

Questions for the Record
Senator Ted Cruz

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Nominee, United States District Court for the District of Columbia

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 do not identify with the judicial philosophy of any particular Supreme Court Justice, past or present. I possess the abiding belief that judges should come to each case with an open mind, set aside their personal views, and decide the matters before them based solely on the controlling law as applied to the facts. If I were to be confirmed, I would devote myself to implementing that belief in every matter that comes before me.

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: To interpret the Constitution, the Supreme Court has looked to founding-era documents and how the public at the time understood the terms contained in those documents. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570 (2008). If confirmed, I would follow that and all other binding precedent in matters that call upon me to interpret 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 not possess the authority to, nor would I, overrule precedent under any circumstance.

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, and if presented with a matter that required me to consider the limitations on federal power in relation to state sovereign interests, I would follow the binding decision in *Garcia*, as well as any other relevant Supreme Court and D.C. Circuit precedent, such as *New York v. United States*, 505 U.S. 144, 157 (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 has stated that a critical factor in determining the limits of Congress’ Commerce Clause power is whether the activity sought to be regulated is economic or

non-economic activity. See, e.g., *United States v. Morrison*, 529 U.S. 598, 610 (2000) (“But a fair reading of [*United States v. Lopez*, 514 U.S. 549 (1995)] shows that the noneconomic, criminal nature of the conduct at issue was central to our decision in that case.”); *Gonzales v. Raich*, 545 U.S. 1, 25 (2005) (“Unlike those at issue in *Lopez* and *Morrison*, the activities regulated by the [Controlled Substances Act] are quintessentially economic.”). If confirmed, and if presented with a matter that required me to consider the limits of Congress’ Commerce Clause power, I would follow the binding decisions in *Lopez*, *Morrison*, and *Raich*, as well as any other relevant Supreme Court and D.C. Circuit precedent.

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

Response: The President’s ability to issue executive orders must “stem either from an act of Congress or from the Constitution itself.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952). Justice Jackson’s “familiar tripartite scheme” articulated in *Youngstown* “provides the accepted framework for evaluating executive action.” *Medellin v. Texas*, 128 S. Ct. 1346, 1368 (2008). Under that framework, presidential authority is at its “maximum” when done “pursuant to an express or implied authorization of Congress.” *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring). At the other end of the spectrum, presidential power is “at its lowest ebb” when the President “takes measures incompatible with the expressed or implied will of Congress.” *Id.* at 637. In between those two poles, there is a “zone of twilight” in which the President may have “concurrent authority” with Congress, or “in which distribution is uncertain.” *Id.* If confirmed, and if presented with a matter that required me to consider the limits of presidential authority, I would follow the binding decisions of *Youngstown* and *Medellin*, as well as any other relevant Supreme Court and D.C. Circuit precedent.

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

Response: The Supreme Court in *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997), stated that “we have regularly observed that the Due Process Clause specially protects those fundamental 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.’” (Citations omitted.) In addition to the specific freedoms protected in the Bill of Rights, the Court identified fundamental rights protected by the Due Process Clause to include, among others, the right to marry, to have children, and to marital privacy. *Id.* at 720. The Court, however, cautioned that it 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.* (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992)). If confirmed, and if presented with a matter that required me to determine whether a right is “fundamental” for purposes of the substantive due process doctrine, I would follow the binding precedent of *Glucksberg* and *Collins*, as well as any other relevant Supreme Court and D.C. Circuit precedent.

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

Response: The Equal Protection Clause is “essentially a direction that all persons similarly situated should be treated alike.” *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985). Although 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, that rule gives way “when a statute classifies by race, alienage, or national origin.” Such classifications are subject to “strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest.” *Id.* Additionally, heightened scrutiny is warranted for classifications based on gender or illegitimacy, and a statute that so classifies will fail “unless it is substantially related to a sufficiently important governmental interest.” *Id.* at 441. If confirmed, and if presented with a matter that required me to determine whether a classification is subjected to heightened scrutiny, I would follow the binding precedent of *City of Cleburne*, as well as any other relevant Supreme Court and D.C. Circuit 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: If confirmed, and presented with a matter that required me to consider the use of racial preferences in public higher education, I would follow the binding decisions in *Grutter* and *Fisher v. University of Texas*, 133 S. Ct. 2411 (2013), as well as any other relevant Supreme Court and D.C. Circuit precedent, regardless of my personal expectations.