

**Questions for Judicial Nominees
Senator Ted Cruz**

**Responses of Carolyn B. McHugh
Nominee, United States Circuit Court for the Tenth Circuit**

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: My judicial philosophy is to exercise my judgment fairly and impartially in applying the law to the facts of the case or controversy before me, and to avoid imposing my will on the outcome by applying not what the law is, but what I want it to be. I believe that Justice John Marshall Harlan II implemented this philosophy during his tenure on the United States Supreme Court.

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: When the text itself is not sufficient to resolve an issue of constitutional interpretation, the United States Supreme Court has examined the original public meaning of the provision. See *United States v. Jones*, 132 S.Ct. 945, 949-50 (2012) (examining original public meaning and determining that the Fourth Amendment to the United States Constitution protects against physical trespass by public officials); *District of Columbia v. Heller*, 554 U.S. 570, 581-92 (2008) (examining original public meaning and determining that the Second Amendment to the United States Constitution confers an individual right to bear arms); *Crawford v. Washington*, 541 U.S. 36, 42-57 (2004) (examining original public meaning and determining that the Sixth Amendment to the United States Constitution affords a criminal defendant the right to cross examine the government's testimonial witnesses). If confirmed, I will follow this precedent.

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, I will be bound by the decisions of the United States Supreme Court and of the Tenth Circuit. Decisions of a prior panel of the Tenth Circuit may be overruled only by the court sitting *en banc* or if the prior decision has been superseded by a decision of the United States Supreme Court. *En banc* consideration of matters is disfavored and should be permitted only in situations of exceptional importance in order "to secure or maintain uniformity of the court's decisions" or "to address a question of exceptional importance." See Fed. R. App. P. 35; U.S.Ct. of App. 10th Cir. R. 35.1. I will follow these rules if confirmed.

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: If confirmed, I will be bound by the Supreme Court's decision in *Garcia* and any subsequent decisions clarifying or modifying its holding. The Tenth Amendment to the United States Constitution reserves to the states all rights that are not expressly granted to the federal government. The Constitution also provides a secondary safeguard by assigning the judicial branch the responsibility to invalidate federal laws if Congress exceeds the limits of its delegated powers and improperly encroaches on states' rights. See *Printz v. United States*, 521 U.S. 898 (1997) (invalidating Brady Handgun Violence Prevention Act's requirement that the "chief law enforcement officer" of each local jurisdiction conduct background checks on prospective handgun purchasers as infringing upon state sovereignty in violation of the Tenth Amendment); *New York v. United States*, 505 U.S. 144 (1992) (invalidating Low-Level Radioactive Waste Policy Act's "take title" provision, requiring states to accept ownership of interstate waste or regulate according to instructions of Congress, as infringing upon state sovereignty in violation of the Tenth Amendment).

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

Response: The United State Supreme Court has held that the Commerce Clause and Necessary and Proper Clause allow Congress to regulate (1) "the use of the channels of interstate commerce," (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce," and (3) "those activities having a substantial relation to" or that "substantially affect" interstate commerce. *United States v. Lopez*, 514 U.S. 549, 558-59 (1995) (holding that Congress exceeded its Commerce Clause power by criminalizing the possession of firearms in a school zone because such conduct was not an economic activity substantially affecting interstate commerce). In *United States v. Morrison*, 529 U.S. 598 (2005), the Supreme Court emphasized the non-economic nature of the activity in holding that the Commerce Clause did not provide Congress with authority to enact the civil remedy provisions of the Violence Against Women Act. See *id.* at 609-19. If confirmed, I will follow these precedents.

Presidential Power

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

Response: In *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 585-87 (1952), the United States Supreme Court explained that "The President's power, if any, to issue [an executive] order must stem either from an act of Congress or from the Constitution itself." Justice Jackson's concurring opinion in *Youngstown* sets forth a three-part analytical framework which remains the

touchstone for determining the constitutionality of executive action or executive orders. *See id.* at 635 (Jackson, J., concurring). *See also Medellin v. Texas*, 552 U.S. 491, 523-29 (2008) (applying “Justice Jackson’s familiar tripartite scheme” from *Youngstown* and holding that President did not have authority to transform terms of non-self-executing treaty into domestic law); *Dames & Moore v. Regan*, 453 U.S. 654, 668-69, 678 (1981) (applying Justice Jackson’s tripartite scheme from *Youngstown* and upholding executive action nullifying attachments, transferring Iranian assets, and suspending claims in American courts). If confirmed, I will follow these precedents.

Individual Rights

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

Response: In *Washington v. Glucksberg*, 521 U.S. 702 (1997), the United States Supreme Court held that the Due Process Clause protects substantive rights and liberties which are “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.” *Glucksberg*, 521 U.S. at 720-21 (internal quotation marks omitted). The fundamental substantive rights protected by the Due Process Clause include the “right[] to marry,” the right “to have children,” the right “to direct the education and upbringing of one’s children,” the right “to marital privacy,” the right “to use contraception,” the right “to bodily integrity,” and the right “to abortion.” *Id.* at 720. The Supreme Court has “always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended.” *Id.* (internal quotation marks omitted). If confirmed, I will follow this precedent.

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

Response: The United States Supreme Court has identified three levels of scrutiny for assessing the constitutionality of legislation challenged under the Equal Protection Clause: strict scrutiny; intermediate scrutiny; and the rational basis standard. *See City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 439-41 (1985). “The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.” *Id.* at 440. However, classifications based on race or ethnic background must meet strict scrutiny. *See Fisher v. University of Texas*, 133 S.Ct. 2411, 2417 (2013) (remanding for reconsideration of constitutionality of university’s consideration of race in admission decisions under strict scrutiny standard). Strict scrutiny is also appropriate when the legislation “impinge[s] on personal rights protected by the Constitution.” *Cleburne*, 473 U.S. at 440. An intermediate level of heightened scrutiny is imposed for classifications based on gender or illegitimacy. *Id.* at 441. If confirmed, I will follow this precedent.

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: I do not have a personal opinion on this issue. If confirmed, I will follow the Supreme Court's precedent in *Grutter*, including its application of strict scrutiny analysis to all racial classifications imposed by government. *See Grutter v. Bollinger*, 539 U.S. 306, 326 (2003). *See also Fisher v. University of Texas*, 133 S.Ct. 2411, 2417 (2013) (remanding for reconsideration of challenge to university's use of racial classifications in admission decisions under strict scrutiny and instructing that, "The reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity.").