

**Senator Cruz**  
**Questions for the Record**

**Travis Randall McDonough**  
**Nominee, U.S. District Judge for the Eastern District of Tennessee**

**Judicial Philosophy**

**1. Describe how you would characterize your judicial philosophy.**

Response: If confirmed, I will strive to ground my judicial philosophy in humility. Humility ensures a judge will subjugate his own preferences to controlling precedent and the rule of law, will never assume that he or she is capable of doing the job without hard work and preparation, will not prejudice the merits of a case before careful consideration of admissible facts and precedent, and will conduct courtroom proceedings in a manner that promotes efficiency and confidence in our justice system and the rule of law. A judge should be humble, decisive, fair, impartial, always prepared, and mindful of the importance of efficiency to the litigants and attorneys who appear before the court.

**2. How does a responsible judge interpret constitutional provisions, such as due process or equal protection, without imparting his own values to these provisions?**

Response: I have been a member of the bar and a litigator for nearly two decades, and I understand firsthand the critical importance of an impartial judge who applies governing precedent and the text of the law without regard for his or her political ideology. A judge who grounds decisions in personal political preferences rather than the law commits a breach of the obligations of judicial office. I have a great deal of respect for our federal system of justice and understand that, for that system to continue to work and for the citizens to continue to have confidence in that system, I must, if confirmed, make decisions that are based solely on the facts and governing law, consistent with precedent of the Supreme Court of the United States ("Supreme Court") and the United States Court of Appeals for the Sixth Circuit ("Sixth Circuit"). Judges who share these values are able to put the rule of law before their own preferences.

**3. With the assumption that you will apply all the law announced by the Supreme Court, please name a Warren Court, Burger Court, and Rehnquist Court precedent that you believe was wrongly decided—but would nevertheless faithfully apply as a lower court judge. Why do you believe these precedents were wrongly decided?**

Response: Respectfully, as a litigator, I did not focus primarily on whether precedent was rightly or wrongly decided. Instead, I sought precedent on which I could build my advocacy for my clients' interests and argued against precedent that was contrary to my clients' interests. If confirmed, as a judge, I expect to have no interest in pointing out my own views of the soundness of the Supreme Court's decisions, unless such an approach is necessary in order to decide the matter before me. Finally, as a judicial nominee, I do not believe it would be appropriate for me to offer criticism of precedent that I might later be obligated to apply without regard for my personal views.

**4. Which sitting Supreme Court Justice do you most want to emulate?**

Response: Given the traditions by which Supreme Court conducts business, I have no significant knowledge of the justices' professional habits. In general, however, I have a great deal of respect for any person of such talent who forgoes the opportunity to enrich himself or herself in favor of public service. I hope to emulate this quality, as well as the justices' devotion to the rule of law and our federal system of justice.

**5. 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, other)?**

Response: The Supreme Court has held in District of Columbia v. Heller that, in interpreting the Constitution, a court should consider the original meaning that "citizens in the founding generation" would have attributed to its text. 554 U.S. 570, 576-77 (2008). If confirmed, I will faithfully apply this precedent as well as other Supreme Court and Sixth Circuit precedent prescribing how the text of the Constitution is to be appropriately interpreted.

**6. What role, if any, should the constitutional rulings and doctrines of foreign courts and international tribunals play in the interpretation of our Constitution and laws?**

Response: A district court should not rely on the constitutional rulings and doctrines of foreign courts and international tribunals. Instead, it should rely on binding precedent handed down by the Supreme Court and the corresponding United States Court of Appeals.

**7. What are your views about the role of federal courts in administering institutions such as prisons, hospitals, and schools?**

Response: In general, federal courts are not ideally equipped to administer such institutions and should not do so unless such administration is required by binding precedent. If confirmed, I will follow such precedent but will not decide such issues unless it is necessary to resolve the dispute before the court.

**8. What are your views on the theory of a living Constitution, and is there any conflict between the theory of a living Constitution and the doctrine of judicial restraint?**

Response: My general understanding is that the theory of a living Constitution espouses that the Constitution evolves over time, depending on the changing and prevailing values of society over time. Adherence to such a theory is problematic, because it encourages judges to inject their personal beliefs into decision-making and increases the likelihood that courts will not ground their decisions in the text of the Constitution, which was intended to capture and to preserve the country's core, immutable principles. The doctrine of judicial restraint generally requires that courts resolve only those issues properly before the court. Adherence to this doctrine makes it less likely that judges will have an opportunity to inject their personal beliefs into decision-making.

**9. What is your favorite Supreme Court decision in the past 10 years, and why?**

Response: I do not have a favorite Supreme Court decision from the past 10 years.

- 10. Please name a Supreme Court case decided in the past 10 years that you would characterize as an example of judicial activism.**

Response: In order to make such an assessment, I would have to study the full record of the case in order to have a complete understanding of the facts and issues before the Supreme Court. I have not had the opportunity to do so and, respectfully, do not believe it would be proper to speculate about the appropriateness of any Supreme Court decision under these circumstances.

- 11. What is your definition of natural law, and do you believe there is any room for using natural law in interpreting the Constitution or statutes?**

Response: Although I am not a scholar of philosophy, it is my understanding that natural law is a philosophical concept that attempts to explain the universal social contract governing the conduct and rights of people in their relationships with one another and with society at large. In interpreting the Constitution or statutes, I would rely on their text and binding precedent of the Supreme Court and Sixth Circuit rather than an understanding of natural law.

### **Congressional Power**

- 12. 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 district court judge, I would be obligated to apply the binding precedent of the Sixth Circuit and the Supreme Court, including Garcia, whether or not I personally agree with such precedent.

- 13. Do you believe that Congress’ Commerce Clause power, in conjunction with its Necessary and Proper Clause power, extends to non-economic activity?**

Response: In United States v. Lopez, the Supreme Court observed that Congress may regulate three broad areas of activity under the authority of the Commerce Clause: (1) “the use of the channels of interstate commerce”; (2) “instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities”; and (3) “those activities having a substantial relation to interstate commerce.” 514 U.S. 549, 558-59 (1995). More specifically, in a concurring opinion in Gonzales v. Raich, Justice Scalia has observed that “Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce.” 545 U.S. 1, 37 (2005). If confirmed, I would be obligated to apply binding precedent of the Sixth Circuit and the Supreme Court in my consideration of issues concerning the Commerce Clause and the Necessary and Proper Clause.

- 14. What limits, if any, does the Constitution place on Congress’s ability to**

### **condition the receipt and use by states of federal funds?**

Response: The Supreme Court has observed that Congress may not use the authority granted by the Spending Clause to “undermine the status of the States as independent sovereigns in our federal system.” National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566, 2602 (2012). Consistent with the text of the Constitution, the Supreme Court has held: (1) that the Spending Clause power may only be used in pursuit of the general welfare, with Congress’s judgment being afforded substantial deference in this inquiry; (2) that Congress may not condition the use of federal funds unless it does so unambiguously in order to allow states to make a knowing choice of whether to accept the conditional funding; (3) any condition imposed on the receipt by states of federal funds should be germane to the federal interest in national programs; and (4) the condition imposed may not be contrary to other provisions of the Constitution. South Dakota v. Dole, 483 U.S. 203, 207-08 (1987). If confirmed, I will faithfully apply this and other binding precedent to disputes involving the Spending Clause.

#### **15. Is Chief Justice Roberts’ decision in *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012), on the Commerce Clause and Necessary and Proper Clause binding precedent?**

Response: Courts have disagreed on this point since the NFIB v. Sebelius opinion, and the Sixth Circuit has not ruled on this issue. The Supreme Court has described the precedential effect of opinions not joined by a majority of the justices in Marks v. United States, 430 U.S. 188 (1977), and, if confirmed, I would follow this guidance.

### **Presidential Power**

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

Response: Presidential actions must be based on authority granted by the Constitution or by an act of Congress. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952). If confirmed, I will apply Youngstown and other binding precedents of the Supreme Court and the Sixth Circuit to questions concerning the limits of executive power.

#### **17. Does the President possess any unenumerated powers under the Constitution, and why or why not?**

Response: Please see my response to Question 16.

### **Individual Rights**

#### **18. 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 if it is “deeply rooted” in the tradition and history of our country and “implicit in the concept of ordered liberty” such that, in its absence, there would be neither liberty nor justice. Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997).

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

Response: When considering Equal Protection Clause claims, the Supreme Court has held that classifications that burden a fundamental right or that are based on race, alienage, national origin, gender, or illegitimacy are subject to heightened scrutiny. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985).

**20. 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: Although I have no personal opinion on whether such preferences will be “necessary” in the future, if confirmed, I will faithfully apply binding precedent handed down by the Supreme Court and the Sixth Circuit on this issue, including Grutter v. Bollinger.

**21. To what extent does the Equal Protection Clause tolerate public policies that apportion benefits or assistance on the basis of race?**

Response: Such policies are subjected to strict scrutiny, according to Supreme Court precedent. Fisher v. University of Texas at Austin, 133 S. Ct. 2411, 2419 (2013). Therefore, policies based on race must be narrowly tailored to fulfill a compelling government interest in order to survive judicial review.

**22. Does the Second Amendment guarantee an individual right to keep and bear arms for self-defense, both in the home and in public?**

Response: Some Circuit Courts of Appeal have determined that the Second Amendment protections do extend beyond the home, and the Sixth Circuit has held that courts must apply strict scrutiny to the enumerated protection found in the Second Amendment. The Second Amendment protects a person’s right to have a firearm “in case of confrontation,” including self-defense in the person’s home. District of Columbia v. Heller, 554 U.S. 570, 592 (2008). The Supreme Court has observed that this Second-Amendment protection is “not unlimited.” Heller at 595. The Supreme Court has not decided whether the Second Amendment protects the right to possess a gun in public, but the Sixth Circuit has granted an en banc hearing in a related case. Tyler v. Hillsdale County Sheriff’s Dept., 775 F.3d 308 (2014). If confirmed, I would apply these precedents to the consideration of the constitutionality of restrictions on the right to keep and bear arms.