

**Response of Patty Shwartz
Nominee to be United States Circuit Judge for the Third Circuit
to the Written Questions of Senator Ted Cruz**

Judicial Philosophy

Describe how you would characterize your judicial philosophy, and identify which US Supreme Court Justice's judicial philosophy from the Warren, Burger, or Rehnquist Courts is most analogous with yours.

Response: Under Article III of the Constitution, a judge decides cases and controversies. Consistent with this obligation, my judicial philosophy is to impartially decide only the case in front of me based upon the governing law and the facts established in the record, to give the parties an opportunity to be heard, to render fair and prompt decisions, and to provide reasons for the decisions for the benefit of the litigants, the public, and any higher court that may be asked to review the decision. Any judicial officer who adopts this approach would have an analogous philosophy.

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 the text is unclear and there is no relevant binding precedent, then a court may apply the established tools for interpretation. Using the original meaning of the words provides a method for interpreting the text.

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 I am confirmed as an appellate judge, I could not overrule Supreme Court precedent and would be bound to follow Federal Rule of Appellate Procedure 35 and the circuit court's internal operating rules governing the authority to overrule appellate court precedent. 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 Rule 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.

Congressional Power

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 quoted language is expressed in the majority opinion in *Garcia*. I would be bound to follow *Garcia* regardless of whether I agreed or disagreed with it.

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

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, the authority on which Congress relied to enact it, and the binding precedent of the United States Supreme Court, 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), as well as the factual record before the court. To the extent the "necessary and proper clause" is also a basis upon which the statute was enacted, I would also consider the binding precedent interpreting that provision, including *United States v. Comstock*, 130 S. Ct. 1949 (2010).

Presidential Power

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

Response: If confronted with a case that challenges the authority of the President to issue an order or engage in a specific action, a court would consider the authority the President is granted under the Constitution, whether Congress has explicitly or implicitly granted or withheld authority for the President to act in a particular area, and the affirmative limits that may be placed on the federal government by the Constitution. See *Medellin v. Texas*, 552 U.S. 491, 524-25 (2008).

Individual Rights

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

Response: The United States Supreme Court has explained 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, 720-21 (1997) (citations omitted).

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

Response: In the context of an equal protection challenge to a classification, there are two levels of heightened scrutiny: strict scrutiny and intermediate scrutiny. The United States Supreme Court has held that "strict scrutiny" applies to classifications based upon "race, alienage, or national origin." *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985). The Supreme Court has applied intermediate scrutiny to classifications based upon gender and discrimination against nonmarital children. *Id.* at 440-41; *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

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 am unable to state when the need for such preferences will end, and it would be inappropriate for me to do so because a case raising related issues may be presented to me either in my current position or as an appellate judge, if confirmed. Moreover, any decision in such a case would have to be based upon a full factual record and an application of the governing law.

Written Questions of Senator Jeff Flake

Patty Shwartz

Nominee, to be United States Circuit Judge for the Third Circuit

U.S. Senate Committee on the Judiciary

February 1, 2013

- 1. Do you believe judges should look to the original meaning of the words and phrases in the Constitution when applying it to current cases?**

Response: If the text is unclear and there is no relevant binding precedent, then a court may apply the established tools for interpretation. Using the original meaning of the words provides a method for interpreting the text.

- a. If so, how would you determine the original-meaning originalism?**

Response: The interpretive approach of “original meaning originalism” seeks to interpret the words of the Constitution based upon how the words would have been understood by a reasonable person living at the time the words were written. Therefore, to determine the “original meaning,” one would engage in an inquiry concerning both the historical usage of the words and historical context that existed at the time the words were written.

- 2. In Federalist Paper 51, James Madison wrote: “In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.” In what ways do you believe our Constitution places limits on the government?**

Response: Under the Constitution, the federal government is one of limited and enumerated powers. The Amendments protecting individual rights as well as principles of state sovereignty, as protected by the Tenth Amendment, also place limits on the power of the federal government. *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992).

- a. How does the Judicial Branch contribute to this system of checks and balances?**

Response: The judicial branch contributes to the system of checks and balances by resolving cases that seek review of the constitutionality of executive and legislative acts. *See Marbury v. Madison*, 5 U.S. 137 (1803).

- 3. Since at least the 1930s, the Supreme Court has expansively interpreted Congress’ power under the Commerce Clause. Recently, however, in the cases of *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000), the Supreme Court has imposed some limits on that power.**

- a. **Some have said the Court’s decisions in *Lopez* and *Morrison* are inconsistent with the Supreme Court’s earlier Commerce Clause decisions. Do you agree? Why or why not?**

Response: Other than the views expressed in Justice Breyer’s dissenting opinion in *Lopez*, I am not familiar with commentaries about whether *Lopez* and *Morrison* are inconsistent with earlier precedent, but my agreement or disagreement with them would play no role in any decision I may be asked to make either in my current position or as an appellate judge if I am confirmed. A judge is required to follow precedent regardless of his or her personal views about it.

- b. **In your opinion, what are the limits to the actions the federal government may take pursuant to the Commerce Clause?**

Response: 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 the government seeks to regulate 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 the federal government’s power to regulate pursuant to the Commerce Clause. *United States v. Lopez*, 514 U.S. 549, 558-59 (1995).

- c. **Is any transaction involving the exchange of money subject to Congress’s Commerce Clause power?**

Response: Every transaction involving the exchange of money is not subject to regulation under the Commerce Clause. To determine if a statute that regulates a particular transaction involving money is within Congress’s Commerce Clause authority, a court would consider the particular statutory text regulating the transaction and the binding precedent of the United States Supreme Court, 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), as well as the factual record before the court.

4. **What powers do you believe the 10th Amendment guarantees to the state? Please be specific.**

Response: As the United States Supreme Court stated in *New York v. United States*, 505 U.S. 144, 155 (1992), “[t]he Constitution created a Federal Government of limited powers . . . and . . . the Tenth Amendment makes explicit that [t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” (internal citation and quotation marks omitted). Citing to its precedent and the observation of Justice Story, the Court stated that “[t]he States unquestionably do retain a significant measure of sovereign authority . . . to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government.” *Id.* at 156 (citation omitted). Thus, the states have extensive authority and may take any action unless there

is a constitutional bar from doing so. Given the breadth of the power granted to the states, it is difficult to comprehensively list such powers.