

Questions for the Record
Senator Ted Cruz

Pamela Harris
Nominee, United States Circuit Judge for the Fourth Circuit

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: The only judicial philosophy that I would bring to the bench if confirmed is that judges should reach decisions through impartial application of law and precedent to the facts before them. Judges have a limited but important role to play in our system of government. They do not make law. They serve the public and advance the rule of law by faithfully applying law and precedent to resolve the concrete disputes before them, based on the particular facts of a case and the briefs and arguments of the parties. If confirmed, I would not expect the substance of my decisions to accord with those of any particular Justice, as I would be applying the precedent of the Supreme Court as a whole. I was privileged to clerk for Justice John Paul Stevens, however, and I would seek to emulate his commitment to precedent, which he understood to reflect the wisdom of judges who had come before him; the degree to which he grounded his opinions in the facts of each case; and the respect and courtesy he showed all parties before him as well as his colleagues and Supreme Court staff.

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: If confirmed as a circuit court judge, I would follow Supreme Court and Fourth Circuit precedent in applying originalist methodologies to constitutional provisions. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), for instance, the Supreme Court relied principally on the text of the Second Amendment as those words would have been understood in ordinary usage at the time of the amendment's adoption. In other cases, the Supreme Court has relied on the historical background of a constitutional provision to better discern its meaning, as reflected in sources like The Federalist Papers, English common law or colonial history. See, e.g., *Printz v. United States*, 521 U.S. 898 (1997); *Crawford v. Washington*, 541 U.S. 36 (2004). I would follow this and other relevant Supreme Court and Fourth Circuit precedent in using originalism in any constitutional 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: If confirmed as a circuit court judge, I would have no authority to overrule Supreme Court precedent, and faithfully would apply such precedent in all circumstances. Nor could I overrule Fourth Circuit precedent while sitting on a panel; such precedent may be reviewed only *en banc* and in the limited circumstances identified by Rule 35(a) of the Federal Rules of Appellate Procedure. Even in such a case, adherence to precedent is so important to the stability

of the law that mere disagreement with a particular decision would not be sufficient grounds for overruling it. In the limited instances where these preconditions for reconsidering a circuit precedent were met, I would follow *stare decisis* principles set out in Supreme Court and Fourth Circuit 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 as a circuit judge, I would be bound to follow *Garcia v. San Antonio Metro Transit Authority*, 469 U.S. 528 (1985), as I would all Supreme Court precedent. In cases decided subsequent to *Garcia*, the Supreme Court has held that the Constitution protects state sovereignty interests through judicially enforceable limits on federal power. See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000); *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 488 U.S. 1041 (1992). I would faithfully apply all relevant Supreme Court and Fourth Circuit precedent in any case seeking to enforce federalism-based limits on the federal government.

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 identified three “categories of activity” that Congress may regulate under the Commerce Clause and Necessary and Proper Clause: “the use of the channels of interstate commerce,” “the instrumentalities of interstate commerce, or persons or things in interstate commerce,” and “those activities that substantially affect interstate commerce.” *United States v. Lopez*, 514 U.S. 549, 558-59 (1995). In *United States v. Lopez* and *United States v. Morrison*, 529 U.S. 598 (2000), the Supreme Court invalidated federal statutes as exceeding Congress’ Commerce Clause authority, and in both cases it emphasized the non-economic nature of the activity in question in holding that it lacked the requisite “substantial effects” on interstate commerce. *Lopez*, 514 U.S. at 560-61, 566-67; *Morrison*, 529 U.S. at 610-11, 613. Neither case held that Congress never could regulate non-economic activity under the Commerce Clause, and in *Gonzales v. Raich*, 545 U.S. 1 (2005), the Supreme Court held that Congress could regulate the local possession and use of marijuana because “failure to regulate that class of activity would undercut” a larger regulatory regime directed at economic activity. See 545 U.S. at 18, 26; *id.* at 37 (Justice Scalia, concurring) (“Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce.”). If confirmed, I would faithfully apply all relevant Supreme Court and Fourth Circuit precedent to the particular facts of any case involving Congress’ power under the Commerce Clause.

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

Response: The Supreme Court has held that the President’s ability to issue executive orders “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). Whether the President has acted within such authority is evaluated by the Supreme Court under the “tripartite scheme” laid out in Justice Jackson’s concurring opinion in the *Youngstown* case. See *Medellin v. Texas*, 552 U.S. 491, 524 (2008) (quoting *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring)). If confirmed, I would faithfully apply all relevant Supreme Court and Fourth Circuit precedent in evaluating the legality of executive orders or actions.

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 if as an “objective[]” matter 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, 720-21 (1997) (internal quotations and citations omitted). In applying that standard, the Supreme Court has required a “careful description” of the asserted fundamental right, and used “[o]ur Nation’s history, legal traditions, and practices” as the “crucial guideposts for responsible decisionmaking.” *Id.* (internal quotations and citations omitted). If confirmed as a circuit judge, I would follow this approach, and all relevant Supreme Court and Fourth Circuit precedent, in any case involving asserted fundamental rights.

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

Response: The Supreme Court has held that a limited set of classifications are subject to heightened scrutiny under the Equal Protection Clause. Classifications that are “so seldom relevant to the achievement of any legitimate state interest” that they are deemed to reflect impermissible discrimination, 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 those based on gender, are subject to intermediate scrutiny. *Id.* (quoting *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973)). If confirmed, I would follow Supreme Court and Fourth Circuit precedent regarding application of heightened scrutiny 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: In *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003), the Supreme Court stated its expectation that twenty-five years from the time of its decision, racial preferences would no longer be necessary in public higher education. If confirmed, I would apply that precedent, along with *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013), and any other relevant Supreme Court or Fourth Circuit precedent in evaluating the constitutionality of such preferences. As in any case I heard as a judge, I would follow that precedent and apply it to the specific facts before me without regard to any personal expectations I might or might not have.