Nomination of David W. Dugan
United States District Court for the Southern District of Illinois Questions for the Record
Submitted July 1, 2020

QUESTIONS FROM SENATOR BOOKER

1. On a candidate survey for Illinois Right to Life Action, you stated that you have been "deeply involved in various organizations as a pro-life advocate."[1] You opposed a judicial bypasses for minors seeking an abortion without parental consent, questioned the holding in *Roe v. Wade*, and urged public policy that would require women seeking an abortion to be informed of the "emotional and psychological" risks.[2] You have also indicated that you would "follow and apply the law" in regards to *Roe v. Wade*, but described the holding as "sorely misplaced" and lacking a "sound basis" if applied under the Illinois Constitution.[3]

   a. Do you stand by those statements?

      Prior to becoming a judge, I voluntarily provided my time, talent and treasure for the protection of children of all ages, including unborn children and their mothers. My pro-life advocacy has always been in the form of faith-based efforts to reduce the need and demand for abortion by providing alternatives and options to, and support for, women who find themselves with an unwanted pregnancy.

      As a nominee, it would be inappropriate to now provide my opinion as to whether the Supreme Court rightly or wrongly decided a case. See Code of Conduct for United States Judges, Canons 2(A) and 3(A)(6). I will, if confirmed, faithfully and dutifully apply binding precedent, including *Roe v Wade* and its progeny, without regard for my personal beliefs or will.

      Regarding the issues of permitting minors to undergo abortive procedures without parental consent and of obtaining more full informed medical consent, it is my understanding that litigation regarding these issues is pending and/or impending. Respectfully, therefore, as a judicial nominee, it would be inappropriate for me to comment. *See* Code of Conduct for United States Judges, Canons 2(A) and 3(A)(6),

   b. Why did you believe the holding in *Roe v. Wade* was "sorely misplaced"?

      I will, if confirmed, faithfully and dutifully apply binding precedent, including *Roe v Wade* and its progeny, without regard for my personal beliefs or will.

   c. If you are confirmed, why should a litigant arguing in favor of women's

[1] David Dugan, Candidate Questionnaire, Illinois Right to Life Action (Dec. 31, 2017); SJQ Attachment 12(c) at pp. 15-16.
[2] *Id.*
[3] *Id.*

reproductive rights, such as Planned Parenthood, expect to have a fair and impartial judge, in light of your statements and record on abortion issues?

All judges are bound by their oath to faithfully and dutifully apply binding precedent regardless of his or her personal beliefs or will. I do not perceive myself as being exempted from that duty. Presently, in my current position as a state court judge, and, if confirmed as a federal district court judge, I have and will continue to faithfully and dutifully apply binding precedent, including *Roe v Wade* and its progeny, without regard for my personal beliefs or will, and without regard to the previously expressed beliefs of litigants appearing before me.

2. You have spoken in favor of forced arbitration and said that mandatory arbitration has "some favorable benefits."[4]

   a. When making those statements, was it your perspective that aggrieved consumers and employees are better able to access justice when they are forced into arbitration?

   The Seventh Amendment to the Constitution of the United State provides that "[i]n Suits at common law, … the right to a trial by jury shall be preserved." I believe that juries play a vital role in our justice system. My response to the Illinois Civil Justice League Candidate Questionnaire that this question references was about Illinois' Mandatory Arbitration established by the Illinois Supreme Court in conjunction with lower Illinois Courts (Please see Il. Sup. Ct. Rules 86, 93, et seq.). As noted, Illinois' Mandatory Arbitration is non-binding, meaning that either litigant, if unhappy with the arbitrators' decision, may reject it, and still proceed to jury trial. The favorable benefits to which I spoke, and which I observed as the trial judge assigned to overseeing the non-binding arbitration docket, included that providing non-binding arbitration early in the case can prove to be far-less costly to the litigant than jury trials and, as a result, non-binding arbitration can serve to lower equal access to justice barriers for those who might otherwise forego seeking a remedy due to the financial cost and/or inability to pay that cost.

   b. If an employee is discriminated against because of the color of her skin do you believe that forced arbitration is the best forum for that employee to seek justice?

   As a lawyer who appeared before juries, I understand the level of importance that juries play in our system of justice. Juries remain vital and foundational: The Seventh Amendment to Constitution provides that "[i]n Suits at common law … the right of trial by jury shall be preserved." However, during my career as a litigation attorney, I came to understand that attorneys may, for a variety of reasons, encourage or recommend their client pursue an avenue to justice other than by jury trial.

[4] David Dugan, Candidate Questionnaire, Illinois Civil Justice League (Feb. 10, 2018); SJQ Attachment 12(c) at p. 13.

3. You became a member of the Federalist Society in 2017.[5]

   a. Why did you decide to join the Federalist Society?

      I came to enjoy reading the *Harvard Journal of Law and Public Policy*, a subscription to which was included with my membership.

   b. Is there any connection between your interest in becoming a member of the Federalist Society and your interest in becoming a federal judge?

      No.

4. Do you consider yourself an originalist? If so, what do you understand originalism to mean?

   I understand the term "originalism" to refer to an approach to constitutional or statutory interpretation and construction, where the words in question are assigned their plain and ordinary meaning as those words were understood by the public when the constitutional or statutory provision was passed. While I prefer to avoid labels, I generally ascribe to this approach when called upon to determine the meaning of a constitutional or statutory provision. If confirmed, I will fully and faithfully apply all binding precedents of the Supreme Court and the Seventh Circuit with regard to constitutional and statutory interpretation and construction.

5. Do you consider yourself a textualist? If so, what do you understand textualism to mean?

   I understand the term "textualism" to refer to an approach to constitutional or statutory interpretation and construction, where the words of the governing text are of paramount concern and that what they fairly convey in their context is what the text means. It is my understanding that "textualism" is an appropriate approach to interpretation and construction, and is in many ways very similar to the concept of "originalism". If confirmed I will fully and faithfully apply all binding precedents of the Supreme Court and the Seventh Circuit with regard to constitutional and statutory interpretation and construction.

6. Legislative history refers to the record Congress produces during the process of passing a bill into law, such as detailed reports by congressional committees about a pending bill or statements by key congressional leaders while a law was being drafted. The basic idea is that by consulting these documents, a judge can get a clearer view about Congress's intent. Most federal judges are willing to consider legislative history in analyzing a statute, and the Supreme Court continues to cite legislative history.

   a. If you are confirmed to serve on the federal bench, would you be willing to consult and cite legislative history?

      I will, if confirmed, consult and cite legislative history when doing so is consistent

[5] SJQ at pp. pp. 5.

with the precedent of the Supreme Court and Seventh Circuit regarding interpretation and construction. The Supreme Court has stated: "As we have repeatedly held, the authoritative statement is the statutory text, not the legislative history or any other extrinsic material." *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 568, 125 S. Ct. 2611, 2626, 162 L. Ed. 2d 502 (2005). *See also Five Points Rd. Joint Venture v. Johanns*, 542 F.3d 1121, 1128 (7th Cir. 2008) ("Resort to the legislative history, however, is only necessary if the language of the statute is ambiguous; if the statutory language is clear, then the legislative history is only relevant if it shows a clear intent to the contrary.").

b. If you are confirmed to serve on the federal bench, your opinions would be subject to review by the Supreme Court. Most Supreme Court Justices are willing to consider legislative history. Isn't it reasonable for you, as a lower-court judge, to evaluate any relevant arguments about legislative history in a case that comes before you?

Yes, it would be reasonable to hear argument regarding legislative history in a case that may come before me. Nevertheless, if confirmed, I will consult and cite legislative history consistent with the precedent of the Supreme Court and Seventh Circuit regarding interpretation and construction. The Supreme Court has stated: "As we have repeatedly held, the authoritative statement is the statutory text, not the legislative history or any other extrinsic material." *Exxon Mobil Corp. v. Allapattah Services, Inc*., 545 U.S. 546, 568, (2005). *See also Five Points Rd. Joint Venture v. Johanns,* 542 F.3d 1121, 1128 (7th Cir. 2008) ("Resort to the legislative history, however, is only necessary if the language of the statute is ambiguous; if the statutory language is clear, then the legislative history is only relevant if it shows a clear intent to the contrary.").

7. Do you believe that judicial restraint is an important value for an appellate judge to consider in deciding a case? If so, what do you understand judicial restraint to mean?

The term "judicial restraint," as I understand it, refers to the concept that a court should avoid allowing his or her personal will, desire, or societal philosophy to become a part of or be reflected in his or her rulings and decisions. Yes, I believe that judges should avoid allowing his or her personal will, desire, or societal philosophy to become a part of or be reflected in his or her rulings and decisions.

a. The Supreme Court's decision in *District of Columbia v. Heller* dramatically changed the Court's longstanding interpretation of the Second Amendment.[6] Was that decision guided by the principle of judicial restraint?

The majority opinion in *Heller* stated that the Court was addressing a question previously unresolved by the courts. The *Heller* Court stated: "We conclude that nothing in our precedents forecloses our adoption of the original understanding of the Second Amendment. It should be unsurprising that such a significant matter has been for so long judicially unresolved. For most of our history, the Bill of Rights

[6] 554 U.S. 570 (2008).

was not thought applicable to the States, and the Federal Government did not significantly regulate the possession of firearms by law-abiding citizens. Other provisions of the Bill of Rights have similarly remained unilluminated for lengthy periods." *Dist. of Columbia v. Heller*, 554 U.S. 570, 625, 128 S. Ct. 2783, 2816, 171 L. Ed. 2d 637 (2008). As a nominee, it would be inappropriate for me to comment on whether the Supreme Court rightly or wrongly decided a case or to discuss my personal beliefs as to its practical effects. *See* Code of Conduct for United States Judges, Canons 2(A) and 3(A)(6).

b. The Supreme Court's decision in *Citizens United v. FEC* opened the floodgates to big money in politics.[7] Was that decision guided by the principle of judicial restraint?

In *Citizens United v FEC,* 558 U.S. 310, 342 (2010), the Supreme Court stated that "First Amendment protections extends to corporations." As a nominee, it would be inappropriate for me to comment on whether the Supreme Court rightly or wrongly decided a case or to discuss my personal beliefs as to its practical effects. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

c. The Supreme Court's decision in *Shelby County v. Holder* gutted Section 5 of the Voting Rights Act.[8] Was that decision guided by the principle of judicial restraint?

In *Shelby County, Ala. v. Holder*, 570 U.S. 529, 536 (2013) the Supreme Court stated that "voting discrimination still exists; no one doubts that. The question is whether the Act's extraordinary measures, including its disparate treatment of the States, continue to satisfy constitutional requirements. As we put it a short time ago, 'the Act imposes current burdens and must be justified by current needs.'" As a nominee, it would be inappropriate for me to comment on whether the Supreme Court rightly or wrongly decided a case or to discuss my personal beliefs as to its practical effects. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

8. Since the Supreme Court's *Shelby County* decision in 2013, states across the country have adopted restrictive voting laws that make it harder for people to vote. From stringent voter ID laws to voter roll purges to the elimination of early voting, these laws disproportionately disenfranchise people in poor and minority communities. These laws are often passed under the guise of addressing purported widespread voter fraud. Study after study has demonstrated, however, that widespread voter fraud is a myth.[9] In fact, in- person voter fraud is so exceptionally rare that an American is more likely to be struck by lightning than to impersonate someone at the polls.[10]

    a. Do you believe that in-person voter fraud is a widespread problem in

[7] 558 U.S. 310 (2010).
[8] 570 U.S. 529 (2013).

[9] *Debunking the Voter Fraud Myth*, BRENNAN CTR. FOR JUSTICE (Jan. 31, 2017), https://www.brennancenter.org /analysis/debunking-voter-fraud-myth.
[10] *Id.*

American elections?

I have not thoroughly studied whether in-person voter fraud is a widespread problem in American elections and any comment I might make on the issue would have insufficient basis. Further, as a nominee for the position of a Federal District Court Judge, it would not be appropriate for me to express my personal beliefs on political issues. See Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

b. In your assessment, do restrictive voter ID laws suppress the vote in poor and minority communities?

I have not thoroughly studied the issue of whether voter ID laws generally serve to suppress the vote in poor and minority communities, and any comment I might make on this issue would be have insufficient basis. Further, as a nominee for the position of a Federal District Court Judge, it would not be appropriate for me to express my personal beliefs on political issues. See Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

c. Do you agree with the statement that voter ID laws are the twenty-first-century equivalent of poll taxes?

I have not thoroughly studied the issue of whether voter ID laws are the twenty-first century equivalent of poll taxes, and any comment I might make on this issue would have insufficient basis. Further, as a nominee for the position of a Federal District Court Judge, it would not be appropriate for me to express my personal beliefs on political issues. See Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

9. According to a Brookings Institution study, African Americans and whites use drugs at similar rates, yet blacks are 3.6 times more likely to be arrested for selling drugs and 2.5 times more likely to be arrested for possessing drugs than their white peers.[11] Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.[12] These shocking statistics are reflected in our nation's prisons and jails. Blacks are five times more likely than whites to be incarcerated in state prisons.[13] In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.[14]

a. Do you believe there is implicit racial bias in our criminal justice system?

Yes.

[11] Jonathan Rothwell, *How the War on Drugs Damages Black Social Mobility*, BROOKINGS INST. (Sept. 30, 2014), https://www.brookings.edu/blog/social-mobility-memos/2014/09/30/how-the-war-on-drugs-damages-black-social-mobility.
[12] *Id.*
[13] Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, SENTENCING PROJECT (June 14, 2016), http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons.
[14] *Id.*

b. Do you believe people of color are disproportionately represented in our nation's jails and prisons?

Yes.

c. Prior to your nomination, have you ever studied the issue of implicit racial bias in our criminal justice system? Please list what books, articles, or reports you have reviewed on this topic.

I have not yet thoroughly studied the issue of implicit racial bias in our federal criminal courts. I did attend a related program shortly after joining the state bench, and have I have also reviewed a variety of articles and writings so as to develop a general understanding of the issue, the urgency with which it needs to be studied and addressed, and the ongoing efforts to address it.

d. According to a report by the United States Sentencing Commission, black men who commit the same crimes as white men receive federal prison sentences that are an average of 19.1 percent longer.[15] Why do you think that is the case?

I have not yet thoroughly studied the issue of racial disparity in sentencing in our federal criminal courts. Any comment I might make at this time as to the cause of such disparity would be without sufficient basis. However, whatever the cause, the disparity is alarming.

e. According to an academic study, black men are 75 percent more likely than similarly situated white men to be charged with federal offenses that carry harsh mandatory minimum sentences.[16] Why do you think that is the case?

I have not yet thoroughly studied the issue of racial disparity in sentencing in our federal criminal courts. Any comment I might make at this time as to the cause of such disparity would be without sufficient basis. However, whatever the cause, the disparity is alarming.

f. What role do you think federal appeals judges, who review difficult, complex criminal cases, can play in addressing implicit racial bias in our criminal justice system?

18 U.S.C.A. § 3553 requires district courts at the time of sentencing to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." It is certainly within the purview of a circuit court to examine on appeal any claimed error related to a district court's failure to comply with §3553. If confirmed, I will fully and faithfully apply all sentencing statutes

[15] U.S. SENTENCING COMM'N, DEMOGRAPHIC DIFFERENCES IN SENTENCING: AN UPDATE TO THE 2012 *BOOKER* REPORT 2 (Nov. 2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114_Demographics.pdf.
[16] Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1323 (2014)

and precedent of the Supreme Court and Seventh Circuit.

10. According to a Pew Charitable Trusts fact sheet, in the 10 states with the largest declines in their incarceration rates, crime fell by an average of 14.4 percent.[17] In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.[18]

    a. Do you believe there is a direct link between increases in a state's incarcerated population and decreased crime rates in that state? If you believe there is a direct link, please explain your views.

       I have not thoroughly studied or adequately investigated this issue. Accordingly, I do not have an informed basis on which to determine whether such a direct link exists.

    b. Do you believe there is a direct link between decreases in a state's incarcerated population and decreased crime rates in that state? If you do not believe there is a direct link, please explain your views.

       Please see my response to question 10.a.

11. Do you believe it is an important goal for there to be demographic diversity in the judicial branch? If not, please explain your views.

    Yes.

12. Would you honor the request of a plaintiff, defendant, or witness in a case before you who is transgender to be referred to in accordance with that person's gender identity?

    Yes.

13. Do you believe that *Brown v. Board of Education*[19] was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

    Yes. While I believe that it is typically inappropriate for me as a nominee to express my views as to whether a case was wrongly or rightly decided by the Supreme Court, I also believe that *Brown* is a watershed and inimitable unanimous decision that hopefully places to rest forever *Plessy's* notions of separate but equal.

14. Do you believe that *Plessy v. Ferguson*[20] was correctly decided? If you cannot give

[17] Fact Sheet, *National Imprisonment and Crime Rates Continue To Fall*, PEW CHARITABLE TRUSTS (Dec. 29, 2016), http://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2016/12/national-imprisonment-and-crime-rates-continue-to-fall.
[18] *Id.*
[19] 347 U.S. 483 (1954).
[20] 163 U.S. 537 (1896).

a direct answer, please explain why and provide at least one supportive citation.

No. Please see my response to question 13.

15. Has any official from the White House or the Department of Justice, or anyone else involved in your nomination or confirmation process, instructed or suggested that you not opine on whether any past Supreme Court decisions were correctly decided?

Not to my recollection.

16. As a candidate in 2016, President Trump said that U.S. District Judge Gonzalo Curiel, who was born in Indiana to parents who had immigrated from Mexico, had "an absolute conflict" in presiding over civil fraud lawsuits against Trump University because he was "of Mexican heritage."[21] Do you agree with President Trump's view that a judge's race or ethnicity can be a basis for recusal or disqualification?

It is the duty of a Federal Judge to address and evaluate whether recusal or disqualification is appropriate under 28 U.S.C., §§144 and 145. If confirmed, I would address and evaluate each matter before me for appropriateness of recusal or disqualification.

17. President Trump has stated on Twitter: "We cannot allow all of these people to invade our Country. When somebody comes in, we must immediately, with no Judges or Court Cases, bring them back from where they came."[22] Do you believe that immigrants, regardless of status, are entitled to due process and fair adjudication of their claims?

The Supreme Court in *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) held that "once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all "persons" within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." If confirmed, I will fully and faithfully apply all binding precedent.

[21] Brent Kendall, *Trump Says Judge's Mexican Heritage Presents 'Absolute Conflict*,' WALL ST. J. (June 3, 2016), https://www.wsj.com/articles/donald-trump-keeps-up-attacks-on-judge-gonzalo-curiel-1464911442.
[22] Donald J. Trump (@realDonaldTrump), TWITTER (June 24, 2018, 8:02 A.M.), https://twitter.com/realDonaldTrump /status/1010900865602019329.