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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 approach each case with an open mind, consider carefully the arguments of the parties, and follow the text of the law as written and the binding precedent that applies. This technique may sound more mechanical than philosophical, but adherence to text and precedent is critical to the stability and predictability of our judicial system. Of the 29 different Justices who served on the Warren, Burger and Rehnquist Courts, I do not know which one had a philosophy most analogous to the one I have described, but I suspect most, if not all, of the 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 the words as understood at the time of the ratification of a constitutional provision must be considered when interpreting the Constitution, as the Supreme Court has stated in cases such as *District of Columbia v. Heller*, 554 U.S. 570, 576-77 (2008) (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931)).

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 I were confirmed as a district court judge, I would be bound by the precedent of the Seventh Circuit and the Supreme Court, and I would not overrule any 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: In overruling *National League of Cities v. Usery*, 426 U.S. 833 (1976), the Court in *Garcia v. San Antonio Metro Transit Auth.*, 469 U.S. 528 (1985), observed that its earlier, judicially created limitation on the Commerce Clause power was unworkable. If confirmed, I would be bound by the Court's decision in *Garcia*, and I would apply it without regard to whether or not I personally agreed that State sovereign interests were protected by the inherent structure of the federal system.

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

Response: Congress may regulate the use of the channels of interstate commerce, the instrumentalities of interstate commerce (or persons or things in interstate commerce), and activities that substantially affect interstate commerce. *United States v. Lopez*, 514 U.S. 549, 558-559 (1995); *United States v. Morrison*, 529 U.S. 598, 608-609 (2000). This power, in conjunction with the Necessary and Proper Clause power, was constitutionally applied to regulate intrastate, non-commercial marijuana cultivation in *Gonzales v. Raich*, 545 U.S. 1 (2005). Moreover, in describing the Supreme Court's precedents in this area, Justice Scalia has observed that it is possible for Congress to regulate "noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce." *Id.* at 37 (Scalia, J., concurring). If confirmed, I would follow these and all other binding precedents.

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. *Medellín v. Texas*, 552 U.S. 491, 524 (2008) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952)). Assuming that a case presents a justiciable controversy involving a litigant with Article III standing to challenge Presidential orders or actions, the judiciary will review executive orders and actions by determining whether: (1) the President acted pursuant to express or implied authorization from Congress; (2) the President acted with support from congressional inertia, indifference or quiescence; or (3) the President acted in a manner incompatible with the expressed or implied will of Congress. *Id.* at 524-525. The judiciary is most likely to defer to the President under the first scenario, and less likely to sustain executive action 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, and under the Court's precedents, fundamental rights are ones that, as an objective matter, are "deeply rooted in this Nation's history and tradition" and are "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, 720-721 (1997) (internal quotations and citations omitted).

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 Retirement v. Murgia*, 427 U.S. 307, 312 (1976). Suspect classifications include classifications "by race, alienage, or national origin." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985). In addition, legislative classifications based on gender and illegitimacy call for heightened scrutiny. *Id.*; see also *United States v. Virginia*, 518 U.S. 515, 531 (1996).

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 Supreme Court held that race-conscious admissions policies must be limited in time, and have a termination point. *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003). I have no expectation about the specific termination point appropriate for any particular admissions policy, and the Court held that “[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause.” *Id.* at 327. If I were confirmed as a district court judge, I would be bound by and follow the Supreme Court’s precedents.