Written Questions of Senator Ted Cruz
Ketanji Jackson
Nominee, United States District Judge for the District of Columbia
U.S. Senate Committee on the Judiciary
January 25, 2013

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: If confirmed as a district court judge, my judicial philosophy would be to approach each case with professional integrity, meaning strict adherence to the rule of law and application of the law to the facts in a straightforward and transparent manner, without any bias or preconceived notion of how the matter is going to be resolved. The role of a Supreme Court Justice is different than that of a district court judge in that it often extends to the development of broader legal principles to guide the lower courts, and Justices sometimes develop substantive judicial philosophies to guide them in this task. Given the very different functions of a trial court judge and a Supreme Court Justice, I am not able to draw an analogy between any particular Justice's judicial philosophy and the approach that I would employ as a district court judge.

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: I believe that district court judges should interpret the Constitution in a manner that is wholly consistent with Supreme Court precedent. I am aware that the Supreme Court has employed originalism when interpreting various constitutional provisions. *See, e.g., U.S. v. Jones*, 132 S. Ct. 945, 949 (2012) (Fourth Amendment); *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 906 (2010) (First Amendment); *District of Columbia v. Heller*, 554 U.S. 570, 576-600 (2008) (Second Amendment); *Crawford v. Washington*, 541 U.S. 36, 42-57 (2004) (Confrontation Clause); *Alden v. Maine*, 527 U.S. 706, 715-724 (1999) (Eleventh Amendment). Moreover, while the Court has primarily evaluated the original public meaning of the text of the constitutional provision at issue, *see Jones*, 132 S. Ct. at 949, 953; *Heller*, 554 U.S. at 576-77, Supreme Court cases also sometimes refer to the original intent of the Framers, *see Crawford*, 541 U.S. at 53-54, 59, 61. If confirmed as a district court judge, I would follow the analysis of binding Supreme Court precedents when applicable to the cases before me, and I would apply those precedents without regard to any personal view of how the Constitution should be interpreted.

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: District court judges must strictly apply precedents and cannot overrule them under any circumstances.

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*, the Supreme Court assessed whether Congress's application of federal wage and hour protections to municipal employees pursuant to the Fair Labor Standards Act contravened any constitutional limit on federal power. I do not believe that it is appropriate for me to express any personal view of the *Garcia* case or the policy matter that the quoted statement addresses. If confirmed as a district court judge, I would strictly adhere to the binding precedents of the Supreme Court in this area, including cases in which the Court has interpreted the Tenth Amendment as a limit on Congress's power for the protection of state sovereign interests. *See, e.g., Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992).

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 not categorically excluded non-economic activity from Congress's reach under the Commerce Clause, in conjunction with its Necessary and Proper Clause power. *See United States v. Morrison*, 529 U.S. 598, 613 (2000); *see also Gonzales v. Raich*, 545 U.S. 1, 37 (2005) (Scalia, J., concurring) ("Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce."). Nevertheless, the Court has thus far generally "upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." *Morrison*, 529 U.S. at 613; *see also United States v. Lopez*, 514 U.S. 549, 561 (1995). In this regard, the Court has held that the Commerce Clause authorizes the regulation of only three categories of activity: (1) "the use of the channels of interstate commerce," (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce" and activities that threaten such instrumentalities, persons or things, and (3) activities that "substantially affect interstate commerce." *United States v. Lopez*, 514 U.S. at 558-59 (1995). This is binding precedent, and if confirmed as a district court judge, I would strictly adhere to it as applicable to any case before me without regard to any personal opinion about the scope of Congress' power under the Commerce Clause.

Presidential Power

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

Response: The Supreme Court has addressed the scope of the President's power to issue executive orders or undertake executive actions, with and without congressional authorization. *See Youngstown Sheet & Tube Co. v, Sawyer*, 343 U.S. 579 (1952); *see also Medellin v. Texas*, 552 U.S. 491 (2008); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Dames & Moore v. Regan*, 453

U.S. 654 (1981). Broadly speaking, "[t]he President's authority to act, as with any exercise of governmental power, 'must stem either from an act of Congress or from the Constitution itself.'" *Medellin*, 552 U.S. at 524 (citation omitted). The judicially enforceable limits on the President's ability to act thus include circumstances in which the President acts without express constitutional or statutory authority, or when the executive action impermissibly interferes with the functions that the Constitution assigns to another branch of government, or when the executive action otherwise violates a constitutional or statutory provision.

Individual Rights

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

Response: The Supreme Court has generally defined fundamental rights protected by substantive due process as those liberties that are "deeply rooted in this Nation's history and traditions," *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977), and among the "fundamental" rights that the Supreme Court has recognized are the rights of family autonomy, custody, travel, access to courts, and voting. District courts should interpret the Constitution in a manner that is wholly consistent with Supreme Court precedents, and if confirmed, I would follow Supreme Court precedent with respect to the evaluation of rights for the purpose of any substantive due process case, as I would with any other Supreme Court case.

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

Response: The Supreme Court has established that certain classifications—primarily distinctions that the government makes based on suspect classifications such as race, national origin, and gender, or classifications that significantly burden a fundamental right—are subject to a heightened level of scrutiny under the Equal Protection Clause. *See City of Clyburne, Tex v. Cleburne Living Ctr.*, 473 U.S. 432, 440-42 (1985); *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978). District courts should interpret the Constitution in a manner that is entirely consistent with Supreme Court precedents, and if confirmed, I would follow Supreme Court precedent with respect to the evaluation of classifications and tiers of scrutiny for the purpose of the Equal Protection Clause, as I would with any other Supreme Court case.

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*, the Supreme Court emphasized that "race-conscious admissions policies must be limited in time," 539 U.S. at 342, and it posited that the law school involved in that case likely would be able to achieve its interest in a diverse student body, without employing such policies, in the relatively near future. I have no particular insight into the future need for, or ramifications of, the continued use of race in admissions. I am aware that the Supreme Court is currently revisiting the issue of the constitutionality of race-conscious admissions policies in public higher education, and if confirmed as a district court judge, I would apply any binding precedent in this area of the law.