

Response of Edward G. Smith
Nominee to be United States District Judge for the Eastern District of Pennsylvania
to the Written Questions of Senator Chuck Grassley

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

Response: The most important attribute of a judge is an unwavering commitment to the rule of law while fairly, objectively, and impartially deciding cases. I believe I possess this attribute.

2. 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 trial judge must be patient, respectful, and courteous to everyone that appears before the court. Also, a judge's demeanor should reflect that the judge is thoughtful, impartial, and diligent. I believe that I have demonstrated this temperament throughout my twelve years as a trial judge.

3. 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: I am committed to faithfully following and giving full force and effect to the precedent of the United States Supreme Court and the Third Circuit Court of Appeals, even if I personally disagreed with such precedent. As a state trial judge in Pennsylvania, I have consistently followed the precedent of the United States Supreme Court, the Supreme Court of Pennsylvania, and Pennsylvania's intermediate appellate courts in resolving the issues that have come before me.

4. 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 faced with a case of first impression, I would first review any potentially analogous decisions by the Supreme Court of the United States or the Third Circuit Court of Appeals. Although I understand that the decisions would only serve as persuasive authority, I would also review and consider any applicable decisions by the other circuit courts or district courts. If the case of first impression involves the interpretation of a statute, code, or regulation, I would examine the text of the law in question, and employ recognized methods of statutory interpretation.

5. **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: Even if I believed that the United States Supreme Court or the Third Circuit Court of Appeals seriously erred in rendering a decision, I would follow the precedent established by that decision. As a trial judge, I will follow existing precedent until or unless that precedent is changed by an appellate court.

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

Response: Any statute enacted by Congress is presumed to be constitutional. There are rare circumstances when a judge is called upon to determine whether Congress has exceeded its authority under the Constitution with respect to particular legislation. Only if a statute is clearly not in conformance with the Constitution as interpreted by the United States Supreme Court or the Circuit Court of Appeals, should a district court judge declare a particular statute unconstitutional.

7. **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 never proper for judges to rely on foreign law, or the views of the “world community”, in interpreting the meaning of the Constitution.

8. **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 appropriate for a judge’s decision to be influenced by political ideology or motivation. I am committed to following the rule of law, which demands strict adherence to the principles of *stare decisis*. With respect to evidence, my twelve-year record as a trial judge in Pennsylvania demonstrates that I have consistently followed the precedent of the United States Supreme Court, the Supreme Court of Pennsylvania, the Superior Court of Pennsylvania, and the Commonwealth Court of Pennsylvania in rendering my decisions.

9. **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: During my twelve years as a Pennsylvania state trial court judge, I have never allowed my personal views to affect my ability to be fair and impartial to everyone that has come before the court.

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

Response: If confirmed as a federal district judge, I would ensure that an efficient process was established to resolve cases on my docket. In particular, I would take an active role in tracking all cases assigned to me. I would set up a process by which any assigned cases are initially reviewed for a determination of whether they are properly filed in federal court. I would then actively monitor my cases, promptly reviewing and scheduling any motions for argument or hearing, and disposing of those motions in a timely fashion. I would also ensure that I effectively work with the United States Magistrate Judges in my district to ensure that cases are efficiently and expeditiously proceeding to settlement or trial.

11. 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, I believe that judges have an important role in controlling the pace and conduct of litigation. If confirmed, I would regularly monitor the cases on my docket. I would also establish firm and fair deadlines for any case management orders, promptly resolve any motions or discovery issues, and entertain and encourage settlement discussions as early as practicable in the litigation.

12. As a judge, you have experience deciding cases and writing opinions. Please describe how you reach a decision in cases that come before you and to what sources of information you look for guidance.

Response: As a judge, I first have to establish the factual record on which I am to decide a particular issue. Once that record is established, I must determine the law that is applicable to the facts at issue. I will often provide the parties the opportunity to supply written submissions, and I will review those submissions and analyze the cases cited by the parties. I will also consider any oral arguments presented by the parties. I then conduct my analysis of the cases cited and my own review of the applicable law and draft a decision in accordance with the appellate precedent applicable to the particular issue in the case.

13. 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, I have not had any contact with the AAJ, the AAJ Judicial Task Force, or any individual or group associated with the AAJ regarding my nomination.

- 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, I am unaware 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 my nomination.

- 14. Please describe with particularity the process by which these questions were answered.**

Response: I received these questions via email on November 13, 2013. I drafted responses and forwarded them to the Department of Justice on November 14, 2013. I discussed responses with a representative of the Department of Justice and authorized the Department of Justice to submit my responses to the United States Senate.

- 15. Do these answers reflect your true and personal views?**

Response: Yes.

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.