which cited *Garcia* for the argument that “the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself”). If a case presenting these issues came before me, I would carefully examine and take into account all relevant Supreme Court decisions.

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

Response: The Supreme Court has emphasized the non-economic nature of the activity being regulated in decisions holding that federal laws exceeded the scope of the Commerce Clause. See *United States v. Morrison*, 529 U.S. 598, 610-11, 613 (2000); *United States v. Lopez*, 514 U.S. 549, 560-61, 566-67 (1995). The Supreme Court has not held, however, that an exercise of the Commerce Clause power could never reach non-economic activity. In his synthesis of the caselaw in this area, Justice Scalia concluded that “Congress may regulate even non-economic activity if that regulation is a necessary part of a more general regulation of interstate commerce.” *Gonzales v. Raich*, 545 U.S. 1, 37 (2005) (Scalia, J., concurring).

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

Response: A President’s ability to issue executive orders or actions “must stem either from an act of Congress or from the Constitution itself.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952). The Supreme Court has adopted the “tripartite scheme” set forth in Justice Jackson’s concurrence in the Steel Seizure Case as the legal framework governing this issue. See *Medellin v. Texas*, 552 U.S. 491, 524 (2008) (quoting *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring)).

7. **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” for purposes of the substantive due process doctrine when it is “deeply rooted in this Nation’s history and tradition . . . and implicit in the concept of ordered liberty.” *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (internal quotations and citations omitted).

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

Response: The Supreme Court has held that classifications that are “so seldom relevant to the achievement of any legitimate state interest,” such as those based on race, are subject to strict scrutiny. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985). Classifications that “frequently bear[] no relation to ability to perform or contribute to society,” such as sex, are subject to intermediate scrutiny. *Id.* at 440-41.

9. 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: Regardless of any personal expectations I may or may not have, I would follow *Grutter* (and other precedent in this area such as *Fisher v. University of Texas*, 570 U.S. __ (2013)) when confronted with an issue concerning the use of racial preferences in public higher education.