

## Written Questions of Senator Ted Cruz

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Nominee, *United States District Judge for the District of Nevada*

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### 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: Judges should faithfully follow the legal precedents of the Supreme Court and the Courts of Appeals. Judges must be fair, must not pre-judge cases or issues, and must treat all parties with respect and dignity. Federal judges must keep in mind that their jurisdiction and their role in government are limited; judges must respect, and not usurp, the roles of the legislative and executive branches. A judge must remember that he is a public servant, and that the courts belong to the citizens. I have not studied the Supreme Court Justices, so I cannot say which Justice's philosophy is 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: In my 25 years of practicing law, I have not been called upon to employ originalism – or any other interpretive method -- to interpret the Constitution. When deciding a case, a district judge should begin by looking for precedents from the Supreme Court or the Courts of Appeals. If no precedent exists and the answer cannot be drawn from analogous cases, the judge should examine the plain language of the Constitution, and try to determine its meaning and how it would apply to the current case by all appropriate means. That may include discerning the original meaning of the language through historical and textual analysis, as demonstrated by the Supreme Court in *Dist. of Columbia v. Heller*, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008) and *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

**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 judge, I would follow the precedents of the Supreme Court and the Court of Appeals.

### 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: As a prospective judge, I do not believe it is appropriate for me to express a personal opinion about any Supreme Court decision. *Garcia* represents a binding precedent of the Supreme Court. If I am confirmed as a judge and *Garcia* remained binding precedent, I would faithfully follow it regardless of whether I agreed with it.

**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 held that Congress' Commerce Clause power extends to non-economic activity, but only in limited circumstances. Justice Scalia summarized the Court's precedents in this area in his concurring opinion in *Gonzales v. Raich*: "Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce." 545 U.S. 1, 37, 125 S. Ct. 2195, 2217, 162 L. Ed. 2d 1 (2005). Justice Scalia further wrote:

As *Lopez* itself states, and the Court affirms today, Congress may regulate noneconomic intrastate activities only where the failure to do so "could ... undercut" its regulation of interstate commerce. [quoting *U.S. v. Lopez*, 514 U.S. 549, 561, 115 S.Ct. 1624 (1995)]

*Lopez* and *Morrison* affirm that Congress may not regulate certain "purely local" activity within the States based solely on the attenuated effect that such activity may have in the interstate market. But those decisions do not declare noneconomic intrastate activities to be categorically beyond the reach of the Federal Government.

545 U.S. at 38-39, 125 S. Ct. at 2218. Because the decisions discussed by Justice Scalia remain binding precedent of the Supreme Court, I would follow them.

### Presidential Power

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

Response: The federal government (including the authority of the President) "is acknowledged by all to be one of enumerated powers." *McCulloch v. Maryland*, 4 Wheat. 316, 405, 4 L.Ed. 579 (1819). "The President's power ... must stem either from an act of Congress or from the Constitution itself." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585, 72 S. Ct. 863, 866, 96 L. Ed. 1153 (1952). Thus, if the President undertakes an action that is not authorized by the Constitution or an act of Congress, and a challenge to that action is properly brought in a case within the court's jurisdiction, then a federal judge must invalidate the action as beyond the President's authority.

## Individual Rights

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

Response: Historically, the Supreme Court has struggled to define which rights are "fundamental" for purposes of substantive due process analysis. Over time the Court has selectively incorporated most of the provisions of the Bill of Rights and applied them to the states under the Fourteenth Amendment. The Court also has recognized some fundamental rights not specifically named in the Constitution, including the right to privacy, the right to make decisions about procreation and contraception, and the right to private education. If called upon to address such an issue as a district judge, I would follow the precedents of the Supreme Court.

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

Response: Pursuant to Supreme Court precedent, classifications are subject to "strict scrutiny" if they categorize on the basis of race, national origin or alienage, or if they infringe upon fundamental rights. An "intermediate level" of scrutiny is used if the law under review categorizes on the basis of gender or illegitimacy. If the Supreme Court has found that additional classifications should be subjected to heightened scrutiny, I would follow those precedents.

### **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: This issue is presently before the Supreme Court, so there may be additional guidance on this topic in the near future. I cannot predict the outcome of that case. If confirmed as a district court judge, I would apply *Grutter* and any other binding Supreme Court decision in this area of law regardless of my expectations.