

Questions for the Record
Senator Ted Cruz

Responses of the Honorable Nancy L. Moritz
Nominee, United States Circuit Judge for the Tenth 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: Since becoming an appellate judge in 2004, my judicial philosophy has been to treat each case that comes before me with the same attention and respect, including familiarizing myself with the record, the parties' arguments and the applicable rule of law. Ultimately, I endeavor to arrive at the correct outcome while maintaining an open mind throughout the appellate process. If I am the authoring judge, I strive to write a concise and cogent decision that judges, practitioners and the public can understand. I have not sufficiently studied the judicial philosophy of particular Justices from the Warren, Burger, and Rehnquist courts to state with any certainty which Supreme Court Justice's judicial philosophy is most analogous to my own.

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: Yes. I would follow Supreme Court and Tenth Circuit precedent regarding the methods to be used in interpreting particular provisions of the Constitution. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570, 584 (2008) (comparing the "natural meaning" of the Second Amendment with its 18th century meaning by considering "founding-era sources").

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 as a federal circuit judge, I would never have authority to overrule Supreme Court precedent. Nor would I have authority to overrule Tenth Circuit precedent, unless the court considers an issue *en banc*, which rarely occurs. In deciding whether to vote for *en banc* consideration, I would be guided by Fed. R. App. Proc. 35(a), which provides that *en banc* consideration is not favored unless: (1) it is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance.

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: In *Garcia*, the Supreme Court upheld application of federal labor standards to a local transit authority, holding that the State's sovereign interests were protected by the structure of the

federal government as well as the political process itself. However, in *Printz v. United States*, 521 U.S. 898 (1997) and *New York v. United States*, 505 U.S. 144 (1992), the Supreme Court invalidated provisions of federal legislation that imposed obligations on state government. If confirmed as a federal circuit judge, I would be bound to apply these holdings as well as any other binding precedent.

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 categorized three general areas Congress can regulate under the Commerce Clause: (1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce; and (3) activities substantially affecting interstate commerce. *Gonzales v. Raich*, 545 U.S. 1, 16-17 (2005). Prior to *Gonzales*, the Supreme Court struck down legislation in two cases in which Congress had attempted to regulate non-economic activity. See *United States v. Morrison*, 529 U.S. 598 (2000) and *United States v. Lopez*, 514 U.S. 549 (1995). In *Gonzales*, the court held that Congress' power under the Commerce Clause includes the power to prohibit the local cultivation and use of marijuana, even if such actions were in compliance with California law. Justice Scalia concurred in *Gonzales* and commented, "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. at 37. (Scalia, J., concurring). If confirmed as a federal circuit judge, I would adhere to these and other Supreme Court precedents concerning the Commerce Clause.

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

Response: In *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 589 (1952), the Supreme Court held that the President's power to issue an executive order must stem from an act of Congress or the Constitution. After *Youngstown*, courts generally have relied on Justice Jackson's concurring opinion in that case to delineate the parameters or limits of the President's executive authority. See 343 U.S. at 637 (Jackson, J., concurring) (explaining that the President's executive authority is at its greatest when the President acts pursuant to an express or implied authorization and is at its lowest when the President acts in a manner incompatible with the expressed or implied will of Congress). See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654 (1981). If confirmed, I would apply these and other Supreme Court precedents if called upon to decide a question involving the limits of the President's executive power.

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, 720 (1997) (internal citations omitted), the Supreme Court reiterated that the Due Process Clause protects only 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." If confirmed, I would adhere to this and other relevant Supreme Court precedent.

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

Response: The Supreme Court employs two "heightened" levels of scrutiny in reviewing classifications under the Equal Protection Clause: strict scrutiny and intermediate scrutiny. According to the Supreme Court, strict scrutiny applies to classifications based on race, alienage, and national origin as well as classifications that impermissibly infringe on fundamental rights and liberties. Intermediate scrutiny applies to "quasi-suspect" classifications, like gender and illegitimacy.

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 have no expectation regarding whether the Supreme Court's prediction in *Grutter v. Bollinger* will prove true. But if confirmed and presented with an issue concerning the use of race in public university admissions, I would review it applying the strict scrutiny test most recently applied by the Supreme Court in *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013).