

Responses of Paul A. Engelmayer
Nominee to be United States District Judge for the Southern District of New York
to the Written Questions of Senator Chuck Grassley

- 1. You have been involved with the Brennan Center for Justice for a number of years. The Center has been a leading advocate for a number of liberal initiatives. Of course, involvement with an organization that takes public policy positions is not a bar to serving as a federal judge. But I want to make sure you are fully committed to transitioning from advocate to impartial jurist.**

- a. Are you confident that will be able to make that transition?**

Response: I am confident I will be able to make that transition. As I testified before the Committee, I understand the fundamental difference between the role of an advocate and the role of an impartial jurist.

- b. Is there any particular aspect of your record that would ease any concerns we may have about your ability to make the transition to impartial jurist?**

Response: Yes. First, I believe my colleagues in each of the jobs I have held as an attorney would attest to my objectivity, punctiliousness, and fairness; and that my consistent practice is to undertake a close, clinical assessment of the merits of potential legal positions in light of governing precedent. Second, I have had a wide-ranging career as an advocate, in which I have represented diverse interests and positions that I do not believe are readily classified as reflecting a common political philosophy. I have served for more than a decade as a government lawyer, working as a federal prosecutor in Manhattan for more than eight years, where I vigorously prosecuted white-collar (and other criminals) as a member of the Official Corruption Unit and as Chief of the Major Crimes Unit, and as an Assistant to the Solicitor General of the United States for two years, where I was the author of the government's briefs in, among other cases, the important criminal-law cases of *Whren v. United States*, 517 U.S. 806 (1996) (upholding constitutionality of so-called "pretext" traffic stops under Fourth Amendment, and holding that officer's subjective motivation is irrelevant where objective basis exists for the stop), and *Wilson v. Arkansas*, 514 U.S. 927 (1995) (common-law "knock and announce" principle informs but is not rigidly required for police entry of home to comport with Fourth Amendment). I have also worked in private practice at WilmerHale, a corporate law firm, where I have represented, among others, banks, broker-dealers, pharmaceutical companies, and numerous corporate executives. Indeed, my most recent amicus brief to the Supreme Court was in *Morrison v. National Australia Bank Ltd.*, 547 F.3d 167 (2010), in which I was lead counsel for the Institute of International Banks, and on whose behalf I advocated for (and the Supreme Court accepted) a significant territorial limitation for the Securities Exchange Act of 1934. Third, I have been promoted to positions of responsibility within both the United States Attorney's Office and

WilmerHale, promotions which, I believe, reflect my supervisors' and colleagues' confidence in my objectivity and fairness.

c. Please describe the particular initiatives you were involved with and summarize the position you took on behalf of the Brennan Center.

Response: As reflected in my Senate Judiciary Committee, I have participated in the following cases, either as counsel to the Brennan Center for Justice or as counsel to an amicus in support of the Brennan Center.

1. In *Johnson v. Bush*, 353 F.3d 1287 (11th Cir. 2003), I submitted an amicus brief to the United States Court of Appeals for the Eleventh Circuit, in support of the Brennan Center, which had brought a lawsuit seeking to invalidate Florida's constitutional provision providing for lifetime disenfranchisement of felons. Our brief was on behalf of a large group of former prosecutors, headed by former Deputy Attorney General (now Attorney General) Eric Holder. The brief argued that a policy of permanent felon-disenfranchisement does not further a valid law-enforcement interest.

2. In *Kansas Judicial Review v. Stout*, 519 F.3d 1109 (10th Cir. 2008), I submitted an amicus brief on behalf of the Brennan Center. The brief argued for reversal of a lower-court decision which had invalidated, under the First Amendment, several of Kansas's judicial canons, including Kansas Supreme Court Rule 601A, which prohibited judicial candidates from "mak[ing] pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office ... [or] statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court."

3. In *New York State Board of Elections v. Lopez Torres*, 552 U.S. ____ (2008), I submitted an amicus brief in the Supreme Court, in support of the Brennan Center, which was arguing for affirmance of a Second Circuit decision upholding its claim that the process by which state supreme court judges are chosen in New York State violated the First Amendment. Our brief was on behalf of Brooklyn District Attorney Charles Hynes. It largely consisted of Mr. Hynes's account of documented instances of corruption created by the political party-dominated judicial selection process.

4. In *Kirk v. Carpeneti*, 623 F.3d 889 (9th Cir. 2010), I submitted an amicus brief on behalf of the Brennan Center. The brief sought affirmance of a lower court decision which had rejected a separation-of-powers challenge to Alaska's merit-selection process for selecting state court judges.

2. You submitted a brief in the Supreme Court case of *United States v. Fanfan* (2005), which of course addressed the constitutionality of the sentencing guidelines.

- a. **Now that the sentencing guidelines are advisory, rather than mandatory, how much deference will you afford them, should you be confirmed?**

Response: If confirmed as a United States District Judge, I will accord the Sentencing Guidelines substantial deference.

- b. **Do you agree that the sentence that a particular defendant receives should not depend on the judge he or she happens to draw?**

Response: Yes. My experience as a federal prosecutor demonstrated to me the valuable role served by the Guidelines, in helping to ensure that like offenders are treated alike in the federal criminal justice system.

- c. **How would you ensure consistency in your judicial rulings when different criminals commit the same offenses?**

Response: I will accord the Sentencing Guidelines substantial deference, which will help ensure such consistency. I will be vigilant, in individual cases, to ensure that like offenders are treated alike, and that differences in sentences accorded to offenders are based on relevant factual differences between them.

3. **Do you believe that our federal government is one of limited and enumerated powers? If so, please explain how that will guide you, if you are confirmed as a U.S. District Judge**

Response: Yes. That principle is expressly set out in the 10th Amendment to the U.S. Constitution. If confirmed as a United States District Judge, and if a case raising these considerations came before me, I would faithfully apply the decisions of the United States Supreme Court, and of the United States Court of Appeals for the Second Circuit, setting out the limits on Congress's enumerated powers, such as its Commerce Clause powers. See, e.g., *United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598, 608-09 (2000).

4. **What is your view of the constitutional principle of separation of powers? Do you still subscribe to the notion you raised in a review of *The Brandeis Frankfurter Connection*, that "there is a place for informal judicial involvement in America's policy-making apparatus so long as judges steer clear of entanglement that could prejudice their decisions?"**

Response: I believe that the principles of separation of powers, and of the balance of powers, are fundamental principles underlying our constitutional structure. If confirmed as a United States District Judge, and if a case raising these considerations came before me, I would faithfully apply the precedents of the United States Supreme Court, and of the United States Court of Appeals for the Second Circuit, in the relevant area. I do not agree with the statement I made, in a 1982 book review for my college newspaper, that

there is a place for “informal judicial involvement in America’s policy making apparatus so long as judges steer clear of entanglement that could prejudice their decisions.”

a. What is the limit on judicial involvement in policy-making?

Response: I do not believe there is an appropriate role for federal judges in policy making, except in connection with the administration of the federal judiciary.

b. If there is judicial involvement in policy-making, how can judges steer clear of entanglement that could prejudice their decisions?

Response: I do not believe judicial involvement in policy making is appropriate, and any such involvement would make it difficult for a judge to steer clear of entanglements that could prejudice their decisions.

5. You have been involved in fundraising and other political activity. What can you tell the Committee to assure us that politics will have no place in your courtroom, if you are confirmed? Why would parties appearing before you have confidence that they will be treated fairly, regardless of their political affiliation?

Response: If confirmed as a United States District Judge, I would faithfully apply the rule of law. I would not decide cases based on politics or the political affiliation(s) of the parties. I have also represented a diverse array of parties and interests, which, I hope, would provide parties with confidence that I am not beholden to any point of view or political affiliation. *See also* Response to Question 1(b). I am confident that my rulings and comportment as a United States District Judge will give litigants confidence in my impartiality and my commitment to the rule of law. Needless to say, if confirmed as a judge, I would not engage in any fundraising or other political activity.

6. Do you believe it is proper for a judge, consistent with governing precedent, to strike down an act of Congress that it deems unconstitutional? If so, under what circumstances, and applying what factors?

Response: Yes. A judge must always be mindful that ours is a democracy and that there is a heavy presumption that laws enacted by Congress are constitutional. If, however, Congress enacts a law that exceeds its limited, enumerated powers under the Constitution, or if Congress enacts a law that is inconsistent with an individual right provided by the Constitution, it is proper for a judge to strike down that statute, or to hold that its application in the particular case is unconstitutional. If confirmed as a United States District Judge, and if a case calling into question the constitutionality of an act of Congress were to come before me, I would faithfully apply the precedents of the United States Supreme Court, and of the United States Court of Appeals for the Second Circuit, in the relevant area.

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

Response: I believe the most important attributes of a judge are fidelity to the rule of law; independence, objectivity, and neutrality; a commitment to treat litigants with dignity and respect; and a recognition that a judge must do the hard work of mastering the applicable facts and law in order to rule correctly. I do believe I have these attributes.

- 8. 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: I believe a judge must always be respectful of parties and their counsel and must treat everyone in the courtroom with utmost dignity. A judge must also be a good listener, open minded, and willing to acknowledge error. A judge must always be mindful that for the parties, the case at bar is vitally important, and that the case belongs to the parties, not the judge. A judge must always remember that the parties and their counsel are looking to the judge to treat the case as the important matter it is, and to carry out his or her role with objectivity, neutrality, care, and analytic rigor. I believe that, if confirmed as a United States District Judge, my conduct will meet that standard.

- 9. 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.

- 10. 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 there were no dispositive controlling precedent of either the United States Supreme Court or the United States Court of Appeals for the Second Circuit, I would look to prior decisions of those courts for relevant reasoning and guidance. I would also look to decisions by other federal courts, including federal courts of appeal other than the Second Circuit, for guidance. In handling statutory questions of first impression, I would, of course, look first to the text of the statute.

- 11. 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: As a United States District Judge, I would be bound by the decisions of the United States Supreme Court and the United States Court of Appeals for the Second Circuit, and would apply those decisions. I would not substitute my own judgment for binding precedents of superior courts.

12. 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: First and foremost, if confirmed as a United States District Judge, I would seek guidance from my fellow district judges as to best practices for managing a busy caseload in the Southern District of New York. I am mindful that there is much to be gained from their experience. I also expect I would seek to manage my caseload by means including (a) setting and adhering to firm deadlines; (b) working hard to resolve pending motions on a timely basis and in a way that affords clear guidance to litigants as to the question or issue presented; and (c) making intelligent use of the fine Magistrate Judges in the district.

13. 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: Yes. Parties reasonably expect judges both to resolve pending motions on a timely basis, and I would work diligently (and expect my law clerks to do the same) to achieve that goal. Parties also reasonably expect judges to keep litigation moving forward with dispatch, so to ensure that justice is not needlessly delayed, and I would set and enforce deadlines suitable to that goal. Most of all, I expect to work very hard as a federal district judge, and hope that my active engagement in the case, including with the details of pending motions such as discovery motions, helps speed the process by which a lawsuit is decided or settled.

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

Response: I received the questions on March 23, 2011. I prepared responses over the following two days. I then reviewed my responses with representatives of the Department of Justice, after which I finalized my responses. I then authorized their transmittal to the Committee.

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

Response: Yes.