

Questions for the Record for all nominees
Senator Ted Cruz
“Judicial Nominations” Hearing – 7/24/13

Responses of Cornelia Pillard
Nominee, United States Circuit Judge for the D.C. 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: I believe that a federal judge must be a devoted guardian of the United States Constitution and laws. I have not specifically studied the philosophies of individual Justices, but I believe there are basic rules that apply to every federal judge. The power of Article III judges is confined to the cases and controversies before them. Accordingly, an appellate judge must meticulously read and understand the factual record to know precisely what issues are and are not presented in the appeal. A judge must read briefs with an open mind, and listen to and engage the advocates’ arguments without prejudgment. Stability and predictability of judicial decisions is a cornerstone of the rule of law in the United States, and to achieve it I believe that judges must rigorously apply relevant precedent to new cases. Judicial opinions should clearly, logically and concisely set forth their premises, reasoning and conclusions. The effectiveness of our system of courts depends not only on judges being objective and impartial in the application of law to fact, but also on the perceptions of the public and the parties appearing before the courts that judges are objective and impartial.

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 duty of a judge is to follow the interpretive approaches that precedent dictates. The Supreme Court has in some cases employed originalism as a method of interpreting the Constitution, and I would apply such precedents. For example, in *District of Columbia v. Heller*, 554 U.S. 570, 584 (2008), the Court used an originalist methodology—specifically, original meaning—to read the Second Amendment to protect an individual right to bear arms, and in *United States v. Jones*, 132 S. Ct. 945, 949-950 (2012), the Court relied on original meaning in deciding that physical trespass by public officials triggers the Fourth Amendment, so that police placement of a global positioning device on a car to gather information amounted to a search under the Amendment. The Supreme Court has not, however, adopted original meaning as a blanket methodology to be applied to all constitutional questions. If confirmed, and if presented with a case involving a particular constitutional question, I would carefully examine Supreme Court and D.C. Circuit precedents relevant to the question and apply those precedents’ interpretive approach.

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: I believe that stability and predictability of judicial decisions is a cornerstone of the rule of law in the United States, and that to achieve it judges must consistently and rigorously apply precedent to new cases. Precedent within the D.C. Circuit is binding on all future panels unless it has been superseded by a decision of the *en banc* court or the United States Supreme Court. *See* Fed. R. App. P. 35. On voting whether to recommend *en banc* consideration, as with all other issues, I would follow the law of the Supreme Court and of the D.C. Circuit as to the circumstances in which such consideration is warranted. The precedents recognize only limited and rare situations in which a court, sitting *en banc*, may overrule its own decisions, such as where there is extraordinary confusion or lack of clarity on an issue, or the precedent has become gravely unworkable. The rationale for judicial reconsideration of precedent, even through *en banc* review, is weaker when the question is statutory or regulatory than when it involves the Constitution, because Congress or an agency may change the law if it believes a court erred. In general, given the bedrock importance of the stability of precedent, mere disagreement with a prior D.C. Circuit panel's decision is not alone sufficient ground for the *en banc* court to overrule it.

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: The structure of the federal system provides important safeguards to state sovereignty, but the Supreme Court has made clear that the quoted statement from *Garcia v. San Antonio Metro Transit Auth.*, 469 U.S. 528, 552 (1985), does not render the protection of state sovereign interests non-justiciable. Instead, “[f]ederalism has more than one dynamic,” *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011). When a question arises whether the federal government has encroached on state sovereignty, individuals and states may in appropriate circumstances seek judicial relief. *See Bond*, 131 S. Ct. at 2365; *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992). If I were confirmed as a judge, I would be bound to apply the Court's precedents with respect to the constitutional allocation of powers between the federal and state governments, as on any other issue.

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 Congress, under the Commerce Clause and Necessary and Proper Clause, may regulate (1) “the use of the channels of interstate commerce,” (2) “the instrumentalities of interstate commerce, or persons or things in interstate commerce,” and (3) “those activities having a substantial relation to” or that “substantially affect” interstate commerce. *United States v. Lopez*, 514 U.S. 549, 558-559 (1995). The Supreme Court has emphasized the non-economic nature of regulated activity in invalidating certain legislation as exceeding Congress's commerce power, *see, e.g., United States v. Morrison*, 529 U.S. 598 (2000), *Lopez*, 514 U.S. at 567. The Court has also, however, concluded that Congress may regulate non-economic activity where such regulation is “an essential part of a larger regulation of economic activity,” *Lopez*, 514 U.S. at 561; *Gonzales v. Raich*, 545 U.S. 1, 24-5 (2005); *id.* at 34 (Scalia, J., concurring).

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

Response: In enforcing limits on presidential actions, the Supreme Court has inquired into whether the President has acted pursuant to constitutional and statutory authority, whether his action has encroached on the authority of another branch, and whether his conduct violates the Constitution’s limitations on federal power, such as in the Bill of Rights. *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579 (1952), set forth a framework for considering the constitutionality of presidential action. The Court has used that framework to review executive action in various cases, including *Medellin v. Texas*, 552 U.S. 491, 523-29 (2008), *Hamdi v. Rumsfeld*, 542 U.S. 507, 531, 536 (2004), and *Dames & Moore v. Regan*, 453 U.S. 654, 668-69, 674, 678 (1981). In order to be judicially enforceable, a limitation on a presidential order or other action must arise in the context of a justiciable case or controversy.

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

Response: The Supreme Court has identified various fundamental rights subject to substantive protection under the due process clause. The Court has stated that, “in addition to the specific freedoms protected by the Bill of Rights, the ‘liberty’ specially protected by the Due Process Clause includes the rights to marry, to have children, to direct the education and upbringing of one’s children, to marital privacy, to use contraception, to bodily integrity, and to abortion,” *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (citations omitted), and the right to travel, *Chicago v. Morales*, 527 U.S. 41, 53-54 (1999). The Court also has “assumed, and strongly suggested, that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment.” *Glucksberg*, 521 U.S. at 720 (citing *Cruzan v. Missouri Dept. of Health*, 497 U.S. 261, 278-79 (1990)). The Court’s substantive due process analysis guards against too-ready recognition of liberty rights as fundamental, lest the mere “policy preferences” of the justice be thereby constitutionalized and largely placed “outside the arena of public debate and legislative action.” *Glucksberg*, 521 U.S. at 720.

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

Response: Under the Supreme Court’s precedents, “unless a classification warrants some form of heightened review because it jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest.” *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). The Court has subjected “suspect” classifications—for example, those based on race or ancestry—to strict constitutional scrutiny. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995). The Supreme Court has also treated sex- and illegitimacy-based classifications as “quasi-suspect,” warranting an “intermediate” level of constitutional scrutiny. *United States v. Virginia*, 518 U.S. 515 (1995); *Clark v. Jeter*, 486 U.S. 456 (1988); see *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440-41 (1985). The Court also uses a higher degree of constitutional scrutiny to review classifications that impinge on the exercise of fundamental

rights, such as distinctions based on religion, protected speech or association, voting, or the exercise of fundamental liberty interests protected by the Due Process Clause. *Nordlinger*, 505 U.S. at 10.

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: The Court’s precedents make clear that race-based affirmative action, if any, should terminate when the objectives for which it was adopted have been achieved. *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003). The Court’s strict-scrutiny precedents have imposed limitations on the consideration of race in higher education that are designed to prevent its unnecessary use. *See Fisher v. University of Texas at Austin*, 133 S. Ct. 2411, 2417-21 (2013). I cannot predict, however, when the Supreme Court might determine that reliance on race in decision making in public higher education is no longer necessary. If confirmed as a judge, I would be bound to apply the Court’s precedents with respect to race-based precedent, as on any other issue.