

Questions for the Record
Senator Ted Cruz

Responses of Douglas L. Rayes
Nominee, United States District Court for the District of Arizona

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: My judicial philosophy has been to consider each case before me to be an important case, to treat those who come into my court with courtesy and respect, and to decide the narrow issue before me fairly, and consistent with the controlling legal precedent. My philosophy is that a judge needs to be a judge, interpreting the law and not making the law. Although I am familiar with decisions rendered by the Supreme Court while each of those Justices acted as Chief Justice, and have applied precedent created by those decisions, I have not compared my philosophy with any Justice's. Therefore, I am unable to state whether my judicial philosophy is analogous to any of the Justices above.

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: An Arizona District Court Judge interpreting the Constitution should follow the methods of interpretation prescribed by the Supreme Court and the Ninth Circuit. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the public understanding of the constitution at the time it was adopted, was used as the method of interpretation by the Supreme Court in its analysis of the Second Amendment. If I am fortunate enough to be confirmed, I would faithfully follow *Heller* and other binding precedent.

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 district judge, there would never be a circumstance that I would overrule precedent.

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: Because *Garcia v. San Antonio Metro Transit Auth.*, 469 U.S. 528 (1985), is Supreme Court precedent, all district judges are bound by it and must follow it. If confirmed, I would follow *Garcia* and all other relevant precedents.

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 defined three broad categories of activity where Congress may use the Commerce Clause to regulate: (1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce; and (3) activities that have a substantial effect on interstate commerce. See *United States v. Morrison*, 529 U.S. 598, 608-609 (2000), *United States v. Lopez*, 514 U.S. 549, 558-559 (1995). Those cases do not hold that the Commerce Clause authority could never be used to regulate non-economic activity. More recently in *Gonzales v. Raich*, 545 U.S. 1, 37 (2005), Justice Scalia authored a concurring opinion where he indicated that Congress had the authority under the Commerce Clause to regulate non-economic activity "if that regulation is a necessary part of a more general regulation of interstate commerce." If confirmed, I would follow applicable Supreme Court and Ninth Circuit precedent.

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

Response: The Supreme Court spoke on the President's authority to act in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952) and in *Medellin v. Texas*, 552 U.S. 491, 524 (2008). The Supreme Court has determined that the President's authority to act must come from either an act of Congress or from the Constitution. In judicial cases and controversies those are judicially enforceable limits on the President's authority.

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

Response: The Supreme Court has decided that a right is "fundamental" for purposes of the Due Process Clause if it is "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." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (citations omitted). If confirmed, I would follow Supreme Court and Ninth Circuit precedent when confronted with an issue of whether a right is "fundamental" for purposes of the substantive due process doctrine.

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

Response: The Supreme Court has decided that a classification should be subjected to heightened scrutiny under the Equal Protection Clause "when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class." *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976). The Supreme Court has stated that strict scrutiny applies when characteristics of a class, such as race, seldom provide a relevant basis for disparate treatment, *Fisher v. University of Texas at Austin*, 133 S.Ct. 2411, 2418 (2013), and that intermediate scrutiny applies to gender-based classifications. *United States v. Virginia*, 518 U.S. 515 (1996). If confirmed, I would follow Supreme Court and Ninth Circuit precedent when deciding any issue involving heightened scrutiny.

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, I will follow whatever Supreme Court and Ninth Circuit precedent exists at the time concerning the use of racial preferences in public higher education including *Grutter* and the Supreme Court’s more recent holding in *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013).