

Nancy J. Rosenstengel
Nominee, United States District Court for the Southern District of Illinois
Responses to Questions for the Record
from 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: If confirmed, my judicial philosophy would be to follow the rule of law and decide the case before me by applying binding precedent. I would decide matters promptly without bias, sympathy, or prejudice and treat all parties fairly. I have not carefully studied the judicial philosophies of specific Supreme Court Justices, but I suspect that many Justices shared this approach.

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 meaning of words as understood at the time of the ratification of a constitutional provision must be considered when interpreting the Constitution, as the Supreme Court noted in *District of Columbia v. Heller*, 554 U.S. 570, 576-77 (2008). Specifically, the Supreme Court explained in *Heller*, “[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning” *Id.* (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931)). “Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation.” *Heller*, 554 U.S. at 576-77. If confirmed, I will follow Supreme Court and Seventh Circuit precedent regarding interpreting 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 district court judge, I would be bound by the precedent of the Seventh Circuit Court of Appeals and the United States Supreme Court. I would not be empowered or authorized to overrule precedent from superior courts. I would follow binding precedent at all times.

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 overruled *National League of Cities v. Usery*, 426 U.S. 833 (1976), holding that the

Court's judicially created limitation on the Commerce Clause power was unworkable. In this particular case, the Court held that the Commerce Clause empowers Congress to enforce provisions of the federal Fair Labor Standards Act against states. See *Alexander v. City of Evansville, Indiana*, 120 F.3d 723, 725 (7th Cir. 1997); *Rhinebarger v. Orr*, 839 F.2d 387 (7th Cir.), *cert. denied*, 488 U.S. 824 (1988). If confirmed as a district court judge, I would be bound by the Court's decision in *Garcia*, and I would apply it without regard to any personal thoughts or beliefs I may have.

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

Response: If presented with a question under the Commerce Clause and the Necessary and Proper Clause, I would research the issue and rely on authoritative precedent. The United States Supreme Court has held that Congress may regulate (1) "the use of the channels of interstate commerce," (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities," and (3) "those activities that substantially affect interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558-59 (1995); *United States v. Morrison*, 529 U.S. 598, 608-09 (2000). Moreover, in *Gonzales v. Raich*, 545 U.S. 1 (2005), the Supreme Court held that this power extends to the regulation of intrastate, non-commercial activity (*i.e.*, possession and manufacture of medical marijuana). As Justice Scalia stated in *Gonzales*, "Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce." *Id.* at 37 (Scalia, J., concurring). *But see United States v. Comstock*, 560 U.S. 126, 164 (2010) ("Under the court's precedents, Congress may not regulate noneconomic activity . . . based solely on the effect such activity may have . . . on interstate commerce.") If confirmed, I would follow these cases and all binding precedent.

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

Response: The President's authority to act "must stem either from an act of Congress or from the Constitution itself." *Medellin v. Texas*, 552 U.S. 491, 525 (2008) (*quoting Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952)). These limitations on Presidential authority are judicially enforceable when presented in a justiciable case or controversy by a litigant with proper standing. A court would analyze whether the President acted (1) pursuant to an express or implied authorization of Congress; (2) in absence of either a congressional grant or denial of authority but with support from congressional inertia, indifference or quiescence; (3) in a manner incompatible with the expressed or implied will of Congress. *Id.* at 524-25. The judiciary is most likely to sustain executive action under the first scenario and less likely to defer to the President under the third scenario.

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

Response: The Supreme Court has established a method for analyzing substantive due process claims. Under the Court’s precedent, fundamental rights are those that objectively are “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 Seventh Circuit precedent with respect to determining whether a right is “fundamental” for purposes of substantive due process.

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

Response: “[E]qual protection analysis requires strict scrutiny of a legislative classification only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class.” *Massachusetts Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 (1976). Strict scrutiny applies when a statute classifies by “race, alienage, or national origin.” *City of Cleburne, Texas v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). As the Supreme Court has explained, “[t]hese factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy – a view that those in the burdened class are not as worthy or deserving as others.” *Id.* Moreover, legislative classifications based on gender also call for heightened scrutiny. “Rather than resting on meaningful considerations, statutes distributing benefits and burdens between the sexes in different ways very likely reflect outmoded notions of the relative capabilities of men and women.” *Id.* at 441.

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 would apply the holding of *Grutter v. Bollinger*, 539 U.S. 306 (2003) and any other legal precedent on this issue, regardless of any personal belief or expectation concerning the specific termination point appropriate for any admissions policy.