

Questions for the Record
Senator Ted Cruz

Responses of Cheryl Ann Krause
Nominee, United States Circuit Judge for the Third 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: My judicial philosophy, if I am fortunate enough to be confirmed, would involve approaching each case fairly, impartially, with an open mind and without preconceived notions as to the parties or the outcome. I would adhere to principles of judicial restraint, with deference to the limited powers of an Article III judge and the distinct roles of the elected representatives of the people under Articles I and II. I would carefully and thoroughly analyze the threshold issue of justiciability and the text of any law at issue, the arguments of the parties, the opinion below, the record, and applicable precedent, and I would faithfully apply the law to the facts of the particular case before me. I am not sufficiently familiar with the full body of opinions of any single justice to identify one whose philosophy is most analogous with mine. However, I admire the Honorable Anthony M. Kennedy of the United States Supreme Court, for whom I had the privilege to clerk, for his love of learning, his deep knowledge of history and constitutional law, his vigorous work ethic, his collegiality, and the dignity and humility with which he conducts himself.

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 interpreting the Constitution, if I have the honor of serving as an appellate judge, I would look to its text and to original sources, such as the Federalist Papers, consistent with the guidance of the Supreme Court in cases like *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *Crawford v. Washington*, 541 U.S. 36 (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 I am confirmed to serve on the Court of Appeals, I would be bound by the precedent of the Supreme Court and would have no authority to overturn precedent within the circuit unless the court were sitting *en banc*, pursuant to Rule 35 of the Federal Rules of Appellate Procedure, since a panel is bound by the decisions of prior panels within the circuit. Under Rule 35, *en banc* review is only appropriate when there is a conflict between two panel decisions or with a decision of the Supreme Court, or where there is an issue of "exceptional importance." Even when these criteria are satisfied, principles of *stare decisis* still require careful consideration of whether to do so with consideration for the criteria described by the Supreme Court in *Montejo v. Louisiana*, 556 U.S. 778, 792-93 (2009), and by the Third Circuit in *Al-Sharif v. United States Citizenship & Immigration Services*, 734 F.3d 207, 212 (2013) (*en*

banc), including the workability of the precedent, its antiquity, the extent of reliance interests, and the soundness of its reasoning.

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: This quotation from *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), reflects binding Supreme Court precedent and, if confirmed, I would follow that precedent and subsequent precedent concerning state sovereign interests and judicially enforceable limitations on federal power, including in *Printz v. United States*, 521 U.S. 898 (1997), and *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’s recent case law on the scope of Congress’s Commerce Clause power has focused on economic activity and identified as permissible categories of regulation the use of the channels of interstate commerce, instrumentalities of interstate commerce, and activities with a substantial relation to interstate commerce. The Court noted in striking down the statutes at issue in *United States v. Morrison*, 529 U.S. 598 (2000), and *United States v. Lopez*, 514 U.S. 549 (1995), the absence of a nexus to economic activity. However, Justice Scalia has observed that Congress’s power under the Commerce Clause may extend to regulation of 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 in the judgment). If confirmed and confronted with this issue in a justiciable case or controversy, I would carefully consider the relevant Supreme Court and Third Circuit precedent, including intervening cases that might provide guidance, and the particular facts and circumstances presented in applying the law to the facts of the case before me.

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

Response: In *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), the Court held that the President’s power to issue executive orders or executive actions must emanate from the Constitution itself or from authorization provided by Congress. *See id.* at 585. Justice Jackson’s concurrence in that case provides the tripartite scheme commonly used by the Supreme Court and appellate courts for evaluating the legitimacy of the executive action at issue, depending on how closely it is tied to Congressional authorization. *See id.* at 635. If confirmed and presented with this question in a pending case, I would analyze the particular Presidential action at issue and apply relevant Supreme Court and Third Circuit precedent to the record before me to analyze whether the action was properly authorized by the Constitution or by Congress.

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

Response: The Supreme Court has held a right is “fundamental” for purposes of the Due Process Clause 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) (citations and internal quotation marks omitted). The Court has also required a “careful description of the asserted fundamental liberty interest.” *Id.* at 721 (citations and internal quotation marks omitted). If I have the privilege of serving as an appellate judge, I would adhere to Supreme Court precedent and any relevant precedent of the Third Circuit in addressing substantive due process issues.

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

Response: The Supreme Court has identified two tiers of review above rational basis review for Equal Protection Clause analysis: intermediate scrutiny for classifications like gender that “frequently bear[] no relation to ability to perform or contribute to society” and therefore “generally provide[] no sensible ground for differential treatment,” and strict scrutiny for classifications like 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 Ctr.*, 473 U.S. 432, 440-41 (1985) (internal quotation marks omitted). If confirmed, I would adhere to Supreme Court and Third Circuit precedent in determining the tier of scrutiny appropriate to the facts and circumstances of any particular case that comes before me.

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: Justice O’Connor, in her majority opinion in *Grutter*, anticipated that the use of racial preferences would no longer be necessary in higher education 25 years from that decision. If confirmed and confronted with a case or controversy raising this issue, I would be bound by the Supreme Court’s decision in *Grutter*, as in all cases, including any intervening guidance issued by the Court.