

Questions for the Record
Senator Ted Cruz

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Nominee, U.S. District Judge 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: If confirmed to serve as a district court judge, I would not approach cases with a particular judicial philosophy other than to take each case on its own merits and to decide the case impartially, based on the governing law and relevant facts. I would faithfully apply Supreme Court and D.C. Circuit precedents and would only decide cases falling within the court's jurisdiction. Given the very different role of the Supreme Court, and the numerous attributes of those who have or who currently serve on that Court, there is no single Justice I would identify as reflecting the approach I would, if confirmed, bring to deciding cases as a district court judge. I was very fortunate and honored to have served as a law clerk for Justice John Paul Stevens, as well as for Judge Pierre N. Leval (who at that time was a district court judge). I have enormous respect for both Justice Stevens and Judge Leval and learned a great deal from both of them.

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 often looks to founding-era documents and understandings in interpreting the Constitution. *See, e.g., Town of Greece, N.Y. v. Galloway*, 134 S. Ct. 1811 (2014); *District of Columbia v. Heller*, 554 U.S. 570 (2008); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995); *New York v. United States*, 505 U.S. 144 (1992); *I.N.S. v. Chadha*, 462 U.S. 919 (1983). If confirmed as a district court judge, I would apply the relevant Supreme Court and D.C. Circuit precedents regarding whether and how originalism should be used in the interpretation of constitutional provisions.

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 would have no authority as a district court judge to overrule any precedent and would not seek to do so under any circumstances.

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: Although the Supreme Court has not overruled its decision in *Garcia v. San Antonio Metro Transit Authority*, and thus the Court's holding remains binding on lower courts, subsequent Supreme Court decisions such as *New York v. United States*, 505 U.S. 144 (1992); *United States v. Lopez*, 514 U.S. 549 (1995); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996); *Printz v. United States*, 52 U.S. 898 (1997); and *United States v. Morrison*, 529 U.S. 598 (2000), have made clear that the Constitution imposes substantive restraints on federal power and provides substantive protection for State sovereign interests. If confirmed to serve as district court judge, I would fully and faithfully apply these decisions and all other relevant Supreme Court and D.C. Circuit precedents.

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*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), the Supreme Court struck down statutes enacted pursuant to the Commerce Clause on the ground that they sought to regulate non-economic activity and improperly intruded on the police power of the States. As the Court explained in *Lopez*, exercise of the Commerce Clause power cannot be justified by "pil[ing] inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Id.* at 567; *see also Morrison*, 529 U.S. at 615-17. Subsequently, in *Gonzales v. Raich*, 545 U.S. 1, 22 (2005), the Court held that Congress has the power to regulate certain purely intrastate activities in the course of comprehensive regulation of "the interstate market in a fungible commodity." In a concurring opinion, Justice Scalia explained that Congress may regulate non-economic activity "in conjunction with congressional regulation of an interstate market," but only to the extent "necessary to make the interstate regulation effective." *Id.* at 38 (Scalia, J., concurring). If confirmed to serve as a district judge, I would fully and faithfully apply these and all other Supreme Court and D.C. Circuit precedents.

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

Response: Like all government officials, the President's authority to act must derive from some constitutional or statutory delegation of power. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952). In evaluating whether the President has acted within the scope of this authority, the Supreme Court has applied "Justice Jackson's familiar tripartite scheme." *See Medellin v. Texas*, 552 U.S. 491, 524 (2008). Under that framework, the President's authority is at its zenith when he acts with congressional authorization; it falls within "a zone of twilight" where he acts in an area of concurrent congressional and presidential authority in the absence of a statutory authorization or prohibition; and it is "at its lowest ebb" "[w]hen the President takes measures incompatible with the expressed or implied will of Congress." *Youngstown*, 343 U.S. at 635-38 (Jackson, J., concurring). If confirmed to serve as a district court judge, I would fully and faithfully apply the relevant statutes and governing precedents in considering any challenge to an executive order or executive action.

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

Response: As the Supreme Court held in *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (citations omitted), substantive due process extends to “those 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.’” The Court also observed that it has “required in substantive-due-process cases a ‘careful description’ of the asserted fundamental liberty interest.” *Id.* at 721 (citation omitted). More recently, in *Chavez v. Martinez*, 538 U.S. 760, 775 (2003) (citations omitted), the Court reaffirmed its “reluctance to expand the doctrine of substantive due process . . . in large part ‘because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended.’” If confirmed to serve as a district judge, I would fully and faithfully apply these precedents, and all other relevant Supreme Court and D.C. Circuit precedents.

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

Response: The Supreme Court has recognized two types of heightened scrutiny under the Equal Protection Clause. First, statutes or rules that apply differentially based on race, alienage, or national origin are subject to “strict scrutiny” because “[t]hese factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy . . .” *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985). Second, statutes or rules that apply differentially based on gender or illegitimacy are subject to “intermediate scrutiny” because gender classifications “frequently bear[] no relation to ability to perform or contribute to society” and “very likely reflect outmoded notions of the relative capabilities of men and women,” and because illegitimacy is unrelated to ability and is beyond the “individual’s control.” *Id.* at 441. If confirmed to serve as a district court judge, I would fully and faithfully apply the relevant Supreme Court and D.C. Circuit precedents in considering the proper level of scrutiny to apply 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 to serve as a district court judge, I would fully and faithfully apply the Supreme Court’s decisions in *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Fisher v. University of Texas*, 133 S. Ct. 2411 (2013), along with all other relevant Supreme Court and D.C. Circuit precedents, and I would do so without regard to any personal expectation I might have.