

Questions for the Record
Senator Ted Cruz

Responses of the Honorable Robert Leon Wilkins
Nominee, United States Circuit Judge for the D.C. Circuit

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, and what I have tried to do since becoming a District Court Judge, is to be mindful of judicial restraint. In order to do that, I train my focus on the case in front of me, and keep it there, rather than reaching out and trying to address other issues. As part of this, it is also very important to me not to enter a case with any preconceived notions, nor allow such notions to impact my decision making. Instead, I believe that it is my job to let the facts and the law point to the correct outcome, wherever that path leads. I have not studied the Justices sufficiently to know which of them may share this same philosophy exactly.

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: I follow the precedent of the Supreme Court and the D.C. Circuit when interpreting the Constitution. Those precedent have interpreted various provisions of the Constitution using various originalist methods, such as by examining the original intent of the framers of the provision, see *Boumediene v. Bush*, 553 U.S. 723, 739–45 (2008), or by examining what courts and members of the public understood a particular provision to mean at or near the time of drafting, see *District of Columbia v. Heller*, 554 U.S. 570, 584 (2008), or by extrapolating governing principles from the original text, such as the "reasonable expectation of privacy" test used as an aid to interpret the scope of the Fourth amendment, see *United States v. Jones*, 132 S.Ct. 945, 949-50 (citing *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J. concurring)).

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: As a member of an inferior court, I have no authority to overrule Supreme Court precedent. With respect to D.C. Circuit precedent, it should only be overruled by the Court of Appeals sitting en banc, and generally only when that precedent is contrary to an intervening decision of the Supreme Court or has proven itself to be thoroughly unworkable in application.

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 in *Garcia* explained, in part by referencing several passages in the Federalist Papers just before the quote you specifically asked about, that the Framers of the Constitution designed a system by which the Federal government would protect the sovereign interests of the States. *Garcia* is binding precedent on all lower courts. For that reason, if I am fortunate enough to be confirmed to the United States Court of Appeals for the District of Columbia Circuit, I would follow *Garcia*, along with all Supreme Court 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 struck down legislation passed by Congress and signed by the President because it sought to regulate non-economic conduct, holding that the laws exceeded Congress's Commerce Clause power. See *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995). Subsequent to *Morrison* and *Lopez*, Justice Scalia stated in a concurring opinion that "Congress may regulate even non-economic local activity if that regulation is a necessary part of a more general regulation of interstate commerce." *Gonzalez v. Raich*, 545 U.S. 1, 37 (2005) (Scalia, J., concurring). Therefore, if a party before me ever challenges a statute with respect to Congress's authority under the Commerce Clause to regulate non-economic activity, I would undertake a searching review of the record and then carefully apply the relevant precedents.

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

Response: Recently, the Supreme Court reiterated that "[t]he President's authority to act, as with the exercise of any governmental power, '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, 585 (1952)). The Court has applied this principle in cases examining both executive orders, see *Youngstown*, 343 U.S. at 582-83, 585, and executive actions, see *Medellin*, 552 U.S. at 498, 524 (involving a presidential memorandum). If I am confirmed, I will adhere to the precedent established in these cases and any relevant cases handed down by the Supreme Court or the District of Columbia Circuit.

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

Response: The Supreme Court has "regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are . . . 'implicit in the concept of ordered liberty'" and "objectively, 'deeply rooted in this Nation's history and tradition.'" *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (citations omitted). I would follow that case and other relevant precedent, and, as instructed by the Court, would "exercise the utmost care" when examining this question. See *id.* at 720.

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

Response: The U.S. Supreme Court has held that laws and classifications based on race, alienage, and national origin are subject to “strict scrutiny” under the Equal Protection Clause. Strict scrutiny also applies to state laws that impermissibly infringe upon fundamental personal liberties secured by the U.S. Constitution. In addition, though not subject to “strict scrutiny,” the Supreme Court has ruled that classifications based on gender and illegitimacy are also subject to a heightened level of scrutiny, commonly described as “intermediate scrutiny.” *See, e.g., Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439-41 (1985).

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 2003, the Supreme Court issued its decision in *Grutter v. Bollinger* and, as noted above, predicted that by 2028 (25 years later), “the use of racial preferences will no longer be necessary to further the interest” of promoting diversity in higher education. 539 U.S. 306, 343 (2003). It remains to be seen whether the Court’s predictive judgment will hold true. If confirmed, though, I would faithfully apply the strict scrutiny test the Supreme Court recently reaffirmed in *Fisher v. University of Texas*, 133 S. Ct. 2411 (2013), which requires that racial classifications be “narrowly tailored to further compelling governmental interests.” *Id.* at 2419.