

**Responses of Robin S. Rosenbaum
Nominee to be United States Circuit Judge for the Eleventh Circuit
To the Written Questions of Senator Ted Cruz**

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 in deciding cases, judges should diligently ascertain the applicable law and apply it faithfully to the facts of the case. In so doing, judges should be fair and impartial, treating with respect and dignity all who come before the court. In addition, in order to promote the legitimacy and fairness of the system, judges should fully explain the reasons for their decisions. The role of judges in our constitutional system is a limited one. Judges do not make the law; instead, judges apply the law as it is written, impartially and fairly, ensuring compliance with our Constitution.

Although I would not characterize myself as sharing a judicial philosophy of a particular Justice, I strive to emulate the diligence and work ethic of all of the Justices.

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 employed originalism to interpret the Constitution. For example, in *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court considered the public understanding of the Second Amendment at and after its ratification in order to interpret the Amendment. In *Boumediene v. Bush*, 553 U.S. 723 (2008), on the other hand, the Supreme Court reviewed the Framers’ intent when construing the writ of habeas corpus and the Suspension Clause. If confirmed to serve on the Eleventh Circuit, I would continue to follow the Supreme Court and Eleventh Circuit precedent applicable to the particular constitutional provision under consideration.

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: The circumstances in which a circuit court may overrule precedent are extremely limited and may occur only when the court sits *en banc*. Rule 35 of the Federal Rules of Appellate Procedure provides that *en banc* hearings and rehearings are disfavored and ordinarily will not be ordered except where they are “necessary to secure or maintain uniformity of the court’s decisions” or the matter “involves a question of exceptional importance.” In order to resolve conflicts among circuit precedent, abrogation of at least some circuit precedent is likely in the first situation. As for the second, however, reversal of circuit precedent may or may not be required. An example of a situation where abrogation by the court sitting *en banc* may be appropriate may occur where earlier circuit precedent conflicts with the reasoning — but not the holding — of a subsequent Supreme Court decision. See *Main Drug, Inc. v. Aetna U.S.*

Healthcare, Inc., 475 F.3d 1228, 1230 (11th Cir. 2007) (“[W]ithout a clearly contrary opinion of the Supreme Court or of this court sitting *en banc*, we cannot overrule a decision of a prior panel of this court.”) (citation and quotation marks omitted). Similarly, where a case may present an “issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue,” the court sitting *en banc* may determine that reversal of the panel’s decision is appropriate. See Fed. R. App. 35(b)(1)(B).

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: While it is true that procedural safeguards inherent in the structure of the federal system provide some protection for state sovereign interests, the Supreme Court has determined that state sovereign interests are protected in other ways as well. For example, in *Printz v. United States*, 521 U.S. 898 (1997), the Supreme Court judicially enforced limitations on federal power, finding provisions of the Brady Act to be unconstitutional because they violated state sovereign rights. See also *New York v. United States*, 505 U.S. 144 (1992) (holding that federal law requiring states either to dispose of radioactive waste or to take title to it and be liable for it was an unconstitutional violation of state sovereign rights). If confirmed to serve on the Eleventh Circuit, I would continue to follow all applicable precedent.

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. Morrison*, 529 U.S. 598 (2000), and *United States v. Lopez*, 514 U.S. 549 (1995), the Supreme Court held that the federal laws under consideration in each case were unconstitutional because they exceeded congressional power under the Commerce Clause. In reaching these conclusions, the Supreme Court emphasized the noneconomic nature of the activities regulated, although the Supreme Court did not hold that noneconomic activity could never be regulated under the Commerce Clause. Moreover, in *Gonzales v. Raich*, 545 U.S. 1, 37 (2005) (Scalia, J., concurring) (citation omitted), Justice Scalia relied on the Necessary and Proper Clause in conjunction with the Commerce Clause to conclude that “Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce.” If confirmed to serve on the Eleventh Circuit, I would continue to follow all applicable precedent of the Supreme Court and the Eleventh Circuit in determining issues under the Commerce Clause and the Necessary and Proper Clause.

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, 635-38 (1952) (Jackson, J., concurring), Justice Jackson set forth a framework for evaluating the constitutionality of executive actions. Under the three-part framework, the President's power reaches its zenith when the President "acts pursuant to an express or implied authorization of Congress." *Id.* at 635. A person challenging the President's actions in such circumstances bears a heavy burden of persuasion. *Id.* at 636-37. Where neither a congressional grant nor denial of power exists, the President acts in "a zone of twilight in which [the President] and Congress may have concurrent authority, or in which its distribution is uncertain." *Id.* at 637. Finally, the President's power sinks to its nadir when he acts contrary to the expressed or implied will of Congress. *Id.* Under those circumstances, the President can rely on only the President's "own constitutional powers minus any constitutional powers of Congress over the matter[,]" courts may uphold the President's actions only by precluding Congress from acting on the matter. *Id.* at 637-38. In *Dames & Moore v. Regan*, 453 U.S. 654 (1981), the Supreme Court favorably discussed Justice Jackson's framework for evaluating executive action. Since that time, in *Medellin v. Texas*, 552 U.S. 491, 524 (2008), the Supreme Court described Justice Jackson's *Youngstown* concurrence as "provid[ing] the accepted framework for evaluating executive action" If confirmed to serve on the Eleventh Circuit, I would continue to follow all applicable Supreme Court and Eleventh Circuit precedent on the judicially enforceable limits on the President's ability to engage in executive 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, 721 (1997), the Supreme Court explained that, in order to determine whether a right that is not explicitly stated in the Constitution is nonetheless constitutionally protected, a court must examine whether the claimed right is "deeply rooted in this Nation's history and tradition . . . and implicit in the concept of ordered liberty" (citations and internal quotation marks omitted). In addition, the proponent of the right must provide a "careful description" of the asserted fundamental liberty interest. *Id.* (citations omitted). If confirmed to serve on the Eleventh Circuit, I would continue to follow all applicable precedent of the Supreme Court and the Eleventh Circuit.

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

Response: In *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985), the Supreme Court explained that classifications that are "so seldom relevant to the achievement of any legitimate state interest" are subjected to strict scrutiny. These classifications include race, national origin, and sometimes alienage. *See id.* Classifications that "frequently bear[] no relation to ability to perform or contribute to society," such as gender and illegitimacy, are subjected to intermediate scrutiny. *Id.* at 440-41. If confirmed to serve on the Eleventh Circuit, I would continue to follow all applicable Supreme Court and Eleventh Circuit precedent concerning when a

classification should be subjected to heightened scrutiny 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: In *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003), the Supreme Court opined that twenty-five years from the date of that decision, it anticipated that race would no longer need to be considered in order to achieve diversity in the student bodies of colleges and universities. Since that time, in *Fisher v. University of Texas at Austin*, ___ U.S. ___, 133 S. Ct. 2411 (2013), the Supreme Court has provided further guidance regarding consideration of race to obtain diversity in higher education. If confirmed to serve on the Eleventh Circuit, I would continue to follow all applicable precedent of the Supreme Court and the Eleventh Circuit regarding consideration of race in admissions to schools of higher education.