

**Response of Gregory Alan Phillips
Nominee to be United States Circuit Judge for the Tenth Circuit
to the Written Questions of Senator Ted Cruz**

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 that judges must confine themselves to their constitutional and statutory role and then exercise that limited role. Judges administer justice by fully advising themselves on applicable law and fully examining the record. I believe that policy-making belongs to the other two branches of government. I believe that by using strong legal reasoning and by conducting themselves professionally in the courtroom judges promote our citizens' faith in our government.

I am not familiar enough with the judicial philosophies of justices from these Courts to compare mine to theirs.

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: I believe that original meaning should be used 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 circuit court judge, I would reconsider circuit precedents only in those rare circumstances allowing *en banc* consideration. I would recognize that my circuit disfavors *en banc* review and considers it available only in extraordinary circumstances. Accordingly, as directed by Tenth Circuit rules, I would recognize that *en banc* review is intended to focus the entire court upon an issue of exceptional public importance or upon a panel decision that conflicts with an earlier decision of the Supreme Court or the Tenth Circuit. In those limited circumstances, I would consider overruling a circuit precedent. The Supreme Court alone can overrule its own precedents. I would follow Supreme Court precedents whether I personally agreed with them or not.

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: In *Garcia v. San Antonio Metro Transit Auth.*, 469 U.S. 528 (1985), the Supreme Court explained how the Constitution protects State sovereign interests by embedding State influence into the structure of the federal government. *Id.* at 550-51. If confirmed, I would apply *Garcia* and all other Supreme Court cases, whether I personally agreed with them or not.

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

Response: In cases “span[ning] more than a century,” the Supreme Court has found that the Commerce Clause allows congressional regulation of three categories of activity: (1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce; and (3) activities that “substantially affect” interstate commerce. *Gonzales v. Raich*, 545 U.S. 1, 16-17 (2005) (citations omitted). In *United States v. Lopez*, 514 U.S. 549 (1995), the Supreme Court found that Congress had exceeded its power under the Commerce Clause by criminalizing the possession of firearms in a school zone—a non-economic activity that neither arises out of nor is “connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.” *Id.* at 561. Citing this passage from *Lopez*, Justice Scalia has observed that “Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce.” *Gonzales*, 545 U.S. at 37 (Scalia, J., concurring). As in all other instances, if confirmed I would apply Supreme Court precedent whether I agreed with it or not.

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 Co. v. Sawyer*, 343 U.S. 579 (1952), the Supreme Court found no authority for President Truman to seize the steel mills amid a proposed work stoppage. *Id.* at 589. The Supreme Court pronounced that “[t]he President’s power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself.” *Id.* at 585. In his concurring opinion, Justice Robert Jackson set forth the standard by which the Court still measures judicially enforceable limits on a President’s executive orders. *Id.* at 634-55 (Jackson, J., concurring). If confirmed, I would apply that precedent and other Supreme Court precedent defining the limits of a President’s power.

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 Court summarized what fundamental rights and liberty interests receive heightened protection against government

interference. *Id.* at 720. It further restated its longstanding substantive due process analysis, saying 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[.]’” *Id.* (internal citations omitted).

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

Response: The Supreme Court applies strict scrutiny to classifications involving suspect classes such as race and national origin, and to classifications involving fundamental rights such as the equal right to vote and the right to travel. The Supreme Court applies intermediate scrutiny to classifications involving quasi-suspect classes such as 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 on this. If confirmed, I would apply applicable Supreme Court precedent including *Grutter* unless the Supreme Court modifies or overrules it, regardless of whether I agreed with that precedent or not.