

**Questions for Judicial Nominees
Senator Ted Cruz**

**John B. Owens
Nominee, United States Circuit Judge for the Ninth Circuit**

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 philosophy is that an appellate court judge plays a very limited role in our judicial system. That role is to review only the case before the court under the proper standard of review, to follow binding precedent, and to base any decision solely on the facts in the record. At no time do one's personal views come into play. In carrying out one's duties, the judge always must have an open mind, be prepared through hard work, and treat the parties, staff, and fellow judges with respect. Although I cannot say that my philosophy is specific to any of the courts or Justices mentioned above, I have tremendous respect for the work ethic, intellectual abilities, and leadership skills of Justice Ruth Bader Ginsburg and Chief Justice Rehnquist.

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 has stated that originalism should be employed when interpreting the Constitution. If confirmed and a case presenting this issue came before me, I would follow the approach taken in cases like *District of Columbia v. Heller*, 554 U.S. 570 (2008).

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: A three-judge panel cannot overrule binding precedent of the Ninth Circuit or Supreme Court. Federal Rule of Appellate Procedure 35 provides that the en banc process can overrule Ninth Circuit precedent only when the matter "involves a question of exceptional importance" or review "is necessary to secure or maintain uniformity of the court's decisions[.]" If confirmed, I would follow Rule 35 and the applicable Ninth Circuit procedures concerning en banc proceedings.

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: *Garcia v. San Antonio Metro Transit Auth.*, 469 U.S. 528 (1985), is binding Supreme Court precedent. If confirmed and this issue came before me, I would follow that precedent when addressing questions of state sovereign interests, as well as other binding precedent including *Printz v. United States*, 521 U.S. 898 (1997), and *New York v. United States*, 505 U.S. 144 (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 invalidated federal statutes that exceeded Congress' Commerce Clause Power, and stressed the non-economic nature of the activities that those statutes regulated. See *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995). However, the Supreme Court has not held that Congress can never regulate non-economic activity through Commerce Clause legislation. If confirmed and this issue came before me, I would carefully review binding Supreme Court and Ninth Circuit precedent concerning the limits of Congress's power under the Commerce Clause to regulate non-economic activity.

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

Response: Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-38 (1952), addressed how courts should review a President's executive orders and actions, and the Supreme Court adopted this concurrence as a majority holding in *Dames & Moore v. Regan*, 453 U.S. 654 (1981). In *Youngstown* and *Dames & Moore*, the Supreme Court set out three guideposts for reviewing the actions of the President. First, "[w]hen the President acts pursuant to an express or implied authorization from Congress, he exercises not only his powers but also those delegated by Congress. In such a case the executive action 'would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.'" Second, "[w]hen the President acts in the absence of congressional authorization he may enter 'a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain.'" In this situation, the Court must "consider[] all the circumstances which might shed light on the views of the Legislative Branch toward such action, including 'congressional inertia, indifference or quiescence.'" Third, "when the President acts in contravention of the will of Congress, 'his power is at its lowest ebb,' and the Court can sustain his actions 'only by disabling the Congress from acting upon the subject.'" *Dames & Moore*, 453 U.S. at 668-69 (quoting *Youngstown*). If confirmed and a case presenting this issue came before me, I would follow this and other relevant Supreme Court and Ninth Circuit precedent when addressing challenges to executive orders and actions.

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 Supreme Court reviewed its precedent and discussed two aspects of its substantive due process clause analysis. First, the Court recognized that "the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition.'" Second, the Court recognized that it has "required in substantive-due-process cases a 'careful description' of the asserted fundamental liberty interest." *Id.* at 720-21 (citations omitted). If confirmed and a case presenting this issue came before me, I would follow *Glucksberg* and any other relevant Supreme Court and Ninth Circuit precedent applying *Glucksberg*.

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

Response: Supreme Court precedent dictates that the Equal Protection Clause triggers heightened scrutiny (either strict or intermediate) when reviewing classifications like race, gender and religion. If confirmed and this issue came before me, I would follow binding Supreme Court and Ninth 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 this issue came before me, I would follow relevant Supreme Court and Ninth Circuit precedent concerning the use of racial preferences in higher education, and this would include cases like *Grutter* and *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013). Any personal expectation that I might have as to this issue (or any other issue) would not be relevant.