

Questions for the Record
Senator Ted Cruz

Indira Talwani
Nominee, U.S. District Judge for the District of Massachusetts

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 have not studied the writings of the Supreme Court Justices to allow me to identify the judicial philosophies of the individual Justices. If confirmed as a district judge, my approach would be to decide each case before me based on the facts of that case and the applicable law.

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: If confirmed, I would follow binding Supreme Court and First Circuit precedents interpreting the United States Constitution, including precedent considering the public understanding of text in the time of enactment. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570 (2008).

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, I would be bound by precedent of the Supreme Court and the First Circuit. I would not overrule that 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: The Supreme Court’s decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), is binding precedent. If confirmed as a district judge, I would follow and apply the holdings in *Garcia* as I would all other binding precedent.

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 identified three categories of activity that Congress may regulate under its commerce power. First, Congress “may regulate the use of channels of interstate commerce.” Second, Congress “may regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities.” Finally, Congress may “regulate those activities that substantially affect interstate commerce.” *See United States v. Morrison*, 529 U.S. 598, 608-09 (2000); *United States v. Lopez*, 514 U.S. 549, 558-59 (1995). If confirmed as a district judge, I

would follow and apply the holdings in *Morrison* and *Lopez* as I would all other binding precedent.

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

Response: The Supreme Court has held that 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, 524 (2008), citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) and *Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981). The Supreme Court has identified the "accepted framework for evaluating executive action" as set forth in Justice Jackson's concurrence in *Youngstown*. 552 U.S. at 524-25, citing *Youngstown*, 343 U.S. at 635-38 (Jackson, J., concurring).

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

Response: The Supreme Court has stated that a right is fundamental for purposes of the substantive due process doctrine only if it "is fundamental to our scheme of ordered liberty and system of justice." *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3034 (2010). Only fundamental rights and liberties "which are 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty'" qualify for such protections. *Chavez v. Martinez*, 538 U.S. 760, 775 (2003), quoting *Washington v. Gluckberg*, 521 U.S. 702, 720-21 (1997). If confirmed as a district judge, I would follow this and all other binding precedent from the Supreme Court and the First Circuit concerning the substantive due process doctrine.

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

Response: The Supreme Court has held that heightened scrutiny under the Equal Protection Clause is appropriate when a classification burdens a fundamental right or when it operates to the peculiar disadvantage of a suspect class. See, e.g., *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 440-41 (1985). Legislative classifications based on race, alienage and national origin are subject to strict scrutiny. *Id.* Legislative classifications based on gender and illegitimacy are subject to intermediate scrutiny under the Equal Protection Clause. *United States v. Virginia*, 518 U.S. 515, 531-33 (1996); *City of Cleburne*, 473 U.S. at 441. If confirmed as a district judge, I would follow this and all other binding precedent from the Supreme Court and the First Circuit on what classifications are subject to heightened scrutiny and how to apply such 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 as a district judge, I would apply the holdings in *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003), *Fisher v. University of Texas*, 133 S. Ct. 2411 (2013) and other binding precedent of the Supreme Court and the First Circuit regardless of any personal expectations I might have.