

**Response of Landya B. McCafferty
Nominee, U.S. District Judge for the District of New Hampshire,
to the Written Questions of Senator Ted Cruz**

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: I approach my cases from the "bottom-up" rather than from the "top-down." That is, I do not approach cases with a fixed ideology or set of beliefs. Rather, I start with the facts and get a detailed understanding of the dispute and the parties before me. After I have a detailed understanding of the facts, I move to the governing law: any constitutional provisions, statutes, regulations, and/or case law. After I have an understanding of the applicable law, I apply the law to the facts of the case fairly and impartially. Once I reach a decision, I communicate my decision to the parties in an accessible and understandable manner. It is my goal in every case that the litigants walk away from my courtroom, whether they have won or lost, with confidence that I listened carefully and gave fair consideration to their arguments.

I am unaware of whether my philosophy is analogous to any justice of the Warren, Burger, or Rehnquist Courts, but expect that virtually all justices would agree that my approach is appropriate for 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: The Supreme Court recently employed original meaning originalism to interpret the Constitution in *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) and *District of Columbia v. Heller*, 554 U.S. 570 (2008). If confirmed as a district court judge, I will follow the precedents of the Supreme Court and the Court of Appeals for the First Circuit with respect to the form of originalism to employ in interpreting the Constitution.

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 duty-bound to apply the precedents of the Supreme Court and the Court of Appeals for the First Circuit; I could not (and would not attempt to) overrule them.

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, I would follow *Garcia*, as I would any Supreme Court precedent, regardless of my personal views, if any.

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 in at least two cases, *United States v. Morrison*, 529 U.S. 598 (2000) and *United States v. Lopez*, 514 U.S. 549 (1995), that Congress lacked the authority under the Commerce Clause to regulate certain types of non-economic activity. I would abide by these precedents, and any other precedents of the Supreme Court and the Court of Appeals for the First Circuit, in construing the scope of Congress’s authority under the Commerce Clause.

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

Response: The judicially enforceable limits on the president’s ability to issue executive orders or to take executive actions can be found in the Supreme Court’s decision in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), specifically in Justice Jackson’s concurring opinion. In short, the President’s ability to issue an executive order “must stem either from an act of Congress or from the Constitution itself.” *Id.* at 585. If confirmed, I would apply the three-part *Youngstown* framework, and any other precedents of the Supreme Court and the Circuit Court of Appeals, to determine the scope of executive authority.

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

Response: The Supreme Court has held that rights are “fundamental” for purposes of the substantive due process doctrine where they are “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 citations and quotations omitted). If confirmed as a district court judge, I would apply the precedents of the Supreme Court and the Court of Appeals for the First Circuit regarding whether a right is “fundamental” for purposes of the substantive due process doctrine.

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

Response: The Supreme Court has held that a classification based on race, alienage, national origin or gender should receive heightened scrutiny under the Equal Protection Clause. *See, e.g., City of Cleburne v. Cleburne Living Ctr*, 473 U.S. 432, 440 (1985). If confirmed as a district court judge, I would apply the precedents of the Supreme Court and the Court of Appeals for the First Circuit regarding whether a classification should be subjected to 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: If confirmed as a district court judge, I will be bound by the rulings of the Supreme Court and the Court of Appeals for the First Circuit regardless of my personal views or expectations concerning the use of racial preferences in public education.