

**Responses of Thomas M. Durkin**  
**Nominee to be United States District Judge for the Northern District of Illinois**  
**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: My judicial philosophy is to treat all litigants fairly and with respect, keeping an open mind and being patient when hearing matters. The role of the judge in our constitutional system is to decide cases fairly without regard to the identities of the parties, and to follow controlling precedent.

- 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: During my career, I have represented the government, and a large number of wealthy and poor plaintiffs and defendants of all political beliefs. I have represented all of my clients ethically and zealously without regard to their station in life. I can assure you I will treat all litigants fairly, as I believe that is the essence of being a good judge.

- 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: Judges are absolutely bound by the doctrine of stare decisis, and should follow controlling precedent. That commitment to stare decisis does not vary depending on the court.

**Senator Chuck Grassley  
Questions for the Record**

**Thomas M. Durkin  
Nominee, U.S. District Judge for the Northern District of Illinois**

- 1. Since *United States v. Booker*, the Federal Sentencing Guidelines have been advisory rather than mandatory. If confirmed, how much deference would you afford the Guidelines?**

Response: If confirmed, I would give the Federal Sentencing Guidelines substantial deference, as is required by controlling precedent.

- a. Under what circumstances would you be willing to depart from the Guidelines?**

Response: I would be willing to depart from the guidelines if the requirements of Section 5K are met, or if controlling precedent from the Supreme Court or the Circuit Court of Appeals for the Seventh Circuit compelled such a departure.

- b. Under what circumstances do you believe it is appropriate for a district court judge to depart downward from the Sentencing Guidelines?**

Response: Please see answer to #1(a).

- 2. Do you agree that the sentence a defendant receives for a particular crime should not depend on the judge he or she happens to draw? Please explain how you would apply this, if confirmed.**

Response: I agree that the sentence a defendant receives for a particular crime should not depend on the judge that defendant draws. I would apply that concept by giving substantial deference to the Federal Sentencing Guidelines, even though they are advisory, in fashioning a sentence that satisfies 18 U.S.C 3553.

- 3. You have spent your entire legal career as an advocate for your clients. As a judge, you will have a very different role. Please describe how you reach a decision in cases that come before you and to what sources of information will you look for guidance. What do expect to be most difficult part of this transition for you?**

Response: I would reach a decision on legal issues in a case by applying controlling precedent of the Supreme Court and the United States Court of Appeals for the Seventh Circuit. In matters where I am required to make factual determinations, I will listen carefully to the evidence, keep an open mind, and make those determinations based strictly on the evidence. For guidance on reaching a decision on a case, I will use the sources of information described above. Additionally, I would not hesitate to consult my fellow judges for advice on legal or procedural issues if I felt it would be helpful to do so. I do not expect the transition from advocate to judge to be difficult, as most of my professional career has

been spent in federal court as either a law clerk, an Assistant United States Attorney, or as a private lawyer. I will take special care to resist the urge to interfere in questioning of witnesses, rather than letting the lawyers try the case.

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

Response: A judge's most important attribute is fairness. Encompassed in fairness is the ability to follow controlling precedent, treating litigants and lawyers with respect, being patient, being humble, and keeping an open mind. I believe I possess these attributes.

**5. 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: The appropriate temperament of a judge is to be calm and deliberate in making decisions, so that parties understand and respect the decision-making process, even if they may disagree with the ultimate decision. The elements of judicial temperament I consider the most important are respect for the rule of law and patience. No matter how heated arguments before the court become, a calm and deliberate analysis of those arguments utilizing controlling precedents is essential to the decision-making process. I believe I have the type of personality and possess the traits necessary to have the appropriate temperament to be a good judge.

**6. 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.

**7. At times, judges are faced with cases of first impression. If there were no controlling precedent that dispositively concluded an issue with which you were presented, to what sources would you turn for persuasive authority? What principles will guide you, or what methods will you employ, in deciding cases of first impression?**

Response: If faced with a case of first impression, I would look to the cases of the Supreme Court and the United States Court of Appeals for the Seventh Circuit for persuasive authority. Absent such authority, I would look to other circuits of the United States Court of Appeals and district court decisions which have analyzed similar issues. If the case involves a statute, I would first look to the text of the statute, giving the words their plain and ordinary meaning. If ambiguous, I would turn to well-established tools of statutory construction.

- 8. 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 judgment of the merits, or your best judgment of the merits?**

Response: I would follow the controlling precedent of the Supreme Court and the Court of Appeals no matter what my own personal judgment is of the merits of that precedent.

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

Response: A federal court should only declare a statute enacted by Congress unconstitutional if the presumption of constitutionality has been overcome and Congress clearly acted beyond its constitutional authority. I would attempt to resolve any constitutional dispute before me by considering the question as narrowly as possible, and only if it cannot be resolved on a non-constitutional ground.

- 10. As you know, the federal courts are facing enormous pressures as their caseload mounts. If confirmed, how do you intend to manage your caseload?**

Response: As a private attorney who has appeared before countless judges in my career, I have observed many procedures that make effective use of court time and resources. The best practice I have observed for effective case management is an early assessment of the case, followed by a realistic but firm schedule that includes a trial date, and frequent status conferences where the parties describe the progress they are making. The status conference is also used to attempt to resolve non-substantial disputes that may be impeding that progress. I would resolve dispositive and discovery motions promptly. I would offer my own services and those of the magistrate judge to assist the parties in resolving the matter short of trial. Finally, I would adhere to the trial date that has been set absent extraordinary circumstances. Nothing focuses the energies of the parties on the case more than a firm, imminent trial date.

- 11. Do you believe that judges have a role in controlling the pace and conduct of litigation and, if confirmed, what specific steps would you take to control your docket?**

Response: Judges have a crucial role in controlling the pace and conduct of litigation, and the steps I would take to control my docket are set forth in my response to Question No. 10. I truly believe that the only way to control a docket and afford parties timely resolution of their disputes is to be proactive and have the court aggressively but fairly require lawyers to adhere to realistic deadlines, and to swiftly render decisions. In the absence of such practices, cases languish and all parties with cases before the court are ill-served.

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

I read through the questions carefully and drafted my responses, which were reviewed by representatives of the Department of Justice. After finalizing my responses, I authorized their transmittal to the Senate Judiciary Committee.

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

Response: Yes.

**Senator Jeff Sessions**  
**Questions for the Record**  
**Thomas M. Durkin**

**1. It appears from your questionnaire that during your chairmanship of your firm's *pro bono* committee, your firm filed *amicus* briefs with the Supreme Court in *Rasul v. Bush* and *al-Odah v. U.S.*.**

**a. As chair of the *pro bono* committee, did you approve your firm's involvement in these cases?**

Response: As chair of Mayer Brown's *pro bono* committee, I was one of many people on the committee who approved the firm's involvement in the *Rasul* and *al-Odah* cases in which Mayer Brown filed *amicus* briefs on behalf of retired senior military officers.

**b. Please describe what role, if any, you had in drafting the briefs.**

Response: I had no role in drafting or reviewing the briefs.

**2. In your opinion, do the procedures put in place by the Military Commissions Act of 2009 meet constitutional standards?**

Response: As a law duly passed by Congress and signed into law, it enjoys a presumption of constitutionality. Were I to review that statute as a judge, I would apply that presumption, and follow any controlling precedent of the Supreme Court and the Circuit Court of Appeals in the Seventh Circuit.

**3. Do you believe that Due Process requires that criminal charges, provision of counsel, and some prospect of release for foreign terrorists captured on the battlefield and detained outside of the United States?**

Response: Although I was not substantively involved in the *Rasul* and *al-Odah* cases, and have not otherwise had occasion to study these issues, I am aware that the D.C. Circuit has concluded that the Due Process Clause of the Constitution does not apply to enemy combatants captured abroad and detained outside the sovereign territory of the United States. *See Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009) (*opinion reinstated as amended*, 605 F.3d 1046 (D.C. Cir. 2010)). If confirmed as a district court judge, and presented with a case raising these issues, I would follow all relevant precedent of the Supreme Court and the Circuit Court of Appeals of the Seventh Circuit.

## Questions for the Record

July 11, 2012 Nominations Hearing

Senator Mike Lee

### Questions for Mr. Durkin

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

Response: No. Congress has only such powers as are enumerated in the Constitution.

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

Response: Please see answer above.

- 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: I am not aware of any requirement that Congressional legislation contain language with a specific authorizing provision from the Constitution. If there is such a requirement under controlling precedent, I would follow it.

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

Response: Yes.

- 2. Do you believe that the Constitution protects rights not specified in the Constitution?**

Response: No. The Constitution does not protect rights it does not specify.

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

Response: The Constitution does not contain specific language relating to a right to privacy, but a number of Supreme Court cases have found rights for citizens which can be characterized as privacy interests. As a district court judge, I would follow the precedent of the Supreme Court.

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

Response: Please see answer to #2a.

**3. 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 Constitution allows that certain fundamental rights of citizens cannot be infringed, even if that citizen is afforded procedural safeguards. As a district court judge I am obligated to follow Supreme Court precedent.

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

Response: The Supreme Court has held 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, 720-721 (1997) (citations and internal quotation marks omitted).

**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: The *Lochner* case has been the subject of significant Supreme Court jurisprudence since it was decided. I believe those cases have effectively overruled *Lochner*. I would follow the current precedent of the Supreme Court in this area.

**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: As a district court judge, my role would be to follow the precedent of the Supreme Court in all areas, including rights protected by substantive due process.