

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 Jeff Sessions

1. Supreme Court historian David J. Garrow wrote, “[i]n Blackmun’s final term of 1993-94, his clerks were almost wholly responsible for his denunciation of capital punishment in his dissent, *Callins v. Callins*.” In *Callins*, Justice Blackmun famously declared, “from this day forward, I shall no longer tinker with the machinery of death.” You clerked for Justice Blackmun from 1993 to 1994, which was his final term on the bench, and when he issued that dissent.

- a. Do you believe Justice Blackmun was right to oppose the death penalty in spite of the language of the Constitution and the Court’s precedents?

Response: Justice Blackmun’s dissenting opinion in *Callins v. Collins* reflected his own position, not my personal view. The Supreme Court has held that the death penalty is constitutional, except in certain narrow circumstances, and if confirmed as a district judge I would apply those precedents.

- b. Do you agree with the position Justice Blackmun took in the dissent in *Callins*?

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

- c. Do you believe the death penalty is constitutional?

Response: Yes, the Supreme Court has held that the death penalty is constitutional, except in certain narrow circumstances.

- d. If appointed, would you have any philosophical or legal views that would prevent you from applying the death penalty?

Response: No.

2. In a 2002 article regarding Oregon’s physician-assisted suicide law, you argued that only Congress has the power to make law, and that the federal Controlled Substances Act did not prohibit Oregon doctors from prescribing lethal medication, as argued by then-Attorney General John Ashcroft. Specifically, you said the debate over physician-assisted suicide “should stay where it belongs, in the legislatures” because the states’ “varied approaches to the issue may, over time, aid in forming a national consensus, making it possible for Congress to resolve it through national legislation.”

In 2003, you co-authored an *amicus* brief, *pro bono*, on behalf of the National Gay and Lesbian Law Association in *Lawrence v. Texas*, which argued that the Court should apply a heightened level of scrutiny to government actions that classify persons according to their sexual orientation. While a plurality of the Court agreed

with you, Justice Scalia dissented, concluding that the same thing “could be said of any law” and that under the plurality’s reasoning, “judges can validate laws by characterizing them as ‘preserving the traditions of society’ (good); or invalidate them by characterizing them as ‘expressing moral disapproval’ (bad).”

Please take this opportunity to explain how your position that the physician-assisted suicide laws should be left to the judgment of the individual states and your position that Texas’ anti-sodomy law was something that warranted federal intervention are consistent.

Response: First, 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. Second, while *Lawrence v. Texas* involved a federal constitutional challenge to a state statute, the Oregon physician-assisted suicide matter did not involve any constitutional challenge. Rather, the issue was whether Congress had prohibited (or authorized the Attorney General to prohibit) physician-assisted suicide in the Controlled Substances Act, thereby preempting Oregon’s law authorizing physician-assisted suicide. In my 2002 article, I argued that Congress had not done so – not that it lacked the power to do so. The Supreme Court subsequently agreed with my position in *Gonzales v. Oregon*, 546 U.S. 243 (2006). In suggesting that the issue should remain with the states, I was not making a constitutional point, but rather making the point that the state legislatures were the appropriate forums for legislation on the issue in the absence of federal legislation addressing it.

3. **You assisted Professors Louis Henkin and Harold Hongju Koh and Mr. Michael H. Posner, *pro bono*, in drafting their *amicus* brief to the Supreme Court in *Rumsfeld v. Padilla* in 2004. The *amicus* brief argued that the “indefinite executive detention” of Padilla “offend[ed] the rule of law and violat[ed] our constitutional traditions.” The brief further maintained that the executive is constrained by the law, even in times of war, and that Padilla’s detention was unconstitutional. The *amicus* brief also questioned the President’s labeling of Padilla as an “enemy combatant,” arguing that this is a “novel term not found international law,” and that he should be tried in a civilian court.**

- a. **Setting aside the issue of military commissions, how do you reconcile your advocacy with both the history and the Supreme Court’s ruling in *Ex parte Quirin*, in which Nazi saboteurs were arrested by the FBI, taken into military custody, tried and convicted by a military commission, and ultimately, executed?**

Response: Although I assisted with a portion of this *amicus* brief in the *Rumsfeld v. Padilla* case, I am not an expert or a practitioner in this area of law. Section I.B

of the *amicus* brief sets forth arguments as to why the Supreme Court's decision in *Ex parte Quirin* is consistent with the positions taken in that brief. However, that *amicus* brief does 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, including the Supreme Court's decisions in *Ex parte Quirin*, 317 U.S. 1 (1942), *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), and *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

- b. Do you agree that *Quirin* is the last Supreme Court decision on the use of military commissions to try domestically arrested terrorists?**

Response: Yes.

- c. If confirmed, will you follow the holding in *Quirin*?**

Response: Yes.