

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

QUESTIONS FROM SENATOR COONS

1. With respect to substantive due process, what factors do you look to when a case requires you to determine whether a right is fundamental and protected under the Fourteenth Amendment?

- a. Would you consider whether the right is expressly enumerated in the Constitution?

Yes.

- b. Would you consider whether the right is deeply rooted in this nation's history and tradition? If so, what types of sources would you consult to determine whether a right is deeply rooted in this nation's history and tradition?

Yes. The Supreme Court itself has turned to period writings, precedent, historical references, treatises, and other sources where it deemed it appropriate. I would, if confirmed, faithfully adhere to and apply all Supreme Court precedent regarding the appropriateness of consulting such sources.

- c. Would you consider whether the right has previously been recognized by Supreme Court or circuit precedent? What about the precedent of any court of appeals?

I would consider first Supreme Court and Seventh Circuit precedent to which I would consider myself to be bound in writing any decision or order. In the absence of such binding precedent, I would give consideration to precedent from other circuits.

- d. Would you consider whether a similar right has previously been recognized by Supreme Court or circuit precedent? What about whether a similar right has been recognized by any court of appeals?

Yes, to each question.

- e. Would you consider whether the right is central to "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life"? See *Planned Parenthood v. Casey*, 505 U.S. 833, 581 (1992); *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (quoting *Casey*).

Yes.

- f. What other factors would you consider?

I would give consideration to those factors identified as appropriate by Supreme Court and Seventh Circuit precedent.

2. Does the Fourteenth Amendment's promise of "equal protection" guarantee equality across race and gender, or does it only require racial equality?

The Supreme Court has held that the "equal protection" guarantees extend across both race and gender. See *Fisher v. Univ. of Texas at Austin*, 570 U.S. 297, 310, (2013); *United States v. Virginia*, 518 U.S. 515, 515, (1996)

- a. If you conclude that it does require gender equality under the law, how do you respond to the argument that the Fourteenth Amendment was passed to address certain forms of racial inequality during Reconstruction, and thus was not intended to create a new protection against gender discrimination?

Please see my response to question 2 above.

- b. If you conclude that the Fourteenth Amendment has always required equal treatment of men and women, as some originalists contend, why was it not until 1996, in *United States v. Virginia*, 518 U.S. 515 (1996), that states were required to provide the same educational opportunities to men and women?

Respectfully, I do not know the answer to the question. However, a possible explanation might be found in *Dist. of Columbia v. Heller*, 554 U.S. 570, 625, 128 S. Ct. 2783, 2816, 171 L. Ed. 2d 637 (2008). 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 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."

- c. Does the Fourteenth Amendment require that states treat gay and lesbian couples the same as heterosexual couples? Why or why not?

The Supreme Court has determined that the Fourteenth Amendment requires that same-sex couples be afforded the right to marry "on the same terms accorded to couples of the opposite sex." See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605 (2015).

- d. Does the Fourteenth Amendment require that states treat transgender people the same as those who are not transgender? Why or why not?

It is my understanding that this issue is presently being litigated. As a nominee, it would be inappropriate for me to comment. See Code of Conduct for United States Judge, Canon 3(A)(6)

3. Do you agree that there is a constitutional right to privacy that protects a woman's right to use contraceptives?

The Supreme Court in the case of *Griswold v. Connecticut*, 381 U.S. 479 (1965), determined that she does have such a constitutional right.

- a. Do you agree that there is a constitutional right to privacy that protects a woman's right to obtain an abortion?

The Supreme Court has determined that there is such a constitutional right. *See Roe v. Wade*, 410 U.S. 113 (1973).

- b. Do you agree that there is a constitutional right to privacy that protects intimate relations between two consenting adults, regardless of their sexes or genders?

The Supreme Court has determined that there is such a constitutional right. *See Lawrence v Texas*, 539 U.S. 558 (2003).

- c. If you do not agree with any of the above, please explain whether these rights are protected or not and which constitutional rights or provisions encompass them.

Please see my responses to Questions 3, 3.a. and 3.b.

4. In *United States v. Virginia*, 518 U.S. 515, 536 (1996), the Court explained that in 1839, when the Virginia Military Institute was established, "[h]igher education at the time was considered dangerous for women," a view widely rejected today. In *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600-01 (2015), the Court reasoned, "As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. . . . Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser." This conclusion rejects arguments made by campaigns to prohibit same-sex marriage based on the purported negative impact of such marriages on children.

- a. When is it appropriate to consider evidence that sheds light on our changing understanding of society?

The Supreme Court has at times considered evidence of contemporary changes to societal norms. When the Supreme Court directs inferior courts to consider evidence that sheds light on our changing understanding of society, lower courts should do so. If confirmed, I will follow the Supreme Court's precedent on this issue.

- b. What is the role of sociology, scientific evidence, and data in judicial analysis?

The presentation of scientific evidence through expert testimony and opinions continues to play an important role in both civil and criminal trials. Rule 702 of the Federal Rules of Evidence governs the admission of such testimony and opinions and places the district court in the role of “gatekeeper” for this type of evidence. See, *Daubert v. Merrell Dow Pharmacy, Inc.* 509 U.S. 579 (1993). If confirmed, I will faithfully apply Supreme Court and Seventh Circuit precedent and the Federal Rules of Evidence when considering such evidence.

5. In the Supreme Court’s *Obergefell* opinion, Justice Kennedy explained, “If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied. This Court has rejected that approach, both with respect to the right to marry and the rights of gays and lesbians.”

- a. Do you agree that after *Obergefell*, history and tradition should not limit the rights afforded to LGBT individuals?

The Supreme Court has determined that same-sex couples have the same right to marry as others, *Obergefell v Hodges*, 135 S.Ct. 2584 (2015), as a right of privacy, *Lawrence v Texas*, 539 U.S. 558 (2003). If confirmed, I will faithfully and dutifully adhere to this precedent and all other binding precedent.

- b. When is it appropriate to apply Justice Kennedy’s formulation of substantive due process?

Since the nature of the formulation of substantive due process itself has and will most likely will continue to bring about an evolving jurisprudence through litigation, it would be inappropriate for me comment. See Code of Conduct for United States Judge, Canon 2(A) and 3(A)(6). If confirmed, I will faithfully and dutifully adhere to binding precedent on issues involving substantive due process.

6. You are a member of the Federalist Society, a group whose members often advocate an “originalist” interpretation of the Constitution.

- a. In his opinion for the unanimous Court in *Brown v. Board of Education*, 347 U.S. 483 (1954), Chief Justice Warren wrote that although the “circumstances surrounding the adoption of the Fourteenth Amendment in 1868 . . . cast some light” on the amendment’s original meaning, “it is not enough to resolve the problem with which we are faced. At best, they are inconclusive We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.” 347 U.S. at 489, 490-93. Do you consider *Brown* to be consistent with originalism even though the Court in *Brown* explicitly rejected the notion that the original meaning of the Fourteenth Amendment was dispositive or even conclusively supportive?

I have not thoroughly examined this issue. If confirmed, however, I will faithfully and dutifully follow *Brown*, and all Supreme Court and Seventh Circuit precedent.

- b. How do you respond to the criticism of originalism that terms like “‘the freedom of speech,’ or ‘equal protection,’ or ‘due process of law’ are not precise or self-defining”? Robert Post & Reva Siegel, *Democratic Constitutionalism*, National Constitution Center, <https://constitutioncenter.org/interactive-constitution/white-papers/democratic-constitutionalism> (last visited June 30, 2020).

I have not thoroughly examined this issue and I am not familiar with this particular writing. Therefore, any comment in response would be without sufficient basis. If confirmed, however, I will faithfully and dutifully follow all Supreme Court and Seventh Circuit precedent.

- c. Should the public’s understanding of a constitutional provision’s meaning at the time of its adoption ever be dispositive when interpreting that constitutional provision today?

The Supreme Court in *Dist. of Columbia v. Heller*, 554 U.S. 570, 586, 128 S. Ct. 2783, 2794, 171 L. Ed. 2d 637 (2008), recognized the importance of a provision’s text, context, structure and original public meaning to the process of interpretation. If confirmed, I will faithfully follow all Supreme Court and Seventh Circuit precedent.

- d. Does the public’s original understanding of the scope of a constitutional provision constrain its application decades later?

Please see my response to question 6.c.

- e. What sources would you employ to discern the contours of a constitutional provision?

Please see my response to question 6.c.

- 7. You stated on your 2018 Judicial Candidate Survey for Illinois Right to Life Action that you are a cofounder of Illinois Vision 2020. Illinois Vision 2020 describes its mission as “Ending Abortion in Illinois by 2020.”

- a. You did not list Illinois Vision 2020 in your response to Question 11 of the Senate Judiciary Committee Questionnaire. Please explain the reason for this omission.

I supplied in my Senate Judiciary Committee Questionnaire, in response to Question 12(c), references to Vision 2020 in my Illinois Right to Life Action Candidate Questionnaire, which reflects my presence at the founding meeting. My understanding of Question 11 of the Senate Judiciary Committee Questionnaire is that the candidate list organizations “to which you belong, or which you have belonged since graduation from law school.” It is my understanding that there has been no “membership” and I at no time “belonged” to Vision 2020. I regret any confusion that my submission in response to 12(c) may have caused.

- b. Please further describe the structure, activities, and purpose of Illinois Vision 2020.

Please see my response to question 7.a. I do not know whether Vision 2020 took on any organizational structure, activities, or purpose following my attendance at its founding meeting and luncheon.

- c. Please detail your involvement with Illinois Vision 2020, including why you decided to found it and what your involvement with it has been since its founding.

Please see my response to question 7.a.

- d. Did you found Illinois Vision 2020 or have any other involvement with it while you were a circuit court judge? If so, please explain how your involvement with it was consistent with applicable ethical standards of conduct.

No. Please see my response to question 7.a. My attendance at Vision 2020's founding luncheon occurred before I became a circuit court judge.

- e. Please explain how Illinois Vision 2020 sought to end abortion in a constitutionally permissible manner.

Please see my response to question 7.a. above.