

Responses of Richard Gary Taranto
Nominee to be United States Circuit Judge for the Federal Circuit
to the Written Questions of Senator Mike Lee

1. How would you describe your judicial philosophy?

Response: I would characterize my judicial philosophy as a thorough commitment to the rule of law. This requires scrupulous attention to record facts, respect for jurisdictional limits and the role of the particular court within the judicial system as a whole and within the overall constitutional system, and adherence to the duty to apply and interpret all governing law, whether constitutional, statutory, regulatory, or otherwise, with impartiality, neutrality, fidelity, reason, appreciation for complexities, clarity of explanation, and all possible expedition.

a. To what sources would you look in deciding a case that turned on interpretation of a federal statute?

Response: As an appellate judge, I would look to those sources that governing Supreme Court precedent deems relevant as a methodological matter to resolution of a statutory issue. I would follow any on-point and still-good precedent on the particular issue, whether from the Supreme Court or from my own court. To the extent that precedent is not controlling, I would look first and foremost to the text of the statute—starting with the words of the particular provision at issue and then widening the inquiry to understand how that particular language fits within the enacted law as a whole, bearing in mind that broad invocations of policy are no substitute for close adherence to the text. Under Supreme Court decisions, legislative history, carefully and cautiously understood, may provide insight into the proper understanding of the text. In examining text and context, I would examine what controlling precedent says about issues or language related to those directly involved in the case. And I would examine any pertinent non-binding judicial decisions (*e.g.*, from other circuits).

b. To what sources would you look in deciding a case that turned on interpretation of a constitutional provision?

Response: As an appellate judge, I would look to those sources that governing Supreme Court precedent deems relevant as a methodological matter to resolution of a constitutional issue. I would follow any on-point and still-good precedent on the particular issue, whether from the Supreme Court or from my own court. To the extent that precedent is not controlling on the particular point, I would examine the text of the particular constitutional provision at issue, what the language means by itself and in the context of the Constitution as a whole, what binding precedent prescribes about the general method of applying that provision and says about other issues bearing on the particular question, and what

light is authoritatively shed on the meaning of the provision by Framers-era sources and other relevant history. I would examine what courts have said on the matter in decisions that do not serve as binding precedent for my court. And I would follow the canon favoring adoption of reasonable interpretations of statutes to avoid unconstitutionality.

2. In your view, what are the constitutional requirements for standing and how robustly should those requirements be applied to novel assertions of standing?

Response: Under Supreme Court precedent, Article III requires that, to have standing, a plaintiff must have a concrete and particular injury in fact, traceable to the alleged wrong, and redressable by a judgment in the case. *E.g.*, *Bond v. United States*, 131 S. Ct. 2355, 2366 (2011); *Arizona Christian School Tuition Org. v. Winn*, 131 S. Ct. 1436, 1442 (2011). Such standing requirements should be enforced robustly to ensure, as the Court has said, that federal courts do not overstep the limits on their role in the constitutional system. *E.g.*, *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006).

3. What role do the text and original meaning of a constitutional provision play in interpreting the Constitution?

Response: The text and original meaning of a constitutional provision supply the proper standard for interpreting the Constitution.

4. Do you believe that Congress has implied powers beyond those enumerated in the Constitution?

Response: Congress has only such powers as are enumerated in the Constitution, including under the Necessary and Proper Clause's authorization of laws that are "necessary and proper for carrying into execution" more specifically enumerated powers.

a. If so, which ones? And which provisions of the Constitution account for these implicit rights?

Response: The Necessary and Proper Clause is an express authorization of powers, but if one viewed it as authorizing "implicit" powers, it does so by reference to the more specifically enumerated powers under a standard of being "necessary and proper for carrying [them] into execution." How to elaborate on that standard more specifically has been the subject of differing opinions within the Supreme Court, *see United States v. Comstock*, 130 S. Ct. 1949 (2010) (several opinions), and is the subject of pending litigation, including in the cases involving the Affordable Care Act. I do not believe that it would be appropriate for me to address the matter in advance of a case that could come before me as a judge if I am

confirmed. In such a case I would faithfully follow Supreme Court precedent on the subject.

b. If not, how would you approach the multitude of legislation that Congress has enacted without reference to an appropriate authorizing provision of the Constitution?

Response: The Supreme Court has said: “The question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise.” *Woods v. Lloyd W. Miller Co.*, 333 U.S. 138, 144 (1948). I am not aware of Supreme Court precedent holding that legislation that in fact comes within a power the Constitution grants to Congress is invalid just because Congress has not referred to the authorizing power. If there is such precedent, I would follow it.

i. Would you strike down laws not properly authorized by the Constitution?

Response: In a case where the issue had to be reached, I would strike down laws that are not properly authorized by the Constitution.

5. Do you believe that the Constitution protects rights not specified in the Constitution?

Response: The Constitution does not protect rights that it does not specify.

a. Do you believe that the Constitution provides for a right of privacy?

Response: The Constitution does not use the term “privacy” and does not guarantee a “right of privacy.” The Fourth Amendment protects certain privacy interests through its guarantee regarding “searches and seizures.” And the Supreme Court has found in other provisions, such as the First Amendment and the Due Process Clauses, protection for certain interests that it has sometimes described as privacy interests. *E.g.*, *NAACP v. Alabama*, 357 U.S. 449, 462 (1958) (“privacy in group association” sometimes protected by First Amendment); *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (due process decision describing *Griswold v. Connecticut*, 381 U.S. 479 (1965), as protecting “marital privacy”).

b. If so, which provision of the Constitution provides for that right?

Response: As noted, the Constitution does not provide for a “right of privacy,” but other provisions protect certain interests that are “privacy” interests.

6. Do you believe there the Constitution provides for substantive due process—that is to say, that the Constitution does not allow the government to infringe certain fundamental rights regardless of the procedural guarantees that might be afforded?

Response: The Supreme Court has held that the Due Process Clauses, in addition to implicitly incorporating certain Bill of Rights protections (in the case of the Fourteenth Amendment) and equal-protection principles (in the case of the Fifth Amendment), “protect[] individual liberty against ‘certain government actions regardless of the fairness of the procedures used to implement them.’” *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992). It has held, too, that this principle “provides heightened protection against government interference with certain fundamental rights and liberty interests.” *Washington v. Glucksberg*, 521 U.S. 702, 719-21 (1997).

a. Which do you believe are protected under substantive due process?

Response: The Supreme Court has recited a number of “fundamental rights and liberty interests” subject to protection under substantive due process. *Washington v. Glucksberg*, 521 U.S. 702, 719-20 (1997) (“rights 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”; Court has “also assumed, and strongly suggested,” protection for “the traditional right to refuse unwanted life saving medical treatment”) (citations omitted). More recently, the Supreme Court applied a substantive due process rationale to invalidate a “statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct.” *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

b. If you believe such rights are protected, is it also your belief that *Lochner v. New York*, 198 U.S. 45 (1905) was correctly decided and should be the state of the law? *Lochner*, to paraphrase, was a case in which the Court held unconstitutional a New York statute that prohibited employment of bakery employees for more than 10 hours a day or 60 hours a week.

Response: As a judicial nominee, I believe that it would not be appropriate for me to opine on the correctness of *Lochner* or of other Supreme Court decisions. I do note that, as to *Lochner*, the Court has referred to “the discredited substantive-due-process case of *Lochner*” (*College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Fund*, 527 U.S. 666, 690 (1999)) and said that “[t]he doctrine that prevailed in *Lochner* ... and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded.” *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963); see also *Day-Brite Lighting Inc. v. Missouri*, 342 U.S. 421, 423 (1952); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505

U.S. 833, 861 (1992) (“*West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), signaled the demise of *Lochner* by overruling *Adkins [v. Children’s Hospital of District of Columbia*, 261 U.S. 525 (1923)].”).

- c. If you believe substantive due process protects some personal rights such as a right to abortion, but not economic rights such as those at stake in *Lochner*, on what basis do you distinguish these types of rights for constitutional purposes?**

Response: My role as a judge would be to follow Supreme Court precedents on substantive due process as well as other matters.

- 7. In the case of the Commerce Clause, apart from circumstances present in *Lopez* and *Morrison*, what are the limits on Congress’s Commerce Clause power?**

Response: The Supreme Court has repeatedly declared that the federal government is a government of limited powers, *see New York v. United States*, 505 U.S. 144, 155 (1992), quoted Madison’s statement that the powers are “‘few and defined,’” *United States v. Lopez*, 514 U.S. 549, 552 (1995) (quoting Federalist No. 45), and stated that the powers do not include “a plenary police power,” *id.* at 566; *United States v. Morrison*, 529 U.S. 598, 618 (2000). As to the Commerce Clause in particular, the Court found an overstepping of the bounds of that authority in *Lopez* and *Morrison*. The Supreme Court may speak further to explain those bounds in the pending cases involving the Affordable Care Act. I do not believe that it would be appropriate for me to address the matter in advance of a case that could come before me as a judge if I am confirmed. In such a case I would faithfully follow Supreme Court precedent on the subject, giving effect to the Court’s explanations as they apply to the particular issue presented.

- a. Do you believe that Congress has at any time overstepped its authority under that provision since *Wickard*, other than in *Lopez* and *Morrison*?**

Response: I am unaware of such Supreme Court decisions other than *Lopez* and *Morrison*, but if there is such a decision, I would follow it. As for other congressional enactments that have not been the subject of a Supreme Court decision, I do not believe that it would be appropriate for me to address the matter in advance of a case that could come before me as a judge if I am confirmed. In such a case I would faithfully follow Supreme Court precedent on the subject.

- 8. How would you go about determining whether a group of persons is a “suspect class,” such that laws affecting that group should receive strict scrutiny?**

Response: I would examine Supreme Court precedents for whether they answer the question for the particular class and, more generally, for what they teach about the proper method of analysis for a court to use in deciding in the first instance whether a particular class is “suspect,” recognizing that any such determination must be affirmatively justified against the background of “[t]he general rule ... that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.” *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985).

9. Under what circumstances do you think it proper for a court to conclude that Congress has delegated legislative power to the executive branch in violation of the Article I of the Constitution?

Response: The Supreme Court has stated that there is no such delegation of legislative power when, “according to common sense and the inherent necessities of the governmental co-ordination,” Congress has laid down an “intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform.” *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928); see *Mistretta v. United States*, 488 U.S. 361, 372 (1989); *id.* at 415-16 (Scalia, J., dissenting). That precedent, and any that might elaborate on or modify it, would govern how to answer the improper-delegation question in any particular case.

10. How would you describe the role that checks and balances and separation of powers play in the Constitution’s structure?

Response: The Supreme Court has often enforced the system of separation of powers and checks and balances that the Framers built into the Constitution (before the addition of the Bill of Rights), recognizing that the provisions that define that system provide “structural protections against abuse of power [that are] critical to preserving liberty.” *Bowsher v. Synar*, 478 U.S. 714, 730 (1986); see *Free Enterprise Fund v. Public Company Account Oversight Bd.*, 130 S. Ct. 3138, 3157 (2010); *Stern v. Marshall*, 131 S. Ct. 2594, 2608-09 (2011).

a. How would you go about deciding a case in which one branch assumed an authority not granted it by the text of the Constitution?

Response: I would determine whether there was a proper case or controversy that required decision of whether a branch assumed an ungranted authority and then apply the precedents of the Supreme Court to determine whether such an impermissible assumption had occurred.

b. What is your understanding of the Recess Appointments Clause?

Response: The scope of authority under the Recess Appointments Clause is a matter currently in litigation. I do not believe that it would be

appropriate for me to address the matter in advance of a case that could come before me as a judge if I am confirmed.

i. To what sources would you look in interpreting that clause?

Response: Focusing on the specific question presented in a case, I would examine precedents from the Supreme Court and other courts for what they teach about whether a court can and should adjudicate the question and for what they teach about the sources for answering the question, including about the meaning of the constitutional text—both the Clause itself and its role within the Constitution as a whole—and the weight to be accorded to the history of practices and pronouncements of the Article I and II Branches.

ii. Which branch should determine whether the Senate is in recess?

Response: This is an aspect of disputes currently in litigation. I do not believe that it would be appropriate for me to address the matter in advance of a case that could come before me as a judge if I am confirmed.

iii. In the event of a dispute, how you would you determine whether the Senate is in recess? Would you employ a functionalist approach, and if so, why?

Response: This is an aspect of disputes currently in litigation. Beyond what I have said above about how I would go about approaching such a question in a case, I do not believe that it would be appropriate for me to address the matter in advance of a case that could come before me as a judge if I am confirmed.

11. What legal experience do you think is necessary for a person to make a good federal judge and what have you done to gain this experience?

Response: Many kinds of legal experience can prepare a person to be a good federal judge. My own experience has been a quarter century of litigating cases in the federal courts, overwhelmingly at the appellate level, and centrally for the last decade in the Federal Circuit. That experience, together with having clerked at three levels of the federal courts, served in the Solicitor General's office, and taught patent law, has prepared me to serve on the Federal Circuit.

12. What role should empathy play in a judge's consideration of a case?

Response: If "empathy" means a personal, emotional, political, or similar sympathy for a party, it should play no role in the judge's decision, which must be a faithful application of the law to the facts, with the judge taking constant care to

avoid influence of any personal views. If “empathy” means simply a full and respectful appreciation for the real-world interests of all of the parties before the court, the attitude is an appropriate part of the fairness and thoroughness of the judicial process.