

**Questions for Judicial Nominees
Senator Ted Cruz**

**Responses of Justice Jill N. Parrish
Nominee, United States District Judge for the District of Utah**

Judicial Philosophy

1. Describe how you would characterize your judicial philosophy.

Response: My judicial philosophy is characterized by the five following principles, which I have followed during my tenure on the Utah Supreme Court. First, I maintain an open mind until all of the issues are fully presented. Second, I am always prepared. Third, I treat all who appear before me with dignity, courtesy, and respect. Fourth, I afford all parties procedural fairness. Finally, I have no personal agenda. I uphold the rule of law by following the statutory text and applying binding precedent.

2. How does a responsible judge interpret constitutional provisions, such as due process or equal protection, without imparting his own values to these provisions?

Response: A responsible judge interprets all constitutional provisions, including the due process and equal protection guarantees, without regard to any personal views she may have on those provisions. This can be accomplished by applying the binding precedent laid down by the Supreme Court of the United States.

3. With the assumption that you will apply all the law announced by the Supreme Court, please name a Warren Court, Burger Court, and Rehnquist Court precedent that you believe was wrongly decided—but would nevertheless faithfully apply as a lower court judge. Why do you believe these precedents were wrongly decided?

Response: If there is one lesson that I have learned from my time as a justice on the Utah Supreme Court, it is that I should not judge a case until I have fully prepared and engaged in all of the issues. This requires reading all of the briefs and supporting materials, listening to the arguments of counsel, debating the case with my colleagues, and researching the applicable law and precedent. Because I have not gone through this process with any of the cases that have been decided by the Warren, Burger, or Rehnquist courts, I am not in a position to conclude that any of those cases were wrongly decided. If confirmed as a federal district judge, I will faithfully follow all binding precedent from the United States Supreme Court and Tenth Circuit Court of Appeals.

4. Which sitting Supreme Court Justice do you most want to emulate?

Response: I respect the commitment and service of each of the justices currently sitting on the United States Supreme Court. Each of them exhibits traits I seek to emulate, but I am not familiar enough with all of their traits to single out any particular justice.

5. 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, other)?

Response: If confirmed as a federal district judge, I will follow the precedent on constitutional interpretation enunciated by the United States Supreme Court, including that provided in *District of Columbia v. Heller*, 554 U.S. 570 (2008). In *Heller*, the Court looked to the normal and ordinary meaning of words used in the Second Amendment as they were understood at the time of ratification.

6. What role, if any, should the constitutional rulings and doctrines of foreign courts and international tribunals play in the interpretation of our Constitution and laws?

Response: Foreign law, including the constitutional rulings and doctrines of foreign courts and international tribunals, and the views of the “world community” can never be binding precedent on the courts of the United States and generally do not provide relevant or persuasive authority. The interpretation of the Constitution and laws of the United States is informed by the intent of the framers and Congress as reflected by the enacted text. Foreign law may inform an understanding of that intent in those rare cases where the framers or Congress had explicitly looked to that law as an example to emulate or avoid, for example the Magna Carta. *See, e.g., Boumediene v. Bush*, 553 U.S. 723, 845 (2008), *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 27–273 (1989).

7. What are your views about the role of federal courts in administering institutions such as prisons, hospitals, and schools?

Response: Under Article III, section 2 of the United States Constitution, the role of the federal courts is limited to deciding those cases and controversies that come before them. In deciding those cases, federal courts must apply the controlling law. As a result, the role of the federal courts with respect to the administration of prisons, hospitals, and schools is limited by both the Constitution and applicable federal law.

8. What are your views on the theory of a living Constitution, and is there any conflict between the theory of a living Constitution and the doctrine of judicial restraint?

Response: The theory of a living Constitution has many formulations. One formulation is that the Constitution evolves over time as it adapts to new circumstances, without being formally amended. The difficulty with such a theory is that judges lack any objective criteria for determining the ways in which the Constitution has evolved. It therefore presents the possibility that a judge’s personal philosophies could be substituted in the place of the constitutional provisions adopted by the framers.

A judge who practices judicial restraint will refrain from injecting her own philosophies or policy preferences into the Constitution and laws and will uphold congressional enactments unless directly contrary to the provisions of the Constitution. In my twelve years on the Utah Supreme Court, I have practiced judicial restraint by relying on

objective criteria such as constitutional text and binding precedent. Any personal views I may have had on an issue have played no role in my decisions.

9. What is your favorite Supreme Court decision in the past 10 years, and why?

Response: I do not have a favorite Supreme Court decision. I would apply them all as binding precedent.

10. Please name a Supreme Court case decided in the past 10 years that you would characterize as an example of judicial activism.

Response: Judicial activism or result-oriented jurisprudence occurs when a judge brings her personal agenda to a case. It is often manifest when a judge decides the outcome of a case before going through the process of applying the controlling law to the facts. It also can be manifest when a judge reaches issues that do not need to be decided or substitutes her own preferences for the result dictated by the governing law. Although I understand the term judicial activism, I am not sufficiently familiar with the cases decided by the Supreme Court during the last decade to feel comfortable characterizing any one of them as an example of judicial activism. My twelve years on the Utah Supreme Court have taught me that it is not possible to quarrel with the outcome of a case without first immersing myself in the facts, applicable law, and relevant precedent. Because I have not immersed myself in the facts and relevant precedent of the cases decided by the Supreme Court over the past decade and because I lack a basis for assessing any personal agendas of the justices, I am unable to identify any of them as examples of judicial activism.

11. What is your definition of natural law, and do you believe there is any room for using natural law in interpreting the Constitution or statutes?

Response: My understanding is that natural law is a philosophical theory that interprets legal principles by relying on an understanding of human nature and general concepts of justice rather than deciding cases based on the terms of legislative enactments. If confirmed as a federal district judge, I will decide cases based upon the Constitution and statutes rather than abstract notions of natural law.

Congressional Power

12. 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 in this area. Accordingly, if confirmed I will follow it without regard to any personal views I may have on the issue.

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

Response: The Court has struck down statutes absent a nexus to economic activity. *See United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995). In *Gonzales v. Raich*, 545 U.S. 1 (2005), it held that Congress may regulate the local possession and use of marijuana because “failure to regulate that class of activity would undercut” a larger regulatory regime directed at economic activity. *See id.* at 18, 26; *see also id.* at 37 (Scalia, J., concurring) (“Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce.”). If confirmed, I will apply all relevant Supreme Court and Tenth Circuit precedent to the particular facts of any case involving congressional power under the Commerce Clause and the Necessary and Proper Clause.

14. What limits, if any, does the Constitution place on Congress's ability to condition the receipt and use by states of federal funds?

Response: The Supreme Court addressed this issue in *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012). *Sebelius* held that Congress may condition the receipt of federal funds, but it must be in the “nature of a contract.” *Id.* at 2602 (internal quotation marks omitted). Thus, “Congress may use its spending power to create incentives for States to act in accordance with federal policies. But when pressure turns into compulsion, the legislation runs contrary to our system of federalism.” *Id.* (citation omitted) (internal quotation marks omitted). If confirmed, I will apply this and other controlling precedent in evaluating the conditional provision of federal funds to the states.

15. Is Chief Justice Roberts' decision in *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012), on the Commerce Clause and Necessary and Proper Clause binding precedent?

Response: Whether Chief Justice Roberts' decision on the Commerce and Necessary and Proper Clauses in *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012), is binding precedent is a matter of dispute in the federal appellate courts. *See, e.g., United States v. Henry*, 688 F.3d 637, 641–42 n.5 (9th Cir. 2012) (noting the existence of a controversy concerning whether the Commerce Clause analysis in *NFIB* is a holding or dicta); *United States v. Rose*, 714 F.3d 362, 371 (6th Cir. 2013) (treating the Commerce Clause reasoning in *NFIB* as a holding); *United States v. Roszkowski*, 700 F.3d 50, 58 n.3 (1st Cir. 2012) (declining to decide on the precedential status of *NFIB*'s Commerce Clause discussion); *Liberty Univ. Inc. v. Lew*, 733 F.3d 72, 94 n.7 (4th Cir. 2013) (“We express no opinion as to whether the limitation on the commerce power announced by five justices in *NFIB* constitutes a holding of the Court.”); *United States v. Robbins*, 729 F.3d 131, 135–36 (2d Cir. 2013) (assuming *arguendo* that the activity-inactivity distinction in *NFIB* was controlling precedent).

The dispute arises from the fragmented nature of the *Sebelius* opinion. The Supreme Court provided guidance on such a situation in *Marks v. United States*, 430 U.S. 188 (1977). Under *Marks*, “[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be

viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.” *Id.* at 193 (internal quotation marks omitted).

Presidential Power

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

Response: The President’s ability to issue executive orders “must stem either from an act of Congress or from the Constitution itself.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952). Whether the President has acted within such authority is evaluated by the Supreme Court under the “tripartite scheme” laid out in Justice Jackson’s concurring opinion in *Youngstown*. See *Medellin v. Texas*, 552 U.S. 491, 524 (2008) (citing *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring)). If confirmed, I will faithfully apply all relevant Supreme Court and Tenth Circuit precedent in evaluating the legality of executive orders or actions.

17. Does the President possess any unenumerated powers under the Constitution, and why or why not?

Response: “The 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) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952)). If confirmed, I will apply this and other binding precedent.

Individual Rights

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

Response: It is the Supreme Court that defines when a right is “fundamental” for purposes of the substantive due process doctrine. In *Washington v. Glucksberg*, the Court held that a right is “fundamental” if it is “deeply rooted in this Nation’s history and tradition and implicit in the concept of ordered liberty.” 521 U.S. 702, 720–21 (1997) (citations omitted) (internal quotation marks omitted). It further held that the “asserted fundamental liberty interest” must have a “careful description.” *Id.* at 721 (internal quotation marks omitted). If confirmed, I will follow this approach, and all binding Supreme Court and Tenth Circuit precedent, in any case involving asserted fundamental rights.

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

Response: Under Supreme Court precedent, a form of heightened scrutiny applies to classifications such as gender, race, alienage, illegitimacy, or national origin that are seldom relevant “to the achievement of any legitimate state interest” or that “bear [] no

relation to ability to perform or contribute to society.” *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440–41 (1985) (internal quotation marks omitted). If confirmed, I will follow Supreme Court and Tenth Circuit precedent regarding application of heightened scrutiny under the Equal Protection Clause.

- 20. 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: I have no personal expectation with respect to this issue. In *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003), the Supreme Court stated its expectation that twenty-five years from the time of its decision, racial preferences would no longer be necessary in public higher education. Ten years later, the Court addressed a similar issue in *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013). If confirmed, I will apply this precedent, along with any other relevant Supreme Court or Tenth Circuit precedent, to the facts of a case presenting an issue of racial preference.

- 21. To what extent does the Equal Protection Clause tolerate public policies that apportion benefits or assistance on the basis of race?**

Response: In *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013), the Supreme Court addressed the propriety of using race in the context of beneficial treatment in education admissions. The Supreme Court held that under the Equal Protection Clause, “strict scrutiny must be applied to *any* . . . program using racial categories or classifications.” *Id.* at 2419 (emphasis added). This includes public policies apportioning benefits or assistance on the basis of race. To survive strict scrutiny, the classification must be “narrowly tailored to further compelling government interests.” *Id.* If I am confirmed, I will apply this and other controlling precedent in a case requiring a determination of whether the Equal Protection Clause tolerates public policies that apportion benefits or assistance on the basis of race.

- 22. Does the Second Amendment guarantee an individual right to keep and bear arms for self-defense, both in the home and in public?**

Response: The United States Supreme Court addressed the individual right to keep and bear arms for self-defense in the home in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010). It held that the Second Amendment “guarantee[s] the individual right to possess and carry weapons in case of confrontation,” and forecloses restricting the use of firearms “for self-defense in the home.” *Heller*, 554 U.S. at 592, 636. Although the Supreme Court has yet to elucidate on “Second Amendment right[s] in some places beyond the home,” *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011) (Wilkinson, J.), those appellate courts that have addressed this issue have either held or assumed that the Second Amendment guarantees the right to keep and bear arms for self-defense in public. *Compare Peruta v. Cnty. of San Diego*, 742 F.3d 1144, 1173 (9th Cir. 2014) (“[T]he Second Amendment protects a responsible, law-abiding citizen’s right to bear arms outside the home for the

lawful purpose of self-defense.”), and *Moore v. Madigan*, 702 F.3d 933, 936 (7th Cir. 2012) (“A right to bear arms . . . implies a right to carry a loaded gun outside the home.”), with *Drake v. Filko*, 724 F.3d 426, 430–35 (3d Cir. 2013) (recognizing likely application of the Second Amendment outside the home), *Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013) (assuming Second Amendment rights exist “outside the home”), and *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 89 (2d Cir. 2012) (“[T]he [Second] Amendment must have *some* application in the . . . context of the public possession of firearms.”). If confirmed, I will apply Supreme Court and Tenth Circuit precedent in a case concerning these rights.