

Response of Joseph F. Leeson, Jr.
Nominee, United States District Judge for the Eastern District of Pennsylvania
To the Written Questions of Senator Al Franken

1. On June 27, 2012, you participated in the “Let Religious Freedom Ring” forum at Notre Dame Church in Bethlehem, Pennsylvania. In your questionnaire, you stated that you have no notes, transcripts or recordings of this forum, but you did provide press coverage of the event. This coverage, from a July 12, 2012 article in *The A.D. Times*, quotes you as saying that the health care law is “un-American, unprecedented and blatantly unconstitutional.” The article goes on to say that you mentioned lawsuits filed against the health care law across the country, including suits filed in the Dioceses of Pittsburgh and Erie, Pennsylvania. And then the article reports that you “explained [that] the mandate violated the First Amendment, the Administrative Procedure Act, and the Religious Freedom Restoration Act.”

- a. It appears from this press coverage that these comments were made about the requirement that employers provide health insurance coverage for preventive health services, including contraception, to their employees, and not the individual mandate requiring people to purchase health insurance. During your hearing, Ranking Member Grassley asked you which of the exact elements of the health care law you were referring to in these comments. You responded that you were discussing “the Act overall” and that there was “a specific discussion on the mandate as well.” Please explain more specifically which provisions of law you were referring to when you made each of the comments noted above.**

Response: In making each of the comments noted above, I was referring to the requirement that employers provide to their employees health insurance coverage for preventive health services, specifically the contraception coverage requirement.

- b. In response to a question from Ranking Member Grassley about the statements you made at the June 27, 2012 forum, you said at your hearing:**

I was asked by one of my clients, the Catholic Diocese of Allentown, to represent it at this forum on the subject of the First Amendment and religious liberty. That was the context in which I was representing the client and made those remarks.

In your questionnaire, you state that you participated in this June 27, 2012 forum, but do not mention that you participated as an attorney representing a client. The press coverage of this event also simply states that you “provided the commentary at the Notre Dame session.”

Please describe with specificity in what capacity you provided these comments and any relevant attorney-client relationship you may have had at the time with the Catholic Diocese of Allentown.

Response: I provided the comments in my capacity as an attorney representing one of my clients, the Catholic Diocese of Allentown, a religious nonprofit organization, which has been a client of mine for approximately two decades and remains a client today.

- c. Do these comments reflect your view of the law at the time you made these comments? Do you continue to hold these views today?**

Response: These comments reflected my client's view of the law at the time I made them on June 27, 2012. If confirmed as a judge, I would be bound to apply Supreme Court and U.S. Court of Appeals for the Third Circuit precedents, regardless of any position I previously advocated on behalf of a client. For example, the U.S. Court of Appeals for the Third Circuit currently has pending before it an appeal raising the issue of the constitutionality of the requirement for religious nonprofit organizations to provide coverage for contraceptive services to their employees (*Zubik, et al. v. Burwell, et al.*, Nos. 14-1376 and 14-1377). If confirmed, I would apply any precedent established in this area of the law by the Supreme Court and the U.S. Court of Appeals for the Third Circuit.

- d. Do your comments reflect your view, then or now, of the requirement that employers cover contraceptive services as it applies to a particular employer or type of employer, or were you referring to the contraceptive requirement as applied to all employers?**

Response: The comments reflected my client's view on June 27, 2012 of the applicability to my client, a religious nonprofit organization, of the contraceptive services requirement. I was not referring to all employers. The U.S. Court of Appeals for the Third Circuit currently has pending before it an appeal raising the issue of the constitutionality of the requirement for religious nonprofit organizations to provide coverage for contraceptive services to their employees (*Zubik, et al. v. Burwell, et al.*, Nos. 14-1376 and 14-1377). If confirmed, I would apply any precedent established in this area of the law by the Supreme Court and the U.S. Court of Appeals for the Third Circuit.

- e. Will these past comments, whether they reflect your past or current views, have any effect on your ability to serve as an impartial judge?**

Response: No. No comments I have ever made on behalf of a client nor any arguments I have made on behalf of a client would have any effect on my ability to serve as an impartial judge. If confirmed, I would apply the law impartially to the

facts of each case and apply precedent established by the Supreme Court and the U.S. Court of Appeals for the Third Circuit.

- f. **If the U.S. Court of Appeals for the Third Circuit's decision in *Conestoga Wood v. Burwell*, 724 F.3d 377 (3d Cir. 2013) had remained binding precedent, would you have had any trouble following this decision?**

Response: I would not have had any trouble following the decision if it had remained binding precedent. If confirmed, I would not have any trouble following any precedent from the Supreme Court and the U.S. Court of Appeals for the Third Circuit.

2. On June 30, 2014, the Supreme Court held in *Burwell v. Hobby Lobby* that closely held for-profit corporations can refuse to provide health insurance coverage of a woman's contraceptive services. The opinion of the Court assumed without deciding that the government has a compelling interest in providing contraceptive services to women. In his concurrence, Justice Kennedy states that the contraceptive coverage requirement "furthers a legitimate and compelling interest in the health of female employees." And in her dissent, Justice Ginsburg, joined by Justices Sotomayor, Breyer, and Kagan, also concludes that the contraceptive coverage requirement "furthers compelling interests in public health and women's well being."

- a. **In your view, does the government have a compelling interest in ensuring that women receive contraceptive care?**

Response: If confirmed as a district court judge, any personal views on this or any other issue would be irrelevant. The majority opinion of the Supreme Court, in its entirety in *Burwell v. Hobby Lobby*, is binding precedent, and as such, is entitled to full force and effect by lower court judges unless and until overruled or modified by later Supreme Court decisions. Although the majority opinion did not explicitly decide whether the government has a compelling interest in providing contraceptive services to women, five justices suggested that the government has a compelling interest in the contraceptive coverage requirement (Justice Kennedy in his concurring opinion and Justices Ginsberg, Sotomayor, Kagan and Breyer in their dissenting opinion). If confirmed, I would follow the *Burwell v. Hobby Lobby* majority opinion in its entirety as I would any precedents from the Supreme Court and U.S. Court of Appeals for the Third Circuit.

- b. **As a judge, would you be able to follow binding precedent holding that the government has a compelling interest in requiring that group health plans provide contraceptive coverage without cost sharing notwithstanding your personal views on the matter?**

Response: If confirmed as a district court judge, I would not have any trouble

following any precedent from the Supreme Court and U.S. Court of Appeals for the Third Circuit.

3. At the June 27, 2012 forum, the press coverage states that you “encouraged everyone to . . . vote their conscience.” Judges sometimes have to make difficult decisions to uphold the law even when they personally disagree with the law or the outcome that could result from applying the law. How will you handle cases where the law conflicts with your conscience or personal beliefs?

Response: I would like to reiterate that I made these comments on behalf of a client and I well understand the difference between the role of an advocate and the role of a judge. The oath sworn by a judge to uphold the law requires that a judge respect and follow the law and all binding precedents, whether or not a judge personally agrees with the law or the outcome that could result from applying the law. If confirmed, I will be firmly committed to following that oath.

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To the Written Questions of Senator Grassley

1. As solicitor for the city of Bethlehem, you made public comments regarding a federal lawsuit filed against the city. What concerns me is that you referred to this suit as a “nuisance suit” filed by a “bounty hunter” seeking a cut of the take. Is this an accurate representation of your view of whistleblowers?

Response: No.

a. If not, what in your view is the role of whistleblowers?

Response: Whistleblowers can play an important role in facilitating oversight and strengthening the system of checks and balances, by exposing waste, fraud and abuse. The 1986 update of the False Claims Act to include *qui tam* provisions, together with the 1989 Whistleblower Protection Act, have helped facilitate the recovery of substantial taxpayer funds that would otherwise have been lost to fraud.

b. If confirmed, how would you approach a *qui tam* case if it came before you?

Response: If confirmed, I would apply and give full effect to the *qui tam* provisions of the False Claims Act, Supreme Court precedent interpreting the False Claims Act and Third Circuit Court of Appeals precedent interpreting the False Claims Act.

2. You have been actively involved in local politics for many years. There is certainly nothing wrong with this activity, but should you be confirmed, your political history might concern future litigants.

a. Can you assure this Committee that, if confirmed, your decisions will remain grounded in the precedent and the text of the law rather than any underlying political ideology or motivation?

Response: Yes.

b. What further assurances or evidence can you give the Committee and future litigants that you will be fair to all who appear before you, if confirmed?

Response: Personal opinions, political and otherwise, should play no role in any judicial decision making. The justice system receives trust from the people it serves only when decisions are made based on the fair, impartial and evenhanded application of the law. If I am confirmed as a district court judge, all judicial decision making

would be fair, impartial and based exclusively on the objective application of the law and binding precedent to the facts in the record.

3. What is the most important attribute of a judge, and do you possess it?

Response: The most important attribute of a judge is integrity. This includes a commitment to the rule of law and to ensuring a fair and impartial process in the resolution of cases. I believe I possess this attribute.

4. Please explain your view of the appropriate temperament of a judge. What elements of judicial temperament do you consider the most important, and do you meet that standard?

Response: A judge should be patient, courteous and respectful. A judge's demeanor should promote respect for the rule of law, respect for the process and civility in the courtroom. I believe I meet this standard.

5. In general, Supreme Court precedents are binding on all lower federal courts and Circuit Court precedents are binding on the district courts within the particular circuit. Please describe your commitment to following the precedents of higher courts faithfully and giving them full force and effect, even if you personally disagree with such precedents?

Response: If confirmed, I am committed to following Supreme Court and Third Circuit Court of Appeals precedents, and would give them full force and effect, even if I personally disagreed with such precedents. The obligation of a district court judge is to follow the precedents of higher courts, and this is a fundamental principle of law, which I would faithfully follow.

6. At times, judges are faced with cases of first impression. If there were no controlling precedent that was dispositive on an issue with which you were presented, to what sources would you turn for persuasive authority? What principles will guide you, or what methods will you employ, in deciding cases of first impression?

Response: If the matter in question pertained to the interpretation of a statute, code or regulation, I would utilize the standard rules of statutory construction, beginning with an examination of the statute's plain language. I would also review and utilize any analogous decisions by the Supreme Court and the Third Circuit Court of Appeals. Although such decisions would only provide persuasive authority, I would also review and consider any applicable decisions by the other circuit courts or district courts.

7. What would you do if you believed the Supreme Court or the Court of Appeals had seriously erred in rendering a decision? Would you apply that decision or would you use your best judgment of the merits to decide the case?

Response: I would apply binding Supreme Court or Third Circuit Court of Appeals precedent, regardless of whether I believed the court erred in rendering its decision. District court judges are obligated to follow existing precedent until or unless that precedent is changed by an appellate court.

8. Under what circumstances do you believe it appropriate for a federal court to declare a statute enacted by Congress unconstitutional?

Response: Statutes enacted by Congress are presumed to be constitutional. Only if Congress clearly exceeded its constitutional authority or if a statute conflicts with another constitutional provision, should a district court judge declare a particular statute unconstitutional.

9. In your view, is it ever proper for judges to rely on foreign law, or the views of the “world community”, in determining the meaning of the Constitution? Please explain.

Response: No. It is not proper for judges to rely on foreign law or the views of the “world community” in interpreting the Constitution.

10. What assurances or evidence can you give this Committee that, if confirmed, your decisions will remain grounded in precedent and the text of the law rather than any underlying political ideology or motivation?

Response: It is never permissible for a judge’s decision to be influenced by any underlying political ideology or motivation. The rule of law is dependent on the judiciary making decisions based on facts and law, and not political ideology or other motivation. I am committed to following the rule of law which demands strict adherence to the principles of *stare decisis*.

11. What assurances or evidence can you give the Committee and future litigants that you will put aside any personal views and be fair to all who appear before you, if confirmed?

Response: For approximately 30 years, I have frequently been requested to serve as an arbitrator in cases, and in some matters as a sole binding arbitrator. Those requests have been made by counsel whom I regularly opposed in litigation matters. I believe that I have established a record of someone who has the ability, experience and integrity to decide cases based on the facts and applicable law, someone who sets aside personal views and someone who is fair to all parties.

12. If confirmed, how do you intend to manage your caseload?

Response: If confirmed, I would undertake to establish a process to promptly resolve cases on my docket. This would include holding a Rule 16 Conference after the filing of each case assigned to me, during which deadlines would be established. It would be my intention to actively monitor my cases, properly reviewing and scheduling any motions for argument or hearing, and disposing of those motions in a timely fashion. I would also seek to work closely and effectively with the United States Magistrate Judges to ensure that all cases are efficiently and properly advanced. An internal calendar alert system would also be established for compliance with the Speedy Trial Act.

13. Do you believe that judges have a role in controlling the pace and conduct of litigation and, if confirmed, what specific steps would you take to control your docket?

Response: Yes. Judges play an important role in controlling the pace and conduct of litigation. The quality of justice in the courts is in part a function of the efficiency and timeliness with which courts operate. I believe a judge should hold prompt Rule 16 Conferences, and establish reasonable deadlines for each case, to facilitate a fair determination on the merits in a timely fashion.

14. You have spent your entire legal career as an advocate for your clients. As a judge, you will have a very different role. Please describe how you will reach a decision in cases that come before you and to what sources of information you will look for guidance. What do you expect to be most difficult part of this transition for you?

Response: As an arbitrator of cases for approximately 30 years, and as a tax hearing officer in cases over the last few years, I have gained experience in decision making that I believe will assist in the transition to judicial service. If confirmed, I would look to the legal briefs and arguments of legal counsel, read the applicable statutes and cases and review the relevant evidence. Because I have practiced primarily in the area of civil litigation I will need to become more familiar with criminal law, and I have already undertaken to read and study in this field in order to become more knowledgeable in this area.

15. President Obama said that deciding the “truly difficult” cases requires applying “one’s deepest values, one’s core concerns, one’s broader perspectives on how the world works, and the depth and breadth of one’s empathy . . . the critical ingredient is supplied by what is in the judge’s heart.” Do you agree with this statement?

Response: I am unfamiliar with the full context in which these remarks were made. Judges are required to decide all cases by applying the law to the facts of the case. District court judges take an oath to decide cases based on the Constitution, applicable statutes, regulations, rules and higher court precedent, and if confirmed, that is what I would do. A judge’s personal views and beliefs must be set aside and play no role in decision making.

16. Every nominee who comes before this Committee assures me that he or she will follow all applicable precedent and give them full force and effect, regardless of whether he or she personally agrees or disagrees with that precedent. With this in mind, I have several questions regarding your commitment to the precedent established in *United States v. Windsor*. Please take any time you need to familiarize yourself with the case before providing your answers. Please provide separate answers to each subpart.

- a. **In the penultimate sentence of the Court’s opinion, Justice Kennedy wrote, “This opinion and its holding are confined to those lawful marriages.”¹**

¹ *United States v. Windsor*, 133 S. Ct. 2675 at 2696.

- i. **Do you understand this statement to be part of the holding in *Windsor*? If not, please explain.**

Response: Yes.

- ii. **What is your understanding of the set of marriages to which Justice Kennedy refers when he writes “lawful marriages”?**

Response: The reference to “lawful marriages” is limited to those same-sex “marriages that are made lawful by the state”. *United States v. Windsor*, 133 S. Ct. 2675, 2695 (2013).

- iii. **Is it your understanding that this holding and precedent is limited only to those circumstances in which states have legalized or permitted same-sex marriage?**

Response: Yes.

- iv. **Are you committed to upholding this precedent?**

Response: Yes.

- b. **Throughout the Majority opinion, Justice Kennedy went to great lengths to recite the history and precedent establishing the authority of the separate States to regulate marriage. For instance, near the beginning, he wrote, “By history and tradition the definition and regulation of marriage, as will be discussed in more detail, has been treated as being within the authority and realm of the separate States.”²**

- i. **Do you understand this portion of the Court’s opinion to be binding Supreme Court precedent entitled to full force and effect by the lower courts? If not, please explain.**

Response: Yes.

- ii. **Will you commit to give this portion of the Court’s opinion full force and effect?**

Response: Yes.

- c. **Justice Kennedy also wrote, “The recognition of civil marriages is central to state**

² *Id.* 2689-2690.

domestic relations law applicable to its residents and citizens.”³

- i. Do you understand this portion of the Court’s opinion to be binding Supreme Court precedent entitled to full force and effect by the lower courts? If not, please explain.**

Response: Yes.

- ii. Will you commit to give this portion of the Court’s opinion full force and effect?**

Response: Yes.

- d. Justice Kennedy wrote, “The definition of marriage is the foundation of the State’s broader authority to regulate the subject of domestic relations with respect to the ‘[p]rotection of offspring, property interests, and the enforcement of marital responsibilities.’”⁴**

- i. Do you understand this portion of the Court’s opinion to be binding Supreme Court precedent entitled to full force and effect by the lower courts? If not, please explain**

Response: Yes.

- ii. Will you commit to give this portion of the Court’s opinion full force and effect?**

Response: Yes.

- e. Justice Kennedy wrote, “The significance of state responsibilities for the definition and regulation of marriage dates to the Nation’s beginning; for ‘when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States.’”⁵**

- i. Do you understand this portion of the Court’s opinion to be binding Supreme Court precedent entitled to full force and effect by the lower courts? If not, please explain.**

Response: Yes.

³ *Id.* 2691.

⁴ *Id.* (internal citations omitted).

⁵ *Id.* (internal citations omitted).

- ii. **Will you commit to give this portion of the Court’s opinion full force and effect?**

Response: Yes.

17. According to the website of American Association for Justice (AAJ), it has established a Judicial Task Force, with the stated goals including the following: “To increase the number of pro-civil justice federal judges, increase the level of professional diversity of federal judicial nominees, identify nominees that may have an anti-civil justice bias, increase the number of trial lawyers serving on individual Senator’s judicial selection committees”.

- a. **Have you had any contact with the AAJ, the AAJ Judicial Task Force, or any individual or group associated with AAJ regarding your nomination? If yes, please detail what individuals you had contact with, the dates of the contacts, and the subject matter of the communications.**

Response: No.

- b. **Are you aware of any endorsements or promised endorsements by AAJ, the AAJ Judicial Task Force, or any individual or group associated with AAJ made to the White House or the Department of Justice regarding your nomination? If yes, please detail what individuals or groups made the endorsements, when the endorsements were made, and to whom the endorsements were made.**

Response: No.

18. Please describe with particularity the process by which these questions were answered.

Response: I received these questions on Thursday, July 31, 2014, drafted my answers to these questions and discussed them with the Department of Justice, Office of Legal Policy. I then made some revisions and finalized my answers for submission to the Committee.

19. Do these answers reflect your true and personal views?

Response: Yes.

Response of Joseph F. Leeson, Jr.
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To the Written Questions of 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 as a district court judge, my judicial philosophy would be to commit to the rule of law with a fair and impartial process, and a strict adherence to precedent. While I have read opinions from the Warren, Burger and Rehnquist Courts, I have not studied the individual Justices sufficiently to enable me to characterize a particular Justice’s philosophy as analogous to my own.

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 as a district court judge, I would follow all binding precedent of the Supreme Court and the Third Circuit Court of Appeals with respect to interpreting the Constitution. The Supreme Court has explained that public understanding of a text around the time of its enactment has a critical role in constitutional interpretation. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570 (2008). I would follow the *Heller* decision and all other binding precedent.

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 not and could not overrule precedent. I would follow precedent established by the Supreme Court and the Third Circuit Court of Appeals.

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: This statement is part of a majority opinion of the Supreme Court in a case that has not been explicitly overruled. If confirmed as a district court judge, I would apply and follow the Supreme Court’s decision in *Garcia* as well as other related Supreme Court and Third Circuit Court of Appeals precedents regarding state sovereign interests.

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 in *United States v. Lopez*, 514 U.S. 549 (1995) and in *United States v. Morrison*, 529 U.S. 598 (2000), held that the federal laws under consideration were unconstitutional

because they exceeded congressional power under the Commerce Clause, and the Supreme Court noted the non-economic nature of the activity being subjected to federal regulation in holding those laws unconstitutional. However, neither of these two Supreme Court decisions held that the Commerce Clause may never extend to non-economic activity. In *Gonzales v. Raich*, 545 U.S. 1 (2005), Justice Scalia's concurring opinion referenced the Necessary and Proper Clause in conjunction with the Commerce Clause to indicate that "Congress may regulate even non-economic 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 as a district court judge, I would follow Supreme Court and Third Circuit Court of Appeals precedent in deciding cases relating to the Commerce Clause.

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

Response: The power of the Executive Branch of the federal government is conferred by both the Constitution and by specific acts of Congress. If a President were to exceed the scope of lawful power, a federal court presented with a justiciable case or controversy would be empowered to enjoin such unlawful actions, as established by a series of cases including *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) and *Medellin v. Texas*, 552 U.S. 491 (2008). If confirmed as a district court judge, I would follow Supreme Court and Third Circuit Court of Appeals precedent in this and all other areas of the law.

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

Response: The Supreme Court has determined that a right may be fundamental if it is expressly stated in the Bill of Rights, or if it is "deeply rooted in this Nation's history and tradition". *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (internal citations and quotations omitted). If confirmed as a district court judge, I would follow Supreme Court and Third Circuit Court of Appeals precedent in deciding cases regarding fundamental rights.

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

Response: The Supreme Court has held that certain classifications, such as race, religion, gender, alienage, national origin or classifications that burden a fundamental right, are subject to a higher level of scrutiny under the Equal Protection Clause. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985). If confirmed as a district court judge, I will follow Supreme Court and Third Circuit Court of Appeals precedent in determining when to apply heightened scrutiny under the Equal Protection Clause.

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 expectations regarding the continued use or lack of use of racial preferences in public higher education. If confirmed as a district court judge, and if an issue concerning racial preferences were before me, I would apply *Grutter* and other relevant precedent, including *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013), to the factual record before me.