

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

- 1. At your confirmation hearing, I asked you about the level of scrutiny the Supreme Court has applied in due process and equal protection challenges to laws making distinctions based on sexual orientation. You responded in part by saying it would be inappropriate for you to discuss “a legal issue in advance of the adversarial process of adjudicating that issue in the concrete case.” Perhaps we had a miscommunication at the hearing, but I was not asking you how you would rule in a hypothetical case. My question was regarding the current status of the law under Supreme Court precedent. You participated by way of amicus briefs in the two seminal Supreme Court cases addressing this issue in *Romer v. Evans* and *Lawrence v. Texas*. I would expect that you would be familiar with these cases and the standard the Supreme Court applied. If you need to refresh your memory, please reread these cases and any other relevant precedent and address the following questions:**

- a. Based on current Supreme Court precedent, what is the standard of review to be applied in Due Process and Equal Protection challenges to laws making distinctions based on sexual orientation?**

Response: The Supreme Court has not articulated a general standard of review to be applied in Due Process and Equal Protection challenges to laws making distinctions based on sexual orientation.

In *Romer v. Evans*, 517 U.S. 620 (1996), the Court invalidated an amendment to the Colorado Constitution that, the Court concluded, “withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies.” *Id.* at 627. Without addressing other kinds of laws or stating a general standard of review, the Court invalidated the amendment under the Equal Protection Clause on two grounds. First, the Court concluded that it was an “exceptional” type of law, describing it as “[a] law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government,” which the Court said “is itself a denial of equal protection of the laws in the most literal sense.” *Id.* at 632, 634. Second, the Court applied rational-basis review and held that the amendment failed under that standard, stating that the amendment’s “sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests.” *Id.* at 632.

In *Lawrence v. Texas*, 539 U.S. 558 (2003), the Court ruled under the Fourteenth Amendment’s Due Process Clause, invalidating a Texas “statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct.” *Id.* at 562. The Court held that this conduct “is within the liberty of

persons to choose without being punished as criminals.” *Id.* at 567; *id.* (“The liberty protected by the Constitution allows homosexual persons the right to make this choice.”). Most of the opinion is a lengthy criticism of the reasoning of *Bowers v. Hardwick*, concluding with the overruling of *Bowers*. 539 U.S. at 566-78. The Court stated expressly that it was not addressing various kinds of laws involving sexual orientation other than the criminal bar before it (*id.* at 578), and it did not declare a particular standard of review. The Court stated its conclusion in these terms: “The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.” 539 U.S. at 578.

In *Baker v. Nelson*, 409 U.S. 810 (1972), the Court dismissed for want of a substantial federal question an appeal from a Minnesota Supreme Court judgment, 191 N.W. 2d 185 (1971), that rejected a challenge to Minnesota’s statute allowing issuance of a marriage license only to opposite-sex couples. The U.S. Supreme Court’s order, issued without any opinion at all, does not address the question of the standard of review. The Court has said that the precedential effect of one its summary orders is limited: such an order binds a lower court in deciding a subsequent case that presents “the precise issues presented and necessarily decided by” the summary order, unless subsequent Supreme Court decisions “instruct otherwise.” *Mandel v. Bradley*, 432 U.S. 173, 176 (1977); *Hicks v. Miranda*, 422 U.S. 332, 344 (1975).

With the Supreme Court not having declared a general standard of review for challenges to laws based on sexual orientation, individual cases presenting such challenges in contexts different from *Romer*, *Lawrence*, and *Baker* necessarily involve arguments by the parties about what the proper standard of review should be. That is the kind of unsettled issue that I do not believe it would be appropriate for me to address in advance of a case that could come before me as a judge if I am confirmed. I also note that the amicus briefs of the American Psychological Association in *Romer* and *Lawrence*, which were joined by my client, the American Psychiatric Association, made no legal argument for a heightened standard of review, but focused on presenting empirical literature relevant to each case. See 1995 WL 17008445 (*Romer* brief); 2003 WL 152338 (*Lawrence* brief). Moreover, the briefs stated the positions only of my client; and my job in any case in which I represented or advised the APA, as with any client, was to advance the client’s positions, not mine. If I am confirmed, I would follow *Romer*, *Lawrence*, *Baker*, and any other Supreme Court precedent.

- b. The Administration has an announced policy that it will not defend the Defense of Marriage Act or similar laws in the context of suits brought by veterans or government employees. In justifying its refusal to defend against these suits, the Administration has asserted that “classifications based on sexual orientation should be subject to a heightened standard of constitutional scrutiny.”**

- i. Are you aware of any Supreme Court precedent that would support the Administration’s position that classifications based on sexual orientation are subject to heightened scrutiny? Please review any applicable precedent in addressing this question.**

Response: Having reviewed the Administration’s written submissions on the issue for purposes of answering this question, I am aware that the Administration has pointed to a number of Supreme Court precedents that consider whether certain classifications not involving sexual orientation warrant heightened scrutiny (*e.g.*, *Bowen v. Gilliard*, 483 U.S. 587, 602-03 (1987); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 441-47 (1985)) and argued that the reasoning of those precedents should lead to heightened scrutiny of classifications based on sexual orientation. That is the kind of argument about the application and extension of precedents from different contexts that I do not believe it would be appropriate for me to address in advance of a case that could come before me as a judge if I am confirmed.

- ii. Do you agree that it would be improper for a district or circuit court to apply any level of scrutiny other than a rational basis standard, absent further guidance from the Supreme Court?**

Response: I am not aware of any Supreme Court case that establishes what level of scrutiny should generally apply to classifications based on sexual orientation. In the absence of such a precedent, a lower court should consider the specifics of the case before it, and if it had to decide on a particular level of scrutiny for the classification at issue, it should fully consider all arguments about the most faithful reading and application of the indirectly relevant precedents of the Supreme Court about how to settle on a level of scrutiny, recognizing that any heightened scrutiny 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.” *Cleburne*, 473 U.S. at 440.

- 2. At your confirmation hearing I asked several questions pertaining to the Whistleblower Protection Act (WPA). I appreciated your taking the time to familiarize yourself with some of these issues prior to the hearing. As you mentioned, the Federal Circuit appears to have backed off of the “irrefragable proof” standard announced in *LeChance v. White*, 174 F.3d 1378 (1999), in its opinion in *White v. Department of Air Force*, 391 F.3d 1377 (2004). However, I have concerns that the irrefragable proof standard has not been completely extinguished.**
 - a. In *White*, the Federal Circuit used a formulation of gross mismanagement that could cause confusion. The Court held that “for a lawful agency policy to constitute ‘gross mismanagement,’ an employee must disclose such serious errors by the agency that a conclusion the agency erred is not debatable**

among reasonable people.’’¹ In your understanding of *White*, are disclosures of “gross mismanagement” subject to a higher standard than the reasonable belief standard applied to other disclosures? Please review any applicable precedent in addressing this question.

Response: The WPA, 5 U.S.C. § 2302(b)(8), prohibits certain employment action against an employee or applicant because of disclosure of information that the employee or applicant “reasonably believes evidences” certain kinds of wrongdoing, namely, a violation of law, rule, or regulation or “gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety” (with exceptions for certain disclosures). *See also* 5 U.S.C. § 1221(e) (corrective action required if prohibited action “was a contributing factor” unless the agency “demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of [the] disclosure”). Section 2302(b)(8) thus has a two-part structure—first, a “reasonable belief” requirement and, second, a requirement of certain statutorily identified wrongdoing that is the subject of the protected disclosure. In my understanding, the first requirement is common to all the types of wrongdoing, but each such type of wrongdoing has its own meaning.

The *White* cases involved an employee’s disclosure of what he alleged he “reasonably believed” was “gross mismanagement” (not “a gross waste of funds, an abuse of authority, or a violation of law,” 391 F.3d at 1382 n.1). Stating that the statute “does not require that whistleblowers establish gross mismanagement by irrefragable proof,” the Court reiterated that “the proper test” was whether “a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee [could] reasonably conclude that the actions of the government evidence gross mismanagement.” *Id.* at 1381. And “gross mismanagement” meant “such serious errors by the agency that a conclusion the agency erred is not debatable among reasonable people.” *Id.* at 1382.

White elaborated on what the “gross mismanagement” standard does and does not require. It requires agency errors that were not reasonably debatable “on the information ‘known to and readily ascertainable by the employee.’” *Id.* at 1382, 1383. But gross mismanagement need not be “blatant” and can include “policy disputes,” policies that some actually thought were a good idea (but unreasonably), and errors in “adoption *or* continuation” of a policy. *Id.* at 1381, 1382, 1383. *See id.* at 1382 (“Many government policies, desirable or at least debatable at their inception, remain in place as the result of inertia or because those responsible do not wish to admit that the policy is no longer useful. The WPA is designed to protect those employees who call attention to such instances through a disclosure. There is again no requirement that there be a unanimous view that the continuation of the policy is a mistake.”).

¹ 391 F.3d. at 1382

On the other hand, while the “reasonable belief” component remains the same across the different types of wrongdoing, the specific definition of “gross mismanagement” does not apply across the board to all the listed types of wrongdoing. *White* itself said that “[t]his non-debatable requirement does not, of course, apply to alleged violations of statutes or regulations.” *Id.* at 1382 n.2 (employee must simply show a reasonable belief as to legal violation). Elsewhere, the Federal Circuit has explained that “substantial and specific danger to public health or safety” contains no concept of non-debatable errors. *Chambers v. Department of the Interior*, 515 F.3d 1362, 1369 (Fed. Cir. 2008) (discussing factors of likelihood, timing, and nature of harm). As to the other two listed types of wrongdoing, *see, e.g., id.* at 1366 (noting Board “standard that a gross waste of funds requires ‘more than debatable expenditure that is significantly out of proportion to the benefit reasonably expected to accrue to the government’”); *Doyle v. Department of Veterans Affairs*, 273 Fed. Appx. 961, 964 (Fed. Cir. 2008) (non-precedential) (“The Board has defined an ‘abuse of authority’ as ‘an arbitrary or capricious exercise of power by a Federal official or employee that adversely affects the rights of any person or that results in personal gain or advantage to himself or to preferred other persons.’”).

- b. In your understanding of Federal Circuit precedent, is there any context where a whistleblower would be required to rebut by “irrefragable proof” the “presumption that public officers perform their duties correctly, fairly, in good faith, and in accordance with the law and governing regulations”?**²

Response: I am not aware of such a context. According to my computer search for “irrefragable,” the word has not appeared in a Federal Circuit WPA case since 1999.

- i. Do you believe “substantial evidence” would be a more appropriate standard in this context for whistleblower cases?**

Response: I do not have a basis for assessing the appropriateness of such a standard. If confirmed, I would follow precedent on the governing standards, and I would give effect to the WPA’s provisions in accordance with its evident function of serving the high value our democratic system places on transparency in government, including revelation of misconduct involving the government. Respecting burdens of proof, I note that the Federal Circuit has stated: “To prevail on the merits of a WPA claim, an employee must prove by a preponderance of the evidence that she made a protected disclosure,” *Chambers v. Department of the Interior*, 602 F.3d 1370, 1376-77 (Fed. Cir. 2010), and, “by a preponderance of the evidence, that a protected disclosure was a contributing factor in an adverse personnel action,” *Johnston v. MSPB*, 518 F.3d 905, 909 (Fed. Cir. 2008).

² 174 F.3d at 1381

3. **At your hearing, I asked you about your understanding of the “irrefragable proof” standard. You responded saying that based on your brief research you believed this standard was comparable to a “clear and convincing evidence” standard, though the case in which the Federal Circuit states this was not in the whistleblower context. Indeed, the Federal Circuit has sometimes equated “irrefragable proof” with “clear and convincing evidence”³ although at times it appears irrefragable proof requires something more.⁴ Could you please elaborate on the answer provided at the hearing? In addressing this question, please also articulate whether you believe any formulation of the “irrefragable proof standard” has any role in the context of cases brought under Whistleblower Protection Act.**

Response: In using the “irrefragable proof” language, the 1999 *Lachance* opinion was quoting a decision from outside the context of the 1989 WPA, *Alaska Airlines v. Johnson*, 8 F.3d 791 (Fed. Cir.1993), which itself reached back to pre-WPA cases, some of which found the requisite “almost [or well-nigh] irrefragable proof” of government bad faith. Subsequent to *Lachance*, the Federal Circuit in a 2002 decision in *Am-Pro Protective Agency v. United States*, 281 F.3d 1234, a non-WPA case, acknowledged “some confusion” about the “irrefragable proof” phrase and ruled that the phrase meant “clear and convincing evidence.” Also, in the non-WPA context, the Federal Circuit has said: “In the cases where the courts has considered allegations of [governmental] bad faith, the necessary ‘irrefragable proof’ has been equated with evidence of some specific intent to injure the plaintiff.” *Galen Med. Assocs., Inc. v. United States*, 369 F.3d 1324, 1330 (Fed. Cir. 2004), quoted in *Savantage Financial Services, Inc. v. United States*, 595 F.3d 1282, 1288 (Fed. Cir. 2010). Those decisions reflect my understanding of the meaning of the standard where it applies.

As noted, the Federal Circuit has not used “irrefragable” in a WPA case since 1999, despite deciding many WPA cases. I am not aware of any WPA context where the “irrefragable proof” standard currently has a role to play. Moreover, the Federal Circuit has stated: “To prevail on the merits of a WPA claim, an employee must prove by a preponderance of the evidence that she made a protected disclosure,” *Chambers v. Department of the Interior*, 602 F.3d 1370, 1376-77 (Fed. Cir. 2010), and “by a preponderance of the evidence, that a protected disclosure was a contributing factor in an adverse personnel action,” *Johnston v. MSPB*, 518 F.3d 905, 909 (Fed. Cir. 2008).

4. **You have served as a law clerk at each level of the federal judicial system. This includes clerking for District Judge Abraham Sofaer, Circuit Judge Bork, and Justice O’Connor at the Supreme Court. Could you share with the Committee what you learned about being a judge from these three well respected judges?**

³ Committee on Homeland Security and Governmental Affairs, Whistleblower Protection Enhancement Act of 2009, Senate Committee Report 111-101, December 3, 2009.

⁴ *Galen Medical Associates, Inc. v. U.S.*, 369 F.3d 1324, 1330 (2004) (“In order to overcome the presumption of good faith [on behalf of the government], the proof must be *almost irrefragable*. *Almost irrefragable* proof amounts to “clear and convincing evidence.”) (internal quotations and citations omitted) See also, *Long Lane Ltd. V. Bibb*, 159 Fed.Appx. 189, 192 (2005) (“well-nigh irrefragable proof is high, as it refers to evidence that cannot be refuted or disproved” (internal quotations and citations omitted)

Response: I prized and learned a great deal from all three of my clerkships. Judges Sofaer and Bork, and Justice O'Connor, each exemplified the core required commitments of judges: to hard work to meet the demands of parties and colleagues; to neutral, incisive, faithful application of the law to the facts attentively discerned from the record; and to civil, good-humored, and collegial discourse and interactions, with parties, colleagues, and staff. And because they are uniquely themselves, in personality and overall outlook and background, and got along well with other judges with other characters and approaches, I saw first-hand how first-class judging can readily encompass a range of differences and disagreements. Collectively, they showed me the challenges and satisfactions of a life engaged with the law through the judicial process.

- a. At your hearing, you discussed attributes of Justice O'Connor you admired, and lessons you learned during your Supreme Court clerkship. Would you please provide a similar response regarding the lessons learned during your other clerkships?**

Response: Judge Sofaer showed me how a busy district court could function at its best. He taught me the need in that forum for quick study to enable non-stop management of a large docket, patient and concentrated listening to evidence and careful, record-based finding of facts, efficient and civil interaction with lawyers and witnesses, dealing with jurors to inspire them to fulfill their vital roles, and filtering out from the welter of matters that demand quick decisions those matters which warrant fuller dress opinions. Judge Sofaer showed how all these needs could be met at the highest level. He brought exceptional intellectual talents, knowledge, and practical skills, reflecting his background as prosecutor and scholar, and his personality traits, including vigor, warmth, and life-loving humor and realism, inspired his law clerks, and all in his court, to function at their best.

Judge Bork showed me one ideal for appellate judging. The D.C. Circuit as a forum required dispassionate, collegial review at a remove from the heat of battle at trial, or (as often in that court) from the great complexity of agency proceedings, to ensure compliance with governing law. This required wide learning about numerous areas of government, as well as scrupulous respect for the standards of proper judicial review (its limits, its necessity) and an incisive mind to sift through the mountain of material and argument to separate facts, policies, and law. Judge Bork, with his background as Solicitor General and scholar, was a model of how to do this, bringing to bear his deep learning, piercing mind, great curiosity, and talent for clear and elegant writing. He also was a model of the collegiality necessary in an appellate court, through his wit, civility, love of debate, valuing of consensus when possible, and respect for disagreement when not.

I hope, and believe, that I learned many valuable lessons about judging, law, and life from Judges Sofaer and Bork, as well as from Justice O'Connor.

- 5. In 1993, you wrote an editorial in support of the nomination of Ruth Bader Ginsburg to the Supreme Court saying, “Ruth Ginsburg is a judge’s judge, like Henry Friendly and Learned Hand: She believes in the rule of law. She should be supported by liberals and conservatives alike.” Do you believe Justice Ginsburg has lived up to your expectations as a Supreme Court Justice?**

Response: As indicated by the title and the comparison to Judges Henry Friendly and Learned Hand—both of whom were renowned as epitomes of appellate judging according to neutral professional standards—the op-ed piece celebrated then-Judge Ginsburg for her similar commitment to sober reasoning and other aspects of legal craft. This assessment was based on the experience of my co-author as a clerk for then-Judge Ginsburg and on my simultaneous experience clerking for Judge Bork next door. I remain a great admirer of Justice Ginsburg’s, but I do not think that it would be appropriate for me to comment further on her work as a Supreme Court Justice.

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

Response: A commitment to treating the parties with respect and complete impartiality in applying the law to the facts. My career in the law rests on prizing that bedrock commitment in judges.

- 7. 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 judge, in temperament, should embody the ideal of neutrality in adjudication while conveying full appreciation for the real-world interests of the litigants. That means treating all parties with respect, striving to understand their positions thoroughly, paying scrupulous attention to the record, faithfully understanding and applying the relevant precedents and sources of law, and explaining decisions clearly. For a court of appeals judge, it also means being collegial and efficient in working with fellow judges. I believe that I meet these standards.

- 8. 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.

- 9. 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: When no precedent is controlling on a specific issue, my task would be to examine the governing law—whether it is a constitutional provision, a statutory provision, a regulation, or otherwise—and, with the assistance of the parties’ analyses and arguments, to give that source the interpretation that most faithfully captures its meaning. In that process, I would carefully consider what other courts, in decisions not binding on the Federal Circuit, have said about the issue. I also would carefully consider precedents on closely related issues to determine what those precedents may fairly imply about the best answer to the new, first-impression issue. And I would apply approaches to interpretation prescribed by the Supreme Court, including a central focus on text, canons of constitutional avoidance, and the like.

10. 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: I would be bound by a Supreme Court precedent even if I believed it to be seriously in error.

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

Response: It is appropriate for a federal court to declare a federal statute unconstitutional only when it must—when a case or controversy requires the constitutionality to be decided and the statute cannot fairly be read to avoid inconsistency with the Constitution.

12. 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?

Response: The decisions of the American people, not those of foreign countries, determine the content of our Constitution, and it is not a judge’s proper function to seek to bring our constitutional law into alignment with the laws or practices of other countries or of the world community. The Supreme Court has held, however, that the Framers’ understanding of English common law may be relevant to the meaning of certain constitutional provisions. *United States v. Jones*, 132 S. Ct. 945 (2012). And it has cited certain foreign and international law as “confirmation” of a determination under the Eighth Amendment. *Roper v. Simmons*, 543 U.S. 551, 575, 578 (2005). Those decisions are binding on a lower court.

13. 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: A Federal Circuit precedent governs future panels unless it has been superseded by contrary precedents of the Supreme Court or of the *en banc* Federal Circuit. *En banc* consideration to overturn a prior precedent is justified only in exceptional circumstances, such as when panel decisions conflict with one another, there

is seriously harmful confusion or lack of clarity on the issue, or a panel decision has become prohibitively unworkable.

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

Response: I thought about each question, did research where necessary, and drafted answers. I reviewed my draft answers with attorneys from the Office of Legal Policy of the Department of Justice, made some revisions, and then submitted my answers.

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

Response: Yes.

**Responses of Richard Gary Taranto
Nominee to be United States Circuit Judge for the Federal Circuit
to the Written Questions of Senator Amy Klobuchar**

- 1. If you had to describe it, how would you characterize your judicial philosophy? How do you see the role of the judge in our constitutional system?**

Response: I would characterize my judicial philosophy as a thorough commitment to the rule of law. The role of the judge, as I see it, is to respect record facts and, within the limits of jurisdiction that authorize adjudication, to interpret and to apply all governing law, whether constitutional, statutory, regulatory, or otherwise, with impartiality, neutrality, fidelity, reason, appreciation for complexities, clarity of explanation, and all possible expedition.

- 2. What assurances can you give that litigants coming into your courtroom will be treated fairly regardless of their political beliefs or whether they are rich or poor, defendant or plaintiff?**

Response: Such fairness, entailing impartiality and neutrality in adherence to law and respect for the record, is the bedrock of the rule of law to which I am committed. I take the oath of office as a solemn, unwavering commitment to such fairness. In addition, my career has been apolitical—spent in the judicial system, representing a broad spectrum of clients. I have not served in political positions in government or in any political organization or engaged in political campaigning or advocacy.

- 3. In your opinion, how strongly should judges bind themselves to the doctrine of stare decisis? How does the commitment to stare decisis vary depending on the court?**

Response: The doctrine of stare decisis is essential to maximizing stability, consistency, and predictability in our system of law. All judges should adhere completely to that doctrine, which treats precedent as controlling in all but limited, exceptional circumstances. One particular aspect of the doctrine is that a lower court must strictly follow a superior court's precedents until the superior court has instructed otherwise. Thus, a circuit court is bound to apply a Supreme Court precedent that is on point and has not been overturned and, more generally, to resolve all cases by giving all pertinent Supreme Court precedents a faithful reading.

**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.

**Responses of Richard Gary Taranto
Nominee to be United States Circuit Judge for the Federal Circuit
to the Written Questions of Senator Tom Coburn, M.D.**

- 1. Some people refer to the Constitution as a “living” document that is constantly evolving as society interprets it. Do you agree with this perspective of constitutional interpretation?**

Response: No.

- a. If not, please explain.**

Response: The Constitution grants only the powers and protects only the rights that have been included and remain in it through its original adoption or the duly authorized processes of amendment. A court’s job is to interpret and apply the Constitution’s provisions, not to add new powers or rights evolved outside the constitutionally prescribed processes of constitutional creation and amendment.

- 2. Do you believe judicial doctrine rightly incorporates the evolving understandings of the Constitution forged through social movements, legislation, and historical practice?**

Response: No.

- a. If not, please explain.**

Response: The principles of the Constitution do not change unless the Constitution has been changed.

- 3. What principles of constitutional interpretation would you look to in analyzing whether a particular statute infringes upon some individual right?**

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 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.

- 4. In *Roper v. Simmons*, 543 U.S. 551 (2005), Justice Kennedy relied in part on the “evolving standards of decency” to hold that capital punishment for any murderer**

under age 18 was unconstitutional. You filed an *amicus* brief in this case on behalf of the American Psychiatric Association. I understand that the Supreme Court has ruled on this matter and you are obliged to follow it, but do you agree with Justice Kennedy’s legal analysis?

Response: As a judicial nominee, I believe that it would not be appropriate for me to express agreement or disagreement with a binding Supreme Court decision or its rationale. The amicus brief by the American Medical Association in *Roper*—a brief that was joined by my long-time client, the APA (but on which my name does not appear)—made no legal arguments about “evolving standards of decency,” or foreign or state laws, but instead was focused on presenting empirical literature about adolescence. 2004 WL 1633549. The same is true of the amicus brief of the American Psychological Association in *Graham v. Florida*, 130 S. Ct. 2011 (2010) (invalidating “imposition of a life without parole sentence on a juvenile offender who did not commit homicide”)—a brief that was joined by my client, the APA (and on which my name does appear). 2009 WL 2236778. Moreover, the briefs stated the positions only of my client; and my job in any case in which I represented or advised the APA, as with any client, was to advance the client’s positions, not mine. If confirmed, I would follow *Roper*, *Graham*, and any other binding Supreme Court precedent under the doctrine of stare decisis.

- a. When determining what the “evolving standards of decency” are, justices have looked to different standards. Some justices have justified their decision by looking to the laws of various American states, in addition to foreign law, and in other cases have looked solely to the laws and traditions of foreign countries. Do you believe either standard has merit when interpreting the text of the Constitution?**

Response: The decisions of the American people, not those of foreign countries, determine the content of our Constitution, and it is not a judge’s proper function to seek to bring our constitutional law into alignment with the laws or practices of other countries. The Supreme Court has held that the States’ laws may be examined in determining whether a punishment is “unusual” under the Eighth Amendment. It also has cited certain foreign and international law as “confirmation” of a determination under the Eighth Amendment. *Roper v. Simmons*, 543 U.S. 551, 575, 578 (2005). As a judge, I would be bound by that and all other Supreme Court precedent.

- i. If so, do you believe one standard more meritorious than the other? Please explain why or why not.**

Response: Beyond what I have just stated, I do not believe that it would be appropriate for me to comment on the merits of binding Supreme Court precedents, which I would follow as a lower court judge.

- 5. In your view, is it ever proper for judges to rely on foreign or international laws or decisions in determining the meaning of the Constitution?**

Response: The decisions of the American people, not those of foreign countries, determine the content of our Constitution, and it is not a judge's proper function to seek to bring our constitutional law into alignment with foreign or international laws or decisions. The Supreme Court has held, however, that the Framers' understanding of English common law may be relevant to the meaning of certain constitutional provisions. *United States v. Jones*, 132 S. Ct. 945 (2012). And it has cited certain foreign and international law as "confirmation" of a determination under the Eighth Amendment. *Roper v. Simmons*, 543 U.S. 551, 575, 578 (2005). Those decisions are binding on a lower court.

a. If so, under what circumstances would you consider foreign law when interpreting the Constitution?

Response: I would not consider foreign law when interpreting the Constitution except to the extent that Supreme Court precedent so required.

b. Do you believe foreign nations have ideas and solutions to legal problems that could contribute to the proper interpretation of our laws?

Response: The proper interpretation of our laws is that which gives effect to the ideas and solutions that our lawmakers enacted, not any ideas foreign nations have. Beyond that fundamental principle, there also are vital practical reasons for courts, in interpreting our laws, to resist looking at foreign ideas and solutions: inviting such inquiries can multiply costs, produce unreliable and inaccurate pictures of foreign systems that are not easily understood by outsiders, and harmfully divert attention from arrival at the proper domestic result, which is already a difficult enough task.