

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

- 1. I am concerned with your limited courtroom experience in general, as well as your lack of experience in criminal law. As I'm sure you know, federal district court judges must rule on a host of different criminal matters. However, you have no experience in this area of the law.**

- a. Is there anything you can share with us about your legal background to ease concerns about your lack of experience?**

Response: While my legal experience has been focused primarily on civil matters, I have had experience in criminal law at several stages of my career. First, I worked on numerous criminal matters as a law clerk for three years to three federal judges, including a district judge on the United States District Court for the District of Columbia. In that position I worked closely with Judge Oberdorfer on all stages of criminal proceedings, including suppression hearings, jury instructions, trials, and sentencings pursuant to the Sentencing Guidelines. As a law clerk on the Seventh Circuit and the Supreme Court, I worked on several appeals in criminal cases, involving both substantive criminal law and criminal procedure issues. Second, as an attorney with the Federal Government, I worked on a number of legislative and other issues that involved criminal law. Third, while in private practice I have worked on a number of criminal investigations and government enforcement investigations; I have also worked on corporate compliance matters, developing and implementing policies to ensure compliance with criminal and other laws that apply to corporations and corporate executives (such as the Foreign Corrupt Practices Act). Finally, I believe that the breadth of my legal experience, including work in both the Federal Government and the private sector, together with my ability to learn quickly and my willingness to work hard, would serve me well in preparing me for the wide range of criminal matters as well as courtroom work generally that I would face if given the honor of serving as a district judge.

- b. Do you feel your overall experience has prepared you for the criminal cases you will handle as a district court judge? Please explain.**

Response: Yes. Please see Response to Question 1(a).

- c. How do you plan to educate yourself with respect to federal criminal law and the Federal Sentencing Guidelines?**

Response: I plan to take advantage of all the resources that are available to newly confirmed federal judges, including those of the Federal Judicial Center, judicial colleagues, and the local bar, to review relevant sources, including the Sentencing Guidelines and commentary regarding them, and to work hard to ensure that I am fully prepared to handle criminal matters if confirmed as a district judge.

d. How much deference will you afford the Sentencing Guidelines?

Response: If confirmed as a district judge, I would afford the Sentencing Guidelines substantial deference. In *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court held that the Guidelines are advisory rather than mandatory. Although no longer mandatory, the Guidelines should be the starting point in sentencing and I would defer to them, both because they serve the important interest of reducing disparity in federal sentencing and because they represent the carefully considered judgment of experts in the area.

e. 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?

Response: Yes.

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

Response: If confirmed as a district judge, I would give substantial deference to the applicable sentencing range calculated pursuant to the Sentencing Guidelines, and I would consider a departure only as provided in the Guidelines and in accordance with applicable precedent of the Supreme Court and the Second Circuit.

2. In *Lawrence v. Texas*, a case in which you submitted an amicus brief on behalf of the National Gay and Lesbian Law Association, the Supreme Court relied on foreign law. Justice Kennedy cited decisions made by the European Court of Human Rights in concluding that prohibiting homosexual sodomy is at odds with current norms in Western civilization.

a. Do you believe it was appropriate of the Supreme Court to cite foreign law in *Lawrence*?

Response: I believe that the United States Constitution should be interpreted by reference to domestic legal sources, and I would not rely on foreign law unless directed to do so by applicable Supreme Court precedent.

b. Do you believe it is ever appropriate for American courts to cite foreign law?

Response: Please see Response to Question 2(a).

c. If foreign law is not binding, is it relevant at all?

Response: Please see Response to Question 2(a).

3. In your amicus brief to the Supreme Court in *Lawrence v. Texas*, you argued that classifications based on sexual orientation deserve heightened scrutiny. Justice Kennedy did not explicitly state which level of scrutiny should apply. In his dissent, Justice Scalia said, “Even if the Texas law *does* deny equal protection to ‘homosexuals as a class,’ that denial *still* does not need to be justified by anything more than a rational basis, which our cases show is satisfied by the enforcement of traditional notions of sexual morality.”

- a. Do you personally believe that government classifications based on sexual orientation deserve a heightened level of scrutiny?

Response: I have not expressed a personal view on this subject. The arguments in the *amicus* brief that I co-authored in *Lawrence v. Texas* were arguments made on behalf of clients. Although I believed that there was a good faith basis in Supreme Court precedent for making those arguments, they do not necessarily reflect how I would approach these issues as a district judge. If confirmed as a district judge, I would apply the applicable precedents of the Supreme Court and the Second Circuit. The Supreme Court in *Lawrence v. Texas* did not decide that case under the Equal Protection Clause, but rather under the Due Process Clause, and it therefore did not decide the issues addressed in my *amicus* brief in that case.

- b. On what precedent would you base your decision if faced with a similar case?

Response: Please see Response to Question 3(a).

- c. Do you agree with Justice Scalia that the rational basis standard of review would be satisfied with “the enforcement of traditional notions of sexual morality”?

Response: If confirmed as a district judge and if faced with that question in a case that was properly before me, I would apply the applicable precedent of the Supreme Court and the Second Circuit.

4. In your Senate Questionnaire you indicated your work in the White House Counsel’s Office included providing advice on constitutional issues, including First Amendment and Appointments Clause issues. Did your work include providing advice on recess appointments? If so, please provide details of your involvement with such appointments.

Response: I recall only one situation during my work in the White House Counsel’s Office in which I was involved in providing advice relating to recess appointments. In that situation, the question arose as to whether a possible recess appointee to the Federal Maritime Commission would be subject to displacement by a Senate-confirmed official.

I presented that question to the Department of Justice Office of Legal Counsel (OLC), and OLC provided advice in the question consistent with past OLC advice on the subject.

5. **In your position at Cablevision, you have participated in or witnessed litigation regarding automated/remote DVR services, buffer copying, digital transmissions and other issues impacting copyright. Some legal commentators have suggested that these cases have not improved legal certainty in this policy area. Litigation has been costly to consumers, litigants, and society as a whole. Furthermore, the cases have created confusion among technology developers and entrepreneurs. I am not asking you to comment on the specifics of any particular litigation; instead, can you comment on a larger principle that perhaps the legislative branch, not the judiciary, is better suited to resolving such matters. Is it appropriate for a court step back and let the political process take the lead on cutting edge technological, social, or cultural issues?**

Response: I believe that the proper role of a court, in copyright cases as in other cases, is to apply the law, based on a faithful reading of the text of the statute and applicable precedent, to the facts of a case that is properly before it. Where a case involves the application of a statute to new technology that may not have been contemplated by the drafters of the statute, it may present the court with a difficult interpretational issue. But that situation would not authorize a court either to revise the statute itself by reading into it a desired result, or to “step back” in the sense of refraining from deciding the case presented to it on the basis of the currently existing law.

6. **Do you believe that our federal government is one of limited and enumerated powers?**

Response: Yes. Pursuant to the Tenth Amendment to the Constitution, and as the Supreme Court has held in *United States v. Lopez*, 514 U.S. 549 (1995), and other cases, the federal government is one of limited and enumerated powers.

7. **What does the concept of separation of powers mean for the federal courts? If confirmed, will this be a governing principle which you will follow?**

Response: The doctrine of separation of powers is a doctrine at the core of the United States Constitution, as articulated in a long line of Supreme Court decisions, pursuant to which each of the three branches of government – Legislative, Executive, and Judicial – exercises its distinct powers without improper interference or encroachment by the other branches. If confirmed as a district judge, I would follow the Supreme Court’s precedents regarding the separation of powers.

8. **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, it is proper for a judge to strike down an act of Congress when Congress has exceeded its authority under the Constitution as determined by binding Supreme Court precedent.

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

Response: I believe that the most important attribute of a judge is the ability to impartially and objectively apply the law to the facts, with respect for the rule of law and without preference for a particular party or outcome. I believe that I possess that quality.

10. 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 that the appropriate temperament of a judge includes the qualities of impartiality, even-handedness, patience, and respect for the law and the parties before the court. I believe that I meet this standard.

11. 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.

12. 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 confirmed as a district judge and if presented with an issue of first impression, I would start with the text of the relevant statute or other legal provision. I would also examine precedents of the Supreme Court and the Second Circuit in closely related or analogous areas of law, as well as persuasive authorities of other circuits, if applicable. I would do my best to decide the issue consistent with the best interpretation of the law based on the text and consistent with those precedents.

13. 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: If the Supreme Court or the Second Circuit had issued a binding decision on an issue that came before me as a district judge, I would apply that precedent regardless of my views of the decision.

14. 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: If confirmed as a district judge, I would manage my caseload by keeping careful track of the status of all cases, setting and enforcing firm deadlines for pretrial discovery, motions, and trials, and ruling on motions as promptly as possible. I would conduct trials efficiently and encourage mediation and settlement where possible.

15. 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, I believe that judges have a significant role in controlling the pace and conduct of litigation. If confirmed as a district judge, I would take the steps outlined in response to Question 14 and I would ensure that I rule on motions promptly and resolve cases as efficiently as possible.

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

Response: I received a copy of these questions from the United States Department of Justice on March 23, 2011. I then prepared draft answers to the questions. I discussed my draft answers with DOJ staff. I then finalized my answers and sent them to DOJ staff for transmission to the Committee.

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

Response: Yes.