

Senator Cruz
Questions for the Record

Mark A. Kearney,
Nominee, United States District Judge for the Eastern District of Pennsylvania

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: If confirmed as a District Court Judge, I would work to be fully prepared and scrupulously fair with each party always mindful of the crucial responsibility in this public service. Judicial philosophy requires strict adherence to precedent to ensure consistency. Judges must decide only the issues presented to avoid confusion through dicta on immaterial issues. I am committed to ensuring consistency and predictability based upon precedent of the United States Supreme Court and the United States Court of Appeals for the Third Circuit. I am not familiar enough with the judicial philosophies of Justices to identify a philosophy similar to one which I hope to apply, although I expect that each Justice worked hard to be fair and impartial.

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 District Court Judge, I would strictly follow the cases from the Supreme Court and the Third Circuit which have examined the original public meaning of Constitutional provisions, including *District of Columbia v. Heller*, 554 U.S. 570 (2008).

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 District Court Judge, I would be bound by the precedent of the United States Supreme Court and the Third Circuit and would not overrule any such 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: Consistent with my strict adherence to United States Supreme Court precedent, I will follow the Supreme Court’s decision in *Garcia* and all holdings from the Supreme Court and the United States Court of Appeals for the Third Circuit regardless of any 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: Analysis of Congress’ Commerce Clause power, in accord with the holdings of the United States Supreme Court and the United States Court of Appeals for the Third Circuit,

focuses on economic activity, permitting regulation of the use of the channels of interstate commerce, instrumentalities of interstate commerce and activities in substantial relation to interstate commerce. For example, in *United States v. Lopez*, 514 U.S. 549 (1995), the Supreme Court invalidated a statute identifying the carrying of fire arms in a school zone as a federal offense, and detailing the three broad categories of activity that Congress may regulate under the Commerce Clause. *See also*, *United States v. Kukafka*, 478 F.3d 531 (3d Cir. 2007) and *United States v. Whited*, 311 F.3d 259 (3d Cir. 2002).

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

Response: A District Court Judge must closely scrutinize the executive orders or executive actions of a President to ensure, consistent with Supreme Court precedent, that such conduct stems either from an act of Congress or from the Constitution itself. In *Medellin v. Texas*, 552 U.S. 491, 524 (2008), the United States Supreme Court adopted the "tripartite" scheme detailed in Justice Jackson's concurrence in *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952) to distinguish the levels of scrutiny applied to a President's executive orders and actions. If I am confirmed as a District Court Judge, I would closely scrutinize the actions taken and the facts presented, and faithfully apply the precedent of the Supreme Court and the United States Court of Appeals for the Third Circuit.

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

Response: If confirmed as a District Court Judge, I would faithfully apply the precedent of the United States Supreme Court and the United States Court of Appeals for the Third Circuit defining a right as fundamental for purposes of the substantive due process doctrine when it is "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) (internal quotations omitted). The Supreme Court requires judges to carefully understand "the asserted fundamental liberty interest". *Id.* at 721. I would strictly follow the Third Circuit holdings including in *McCurdy v. Dodd*, 352 F.3d 820 (3d Cir. 2003), to ensure that the fundamental guarantees of the due process doctrine are extended only as consistent with the precedent of the Supreme Court in *Glucksberg*.

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

Response: If confirmed as a District Court Judge, I would strictly adhere to the precedent of the United States Supreme Court and United States Court of Appeals for the Third Circuit in applying the two tiers of review above the rational basis review for Equal Protection Clause analysis. Specifically, the Supreme Court and United States Court of Appeals for the Third Circuit define an intermediate scrutiny for classifications such as gender that generally provide no sensible ground for differential treatment and a more strict scrutiny for classifications such as race, alienage and national origin that are "so seldom relevant to the achievement of any

legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy”. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440-41 (1985).

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: If confirmed as a District Court Judge, personal expectations or predictions, if any, would have no role in my strict application of the binding precedent of the United States Supreme Court and United States Court of Appeals for the Third Circuit.