

**Response of Katherine Polk Failla
Nominee to be United States District Judge for the Southern District of New York
to the Written Questions of Senator Chuck Grassley**

- 1. During your confirmation hearing, you stated that judicial decisions “should be decided based on law and not based on any personal feelings for any of the litigants,” but allowed that “certainly people’s factors and characteristics may come into play.” Please clarify how a judge ought to allow a litigant’s characteristics to come into play without making a decision based on personal feelings.**

Response: In almost all cases, a judge must decide disputed issues without reference to a particular litigant’s characteristics. However, there are a few statutes that require a judge to consider such factors in limited circumstances – such as 18 U.S.C. § 3553(a), which instructs a judge to consider, among other sentencing factors, “the nature and circumstances of the offense and the history and characteristics of the [criminal] defendant.” Put simply, a judge must do what the law requires, and a judge may only consider the characteristics of a particular litigant when the law requires it and for the limited purposes for which the law requires it.

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

Response: I think the most important attribute of a judge is an abiding sense of (and concern for) fairness, and I believe that I possess it.

- 3. 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 an appropriate judicial temperament comprises respect for all parties, a willingness to listen carefully to the parties’ arguments, a dedication to steeping oneself in the facts of the case and the relevant precedent, and a commitment to deciding disputed issues fairly, transparently, and promptly. I believe I have those qualities.

- 4. 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, I am.

- 5. 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: I believe the starting point for deciding cases of first impression is the text of the provision at issue. If it is unambiguous, my inquiry would end. If it is ambiguous, I would look to the structure and context of the provision, any relevant canons of statutory construction, and any guidance from analogous precedent of the Supreme Court, the Second Circuit Court of Appeals, other Circuit Courts of Appeals, and/or other district courts (in that order). If appropriate, I would also consider the legislative history of the provision.

- 6. 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: If I were fortunate enough to be confirmed, I would faithfully apply any relevant precedent from the Supreme Court or the Second Circuit, regardless of my personal views on that precedent.

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

Response: I believe that it is appropriate for a federal court to declare a statute enacted by Congress unconstitutional only where it violates a provision clearly set out in the Constitution or where Congress has exceeded its constitutional authority. In considering a constitutional challenge to a statute, a district judge must apply any applicable precedent of the Supreme Court and the relevant Circuit Court of Appeals. In addition, the district judge must be mindful of the relevant canons of construction, such as the presumption of constitutionality and the doctrine of constitutional avoidance.

- 8. 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: I do not believe it is ever proper for judges to rely on foreign law, or the views of the “world community,” in determining the meaning of the Constitution.

- 9. 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 I were confirmed as a district judge, I would make clear to litigants early on my expectations concerning the progress of a particular case, by setting realistic deadlines that would move only in limited circumstances. More fundamentally, I would review my docket on a regular basis to ensure that cases did not “fall through the cracks”; I would make effective use of both Magistrate Judges and the District’s mediation program; and I would work hard to ensure that disputed issues presented to me were resolved promptly.

10. 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: I believe that judges have both a role and a responsibility to control the pace of litigation, in order to ensure that justice is fairly and timely administered to all litigants. If I were confirmed as a district judge, I would take the specific steps outlined in my response to Question 9 to control my docket.

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

Response: In resolving disputed legal issues, I would consider the relevant Constitutional or statutory provisions, and any precedent from the Supreme Court and the Second Circuit. To the extent that I needed to resolve factual issues, I would ensure that I had a thorough understanding of the record. I would also strive to listen carefully and with an open mind to the arguments of the parties. I think the most difficult part of the transition would be familiarizing myself with certain substantive areas of civil law with which I have little or no experience.

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

Response: I received these questions on Wednesday, September 26, 2012. Over the course of the next few days, I drafted responses to the questions. I then discussed my responses with a representative of the Department of Justice and authorized the Department of Justice to transmit them to the Committee.

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

Response: Yes.