

**Responses of Patty Shwartz
Nominee to be United States Circuit Judge for the Third Circuit
to the Written Questions of Senator Chuck Grassley**

- 1. In your opening remarks at your hearing you indicated that members of the Department of Justice and the White House Counsel's Office had assisted you throughout the process. Other than what is contained in your response to Question 26.a. of your Senate Questionnaire, were there additional contacts with those entities? If so, please describe the nature of your contact, including dates of any meetings and summaries of communications or meetings.**

Response: On several occasions after my nomination on October 5, 2011, I communicated with representatives of both the Department of Justice and White House Counsel's Office concerning the status of my nomination and the nomination hearing. In addition, I contacted representatives of the Department of Justice to obtain answers to procedural questions. In addition, I discussed arranging a second meeting with Senator Robert Menendez and met with a representative of the White House Counsel's Office on January 13, 2012, in connection with that second meeting. I also met with representatives of the Department of Justice and White House Counsel's Office on February 14, 2012, in connection with my February 15, 2012 hearing.

- 2. Your call, in your commencement speech, to disregard precedent or preexisting doctrine "to best accommodate the demands of a greater society" sounds a lot like those who advocate a "living" constitution that evolves over time.**
- a. Do you think judges should consider the current preferences of society when ruling on a constitutional challenge? Should current preferences of society be a basis for overruling longstanding Supreme Court or Circuit precedent?**

Response: I gave the speech referred to in this question at my 1986 law school graduation and was not referring to constitutional interpretation or the role and responsibility of a judge. A judge must follow binding precedent and should not consider societal preferences in ruling on a case, except in the rare circumstance where binding precedent so dictates. In determining whether a particular punishment violates the Cruel and Unusual Punishment Clause of the Eighth Amendment, the United States Supreme Court considers societal preferences to identify "evolving standards of decency." *Graham v. Florida*, 130 S. Ct. 2011, 2021 (2010) (citations omitted). Although the Supreme Court has observed that "community consensus" is "not itself determinative," it should be given weight. *Id.* at 2026. According to the Supreme Court, "the clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (citations omitted). As a lower court judge, I am bound to follow this precedent.

- b. On the living constitution theory, Justice Scalia has said, “the risk of assessing evolving standards is that it is all too easy to believe that evolution has culminated in one’s own views.” Do you agree with Justice Scalia?**

Response: I am not familiar with the context in which Justice Scalia made this statement and I am not exactly sure what he was trying to convey and, therefore, I cannot say whether I agree with the statement or not. To the extent Justice Scalia was expressing a concern about the influence of a judge’s personal views on a case, I can say that a judge’s personal views should play no role in deciding a case. Rather, a judge should decide a case based only on the governing law and the facts embodied in the record.

- 3. In my question regarding your meeting with Senator Menendez you stated that you talked generally about your understanding of certain substantive areas of the law but that he didn’t ask you to reveal your views on “any of those cases.”**

- a. What were the “substantive areas of the law” which you discussed and what did you tell him with regard to those?**

Response: To the best of my recollection, between the two meetings I had with Senator Menendez, he asked me about my understanding of what constitutes settled law and my understanding of several areas of substantive law including the rights of corporations, executive power, executive privilege, the levels of scrutiny that apply to a law being challenged as violating either the Equal Protection Clause or Due Process Clause, federalism, and the Ninth Amendment. I do not recall if all of these subjects were discussed at both meetings. At no time did he ask for, nor did I offer, my personal views nor did I give any indication as to how I would rule on any issue that might come before me as a judge. His inquiry focused on my understanding of various areas of the law.

- b. What cases did you discuss?**

Response: Senator Menendez mentioned two cases: *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010) and *Roe v. Wade*, 410 U.S. 113 (1973). He mentioned *Citizens United* in the context of our discussion of the rights of corporations, as indicated in my response below. With respect to *Roe*, he simply asked if it was settled law, which I understood to be his reference to binding precedent or *stare decisis*, and I said yes. *Citizens United* is also binding precedent. This was the extent of our discussion about these cases.

- c. You indicated, in a response to Senator Coburn, that you discussed, in a general way, your understanding of executive power. What is your general understanding of the scope and limits of executive power?**

Response: Under Supreme Court precedent, “Justice Jackson’s familiar tripartite scheme provides the accepted framework,” *Medellin v. Texas*, 552 U.S. 491, 524

(2008), for considering questions of executive power. First, when the President “acts pursuant to an expressed or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.” *Id.* (internal quotation marks omitted). Second, when the President acts in the “absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain.” *Id.* (internal quotation marks omitted). Third, when the President takes actions that are “incompatible with the expressed or implied will of Congress, his power is at its lowest ebb and the Court can sustain his actions only by disabling the Congress from acting upon the subject.” *Id.* at 524-25 (internal quotation marks omitted).

4. Senator Menendez issued a statement where he said, in part, the following:

“In my opinion, Judge Shwartz did not adequately demonstrate the breadth of knowledge of constitutional law and pivotal Supreme Court decisions such as *Citizens United* that we should expect from a United States Circuit Court judge.”

a. In your first interview with him, did Senator Menendez ask you specifically about the Supreme Court’s holding in *Citizens United*? What, specifically, did he ask you?

Response: Senator Menendez asked me a general question about whether or not corporations have rights.

b. What did you tell him?

Response: I explained that it was my understanding of the law that corporations have the same First Amendment rights as people, in addition to certain rights under the Fourth, Fifth, Sixth, and Seventh Amendments. I do not believe that I mentioned the *Citizens United* case by name, and he indicated that it is the Supreme Court precedent on this topic. If there was a misunderstanding about my knowledge of that case this may have been the reason.

5. Would you please update your Senate Questionnaire, question 26.a and 26.b. to fully describe all your interviews with Senator Menendez?

Response: In addition to the interview referenced in question 26.a, I met with Senator Menendez on January 13, 2012. As to question 26.b, my original response remains accurate. At no time has anyone, including Senator Menendez, discussed any case, issue, or question in a manner that could be interpreted as seeking any assurance about how I would rule on any case, issue, or question.

6. It appears that your legal and judicial experience is entirely at the trial court level. Please provide to the committee a description of your appellate experience including:

- a. The number of appellate briefs you have written, edited, or otherwise contributed to in a significant manner, and a description of each.**

Response: I have not written any appellate briefs. During my time as an Assistant United States Attorney, I consulted with and provided support to the appellate lawyers who handled cases I prosecuted in the trial court, including providing the legal arguments (including in written briefs) made to the trial court and identifying portions of the trial record that were relevant to the issues on appeal.

- b. The number of appellate arguments you have participated in, and a description of each.**

Response: None.

- c. The number of appellate opinions you have written, edited, or otherwise contributed to in a significant manner.**

Response: I have authored hundreds of opinions at the trial level but have not authored any appellate opinions. Some of the cases that I have considered at the trial level have been akin to judicial review of an agency decision and thus similar to the type of situation an appellate court confronts. *See, e.g., Solid Waste Services Inc. v. Morris County Municipal Utilities Authority*, Civ. No. 08-327, 2008 WL 5046715 (D.N.J. Nov. 20, 2008).

- d. Any other particular experience related to the duties of an appellate court judge, beyond the response you gave to Senator Coons (legal research and writing, record development.)**

Response: As an Assistant United States Attorney for more than thirteen years and a United States Magistrate Judge for almost nine years, I have been exposed to a variety of areas of civil and criminal law and procedure. As an Assistant United States Attorney, I briefed and argued significant questions of law and tried cases. As a judge, I have considered briefs and arguments in connection with complex motions and tried cases. Because of the variety of cases that have come before me and the daily requests for resolutions of disputes, I have experience in judicial decision-making in a wide range of substantive legal areas and types of proceedings. Such decision-making involves educating myself on the governing law, applying the law to the facts established in the record, reaching an impartial decision, and providing reasons for the decision. The skills needed to perform these tasks are the same skills needed to fulfill the duties of an appellate judge. The American Bar Association recognized the strength of this collection of experiences in its unanimous rating that I am well qualified for a circuit court judgeship.

Although the job of an appellate judge differs in some significant respects from my current duties, I am also accustomed to making transitions in the law. When I became a United States Magistrate Judge, for example, I went from focusing almost

exclusively on criminal law and procedure to spending approximately eighty percent of my time handling civil cases. To ensure I was prepared for these duties, I educated myself on the federal and local rules of civil procedure and civil practice in our court and, for each case, educated myself on the governing substantive law. I would apply the same approach as an appellate judge if I am confirmed.

Moreover, as a Magistrate Judge, I have become well-versed in issues of jurisdiction and am familiar with standards of review, which are important concepts in appellate proceedings. For instance, in each matter I am asked to decide, I must ensure that the District Court has jurisdiction over the case and that I, as a Magistrate Judge, have the authority to decide the issue. Similarly, an appellate court must have jurisdiction over the case and appellate jurisdiction over the issue on appeal. Concerning standards of review, as a Magistrate Judge, I am aware that each of my decisions can be appealed and that those decisions are subject to a certain standard of review. To ensure that I develop a proper record for review, I must understand the standard that the reviewing court would apply to my decision. My understanding of the limits of a particular court's authority and familiarity with the standards of review would be transferable to an appellate judgeship if I am confirmed.

- 7. Interpretation of the Commerce Clause is a longstanding cause for debate and dissention among constitutional scholars. The Supreme Court recognized limits on Congress' Commerce Clause power in *United States v. Lopez*. Other Supreme Court precedent has taken a more expansive view, relying on *Wickard v. Filburn*, to find a broad congressional power to regulate commerce on even non-economic activity as long as it relates to a wider and proper federal scheme. Currently unanswered questions, such as whether Congress can mandate individual behavior and/or regulate economic inactivity, leave a lot of room for lower court interpretation.**

- a. If assessing a commerce clause issue where Congress has mandated action from a group of previously inactive citizens, what case precedent would you apply? Assume that this is an economic activity that plainly affects interstate commerce.**

Response: I have not comprehensively researched this area of the law but I am not presently aware of any precedent from the United States Supreme Court or the Court of Appeals for the Third Circuit that has addressed a situation in which a statute mandated economic activity from a group of previously inactive citizens. The United States Supreme Court may resolve this issue in connection with its review of the Patient Protection and Affordable Care Act and such a decision would provide precedential guidance. In the absence of such guidance, a lower court considering a challenge to such a law would be guided by the Supreme Court's recent cases on the limits of Congress' power under the Commerce Clause, including *Gonzales v. Raich*, 545 U.S. 1 (2005), *United States v. Morrison*, 529 U.S. 598 (2000), and *United States v. Lopez*, 514 U.S. 549 (1995).

- b. Are there any scenarios you can think of where Congress may mandate private citizens to purchase certain goods or services under penalty of fine and/or jail time?**

Response: Congress enacted the Patient Protection and Affordable Care Act, which mandated private citizens to purchase services or pay a penalty. The United States Supreme Court is currently reviewing this statute and may provide precedential guidance as to whether Congress has the authority to enact such a law. I am not aware of any prior decision of the Supreme Court or the Court of Appeals for the Third Circuit addressing this question.

- c. Under current Court precedent, the Court aggregates intrastate economic activity to determine whether it substantially affects interstate commerce. This has allowed the Court to find that a farmer growing wheat for his own personal consumption substantially affected interstate commerce. Under this theory of the Commerce Clause, are you able to give me an example of purely intrastate economic activity that Congress could not regulate?**

Response: I do not think it would be appropriate for me to attempt to answer this question outside the context of a specific statute that is aimed at regulating particular conduct. If called upon to examine such a statute, I would consider the statutory text and the authority on which Congress relied to enact it. To determine if the statute falls outside Congress' Commerce Clause authority, I would consider the binding precedent of the United States Supreme Court, including *Raich*, *Morrison*, and *Lopez*, as well as the factual record before the court to determine whether the activity had no substantial effect on interstate commerce.

- d. Is there any justiciable limit to Congress' power to regulate purely intrastate economic activity?**

Response: The federal government is one of limited and enumerated powers. Under Article 1, Section 8, and Supreme Court precedent, Congress has the authority to regulate instrumentalities of interstate commerce, channels of interstate commerce, and activities that substantially impact interstate commerce. If the activity that Congress is regulating does not fall within one of these categories or if the statute at issue violates some other provision of the Constitution, then it is beyond Congress' power to regulate such activity.

- 8. What role do you think a judge's opinions of the evolving norms and traditions of our society have in interpreting the written Constitution?**

Response: A judge's personal opinion should play no role in deciding any case or in interpreting the Constitution.

- 9. What would be your definition of an "activist judge"?**

Response: As the United States District Judge for whom I clerked stated, “judges have cases, not causes.” Thus, an activist judge would be one who seeks to further causes, policies, or personal preferences through his or her decisions rather than deciding the cases before the court based upon the law and the facts.

10. What is your understanding of the current state of the law with regard to the interplay between the establishment and free exercise clause of the First Amendment?

Response: I have not researched this issue comprehensively but, as a general matter, the Establishment Clause prohibits the government from establishing a religion and the Free Exercise Clause protects an individual’s freedom to believe and worship. With respect to the interplay between these two provisions, the Supreme Court has “recognize[d] that there is room for play in the joints between the Clauses, some space for legislative action neither compelled by the Free Exercise Clause nor prohibited by the Establishment Clause.” *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005) (citations and internal quotation marks omitted).

11. Do you believe there is a right to privacy in the U.S. Constitution?

Response: The United States Supreme Court has held that there is a constitutional right to privacy. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965).

a. Where is it located?

Response: The United States Supreme Court has stated that the right to privacy or personal autonomy is a liberty interest that the Due Process Clauses of the Fifth and Fourteenth Amendments protect. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 567 (2003); *Washington v. Glucksberg*, 521 U.S. 702, 719-20, 726 & n.19 (1997); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 846-51 (1992).

b. From what does it derive?

Response: Please see my response to Question 11a.

c. What is your understanding, in general terms, of the contours of that right?

Response: The United States Supreme Court has described the right to privacy or personal autonomy as protecting “the right to marry, to have children, to direct the education and upbringing of one’s children, to marital privacy, to use contraception, to bodily integrity, and to abortion.” *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1998) (citations omitted).

12. In *Griswold*, Justice Douglas stated that, although the Bill of Rights did not explicitly mention the right to privacy, it could be found in the “penumbras” and “emanations” of the Constitution.

- a. **Do you agree with Justice Douglas that there are certain rights that are not explicitly stated in our Constitution that can be found by “reading between the lines”?**

Response: Constitutional rights are not identified by “reading between the lines.” Rather, the Supreme Court has interpreted the Constitution to include certain fundamental rights even though the rights are not literally expressed in the text. Relying on the Due Process Clause, the United States Supreme Court has made clear that the “Due Process Clause specially protects those fundamental rights and liberties which 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 (1997) (citations omitted).

- b. **Is it appropriate for a judge to go searching for “penumbras” and “emanations” in the Constitution?**

Response: Judges should not be searching for “penumbras” and “emanations.” Indeed, the United States Supreme Court has stated that it is “reluctant to expand the content of substantive due process” and directed courts “to exercise the utmost care whenever [they] are asked to break new ground in this field.” *Glucksberg*, 521 U.S. at 720.

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

Response: The most important attribute of a judge is to impartially decide only the case before the court based upon an application of the governing law to the facts established in the record, regardless of the judge’s personal views. I believe my conduct as a United States Magistrate Judge shows that I possess this attribute.

14. 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: As the United States District Judge for whom I clerked succinctly expressed it, appropriate judicial temperament is characterized by “courtesy to all, partiality to none.” I believe that I have comported myself in accordance with this standard as a United States Magistrate Judge by being courteous, patient, impartial, diligent, and respectful of the litigants, the lawyers, and the process.

15. 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. Are you committed to following the precedents of higher courts faithfully and giving them full force and effect, even if you personally disagree with such precedents?

Response: Yes.

- 16. 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 presented with a case of first impression that involves a federal statute, I would review the statutory text and if the language is clear, apply it to the facts of the case. If the language were ambiguous, I would examine the statutory scheme of which the particular text is a part, the legislative history, and analogous cases from the United States Supreme Court and Court of Appeals for the Third Circuit to see how those courts construed similar text and to identify the analytical framework those courts employed. If there were no such precedent, then I would research cases from other federal courts to determine if other courts considered similar issues and if so, examine the reasoning of those cases for possible guidance.

- 17. 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 own best judgment of the merits?**

Response: I would be bound by and would apply the precedent of the United States Supreme Court and the Court of Appeals for the Third Circuit, regardless of my personal views about its correctness.

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

Response: A statute is presumed constitutional and a court may deem it unconstitutional “only upon a plain showing that Congress has exceeded its constitutional bounds,” *United States v. Morrison*, 529 U.S. 598, 607 (2000), or if it unlawfully infringes a right that the Constitution protects.

- 19. Under what circumstances, if any, do you believe an appellate court should overturn precedent within the circuit? What factors would you consider in reaching this decision?**

Response: According to Internal Operating Procedure 9.1 of the Court of Appeals for the Third Circuit, a prior precedential decision of one panel is binding on all subsequent panels. Thus, one panel cannot overrule a precedential decision of another panel. Only a circuit court sitting *en banc* may overturn the circuit’s precedent. Pursuant to Federal Rule of Appellate Procedure 35, such a sitting should only occur when the panel’s decision conflicts with United States Supreme Court precedent, the case involves “a question of exceptional importance,” or it is “necessary to maintain uniformity of the court’s decisions.” The factors that dictate when an *en banc* sitting should occur are among the factors appellate judges sitting *en banc* would consider in deciding whether to overturn circuit precedent.

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

Response: I received the questions during the evening of February 22, 2012, prepared answers to the questions, reviewed my responses with a representative of the Department of Justice on February 26, 2012, and requested that my responses be submitted to the Senate Judiciary Committee.

21. Do these answers reflect your own views?

Response: Yes.