

Response of Edward G. Smith
Nominee to be United States District Judge for the Eastern District of Pennsylvania
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: As a trial judge, my judicial philosophy is focused on the responsibilities of a trial judge, which include being patient, courteous, and diligent. A judge must have an unwavering respect for the rule of law and treat everyone that comes before the court impartially and respectfully. A trial judge must faithfully follow the principle of *stare decisis*, and I have followed that principle during my twelve years as a state trial court judge. As for the Justices of the United States Supreme Court, while I greatly admire and respect the Justices, due to the different roles of a trial court judge and a Justice of the Supreme Court, I do not have a specific Justice of the Supreme Court whose judicial philosophy is most analogous to mine.

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 all binding precedent of the United States Supreme Court and the Third Circuit Court of Appeals with respect to interpreting the Constitution. The United States 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 judge, there are no circumstances in which I would overrule 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 United States Supreme Court's decision in *Garcia* is binding precedent. Therefore, if confirmed, I would follow the holdings in that case as I would for all other precedent established by the United States Supreme Court.

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

Response: The United States Supreme Court has addressed the scope of Congress's Commerce Clause power in *United States v. Lopez*, 514 U.S. 549 (1995), *United States v. Morrison*, 529

U.S. 598 (2000), and *Gonzales v. Raich*, 545 U.S. 1 (2005). The Supreme Court determined that Congress may regulate (1) “the use of the channels of interstate commerce,” (2) “the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities” and (3) “those activities having a substantial relation to” or that “substantially affect” interstate commerce. *Lopez*, 514 U.S. 549, 558-59 (1995). In *Lopez* and *Morrison*, the Supreme Court concluded that Congress had exceeded its powers under the Commerce Clause when Congress regulated non-economic activity. Although the Supreme Court concluded that Congress exceeded its powers in *Lopez* and *Morrison*, the Court did not hold that Congress could never rely on the Commerce Clause to regulate non-economic activity. In *Raich*, Justice Scalia authored a concurring opinion in which he stated that Congress may regulate non-economic activity if “that regulation is a necessary part of a more general regulation of interstate commerce.” 545 U.S. at 37 (Scalia, J., concurring). If confirmed, I would follow *Morrison*, *Lopez*, *Raich*, and all other applicable precedent of the United States Supreme Court and Third Circuit Court of Appeals in resolving any cases involving issues with the Commerce Clause.

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

Response: The standard for judicial review of executive orders and executive actions by the President is set forth in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring). The President can issue executive orders or take executive action if the Constitution or an act of Congress provides the President with the authority to do so.

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

Response: Pursuant to United States Supreme Court precedent, rights are “fundamental” if the rights are “objectively, ‘deeply rooted in this Nation’s history and tradition,’ and ‘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, 720-21 (1997) (citations omitted). If confirmed, I would follow this and all other applicable United States Supreme Court and Third Circuit Court of Appeals precedent in addressing issues involving fundamental rights.

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

Response: The United States Supreme Court applies strict scrutiny under the Equal Protection Clause when the legislation involves classifications based on race, religion, or national origin. The Supreme Court also applies strict scrutiny to state laws infringing upon fundamental rights. Additionally, the Supreme Court has applied a heightened, or “intermediate,” level of scrutiny to classifications based on gender or illegitimacy. See, e.g., *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439-41 (1985). I would follow binding United States Supreme Court and United State Court of Appeals for the Third Circuit precedent in addressing any questions regarding heightened 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: In *Grutter*, the United States Supreme Court stated its expectation that by 2028, “the use of racial preferences will no longer be necessary to further the interest” of a school in promoting a diverse student body. 539 U.S. at 343. If confirmed as a district court judge, I will apply binding Supreme Court precedent, including *Grutter*, and any Third Circuit Court of Appeals precedent, regardless of any personal expectations.