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

QUESTIONS FROM SENATOR FEINSTEIN

1. You ran for judicial office in Illinois in 2018.

   a. **How many questionnaires or candidate surveys from outside groups did you respond to during the course of your campaign? Please list all organizations to which you submitted a questionnaire or candidate response. Please provide copies of the responses.**

      To the best of my recollection, the written questionnaires or candidate surveys from outside groups I submitted during my election contest consisted of those offered by the Illinois Right to Life Action and the Illinois Civil Justice League, both of which are included in the record.

   b. **In 2018, how many outside groups endorsed your candidacy? Please list all organizations that endorsed you and explain the process for securing their endorsement.**

      To the best of my recollection, the outside groups that endorsed my candidacy are the Illinois Right to Life Action by questionnaire; Illinois Civil Justice League by questionnaire; Madison County Republican Party by vote or poll; and Madison County Leadership Council by speech/interview.

2. You completed a candidate survey for Illinois Right to Life Action in relation to your campaign to be a Circuit Judge for the Third Judicial Circuit in Madison County, Illinois, in 2018.

   In that survey, you wrote that, "for a number of reasons," the Supreme Court's decision in *Roe v. Wade* was "sorely misplaced." You also wrote that any minor seeking an abortion was "in a presumably very emotional and maybe even irrational state."

   a. **Why did you seek the endorsement of Illinois Right to Life Action?**

      I responded to the Questionnaire during the course of my campaign to expand my name recognition within my county and thereby secure votes for my election.

   b. **Please explain, in detail, your reasons for believing the holding in *Roe v. Wade* is "sorely misplaced."**

As a judicial nominee, it would be inappropriate for me to now comment on whether the Supreme Court rightly or wrongly decided a particular 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.

c. What was the basis for your assertion that minors seeking abortions are in an "irrational state?" Please provide specific evidence or studies supporting your claim.

I did not assert "that minors seeking abortions are in an "irrational state." The questionnaire response to which this question refers clearly states: "I believe sound public policy would give due consideration to the decision-making involvement of the parents of a child who finds herself pregnant. In most instances, the parents can provide unequaled advice and guidance that youth simply does not permit. To allow such a weighty decision to be made by a child in a presumably emotional and maybe even irrational state, invites the expedient solution which so often ends in great regret or grief once that decision is carried out."

As the questionnaire reflects, I stated then, and I affirm now, that I will, without regard to any personal beliefs, faithfully follow the law as it has been established in *Roe v Wade* and its progeny.

3. **On your Senate Judiciary Questionnaire, you indicated that you were a member of the Alliance Defending Freedom (ADF) from 2014-2016. Among other positions, ADF opposes women's reproductive rights, marriage equality, civil unions between same-sex couples, and adoption by same-sex couples.**

   Do you support ADF's positions on women's reproductive rights and the rights of same-sex couples?

   I am not aware of, nor have I investigated, ADF's positions on women's reproductive rights or the rights of same-sex couples. Accordingly, any comment regarding ADF's positions would be without basis. In any event, it would be inappropriate for me as a nominee to comment on my personal opinions regarding ADF's positions on women's reproductive rights and the rights of same-sex couples. *See* Code of Conduct for United States Judges, Canons 2(A) 3(A)(6) If confirmed, I will faithfully and dutifully adhere to Supreme Court and Seventh Circuit precedent all issues before me.

4. Please respond with your views on the proper application of precedent by judges.

   a. When, if ever, is it appropriate for lower courts to depart from Supreme Court precedent?

I am not aware of a circumstance under which it would be appropriate for a district court to depart from Supreme Court precedent.

b. Do you believe it is proper for a district court judge to question Supreme Court precedent in a concurring opinion? What about a dissent?

Typically, district court judges do not author concurring or dissenting opinions. However, all orders authored by a district court judge should reflect fully an adherence to Supreme Court precedent.

c. When, in your view, is it appropriate for a district court to overturn its own precedent?

Except possibly for those situations permitted by rule, such as motions to alter or amend a judgment pursuant FRCP 59, or motions for relief from a judgement or order pursuant to FRCP 60, I do not believe that a district court creates precedent to be overturned by itself.

d. When, in your view, is it appropriate for the Supreme Court to overturn its own precedent?

Whether the Supreme Court overturns its own precedent is a question uniquely within the province of the Supreme Court itself.

5. When Chief Justice Roberts was before the Committee for his nomination, Senator Specter referred to the history and precedent of *Roe v. Wade* as "super-stare decisis." A text book on the law of judicial precedent, co-authored by Justice Neil Gorsuch, refers to *Roe v. Wade* as a "super-precedent" because it has survived more than three dozen attempts to overturn it. (The Law of Judicial Precedent, Thomas West, p. 802 (2016).) The book explains that "superprecedent" is "precedent that defines the law and its requirements so effectively that it prevents divergent holdings in later legal decisions on similar facts or induces disputants to settle their claims without litigation." (The Law of Judicial Precedent, Thomas West, p. 802 (2016))

a. Do you agree that *Roe v. Wade* is "super-stare decisis"? Do you agree it is "superprecedent"?

Roe v Wade has survived numerous challenges, and regardless of whether one refers to the decision in *Roe v Wade* as "super-stare decisis" or "super precedent", all federal district court judges are bound by the precedent of *Roe v. Wade* and its progeny. If confirmed, I too will faithfully and dutifully adhere to binding precedent, including *Roe v Wade* and its progeny.

b. Is it settled law?

Yes. *Roe v Wade* is a binding precedent of the Supreme Court.

6. In *Obergefell v. Hodges*, the Supreme Court held that the Constitution guarantees same-sex couples the right to marry. Is the holding in *Obergefell* settled law?

   Obergefell is binding precedent and I, if confirmed, will faithfully and dutifully adhere to binding precedent, including *Obergefell*.

7. In Justice Stevens's dissent in *District of Columbia v. Heller* he wrote: "The Second Amendment was adopted to protect the right of the people of each of the several States to maintain a well-regulated militia. It was a response to concerns raised during the ratification of the Constitution that the power of Congress to disarm the state militias and create a national standing army posed an intolerable threat to the sovereignty of the several States. Neither the text of the Amendment nor the arguments advanced by its proponents evidenced the slightest interest in limiting any legislature's authority to regulate private civilian uses of firearms."

   a. Do you agree with Justice Stevens? Why or why not?

   As a nominee, it would be inappropriate for me to comment on whether the Supreme Court rightly or wrongly decided a particular case. *See* Code of Conduct for United States Judges, Canons 2(A) and 3(A)(6)

   b. Did *Heller* leave room for common-sense gun regulation?

   In *District of Columbia v. Heller*, the Supreme Court wrote that "nothing in our opinion should be taken as to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." 554 U.S. 570, 626-627 (2008). It otherwise would be inappropriate for me as a nominee to comment on political issues or those issues that are within the purview of the legislative or democratic process. *See* Code of Conduct for United States Judges, Canons 2(A) and 3(A)(6)

   c. Did *Heller*, in finding an individual right to bear arms, depart from decades of Supreme Court precedent?

   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 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). If confirmed, I will fully and faithfully apply all Supreme Court and Seventh Circuit precedent.

8. In *Citizens United v. FEC*, the Supreme Court held that corporations have free speech rights under the First Amendment and that any attempt to limit corporations' independent political expenditures is unconstitutional. This decision opened the floodgates to unprecedented sums of dark money in the political process.

   a. Do you believe that corporations have First Amendment rights that are equal to individuals' First Amendment rights?

   In *Citizens United v FEC,* 558 U.S. 310 (2010), the Supreme Court stated that "First Amendment protections extends to corporations." *Id* at 342. If confirmed, I will fully and faithfully apply all Supreme Court and Seventh Circuit precedent.

   b. Do individuals have a First Amendment interest in not having their individual speech drowned out by wealthy corporations?

   Please see my response to question 8.a.

   c. Do you believe corporations also have a right to freedom of religion under the First Amendment?

   The Supreme Court has stated that the First Amendment's free exercise clause provides protections to associations and organizations. *See Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018). "Business practices compelled or limited by the tenets of a religious doctrine fall comfortably within the understanding of the "exercise of religion." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 684 (2014). Beyond that reference, it would be inappropriate form me as a nominee to comment on a question that is likely to arise in the future. See Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed, I will faithfully and dutifully adhere to all binding Supreme Court and Seventh Circuit precedent.

9. Does the Equal Protection Clause of the Fourteenth Amendment place any limits on the free exercise of religion?

   The Fourteenth Amendment provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction equal protection of the laws." The Fourteenth Amendment provides for the protection of the free exercise of religion from intrusion by the states. *See Cantwell v Connecticut,* 310 U.S. 296 (1940). If confirmed, I will fully and faithfully follow Supreme Court precedent, including precedent involving the First and Fourteenth Amendments.

10. Would it violate the Equal Protection Clause of the Fourteenth Amendment if a county clerk refused to provide a marriage license for an interracial couple if interracial marriage violated the clerk's sincerely held religious beliefs?

    The Supreme Court in *Loving v. Virginia*, 388 U.S. 1 (1967) potentially provides some insight. There, the Supreme Court held that state laws prohibiting interracial marriage violate the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment. Beyond that reference, it would be inappropriate for me as a nominee to comment on this issue as it is likely to arise in the future. See Code of Conduct for United States Judges, Canon 3(A)(6). In any event, I will fully and faithfully follow all Supreme Court precedent regarding this issue.

11. Could a florist refuse to provide services for an interracial wedding if interracial marriage violated the florist's sincerely held religious beliefs?

    The Supreme Court in *Loving v. Virginia*, 388 U.S. 1 (1967), potentially provides some insight to the question. There, the Supreme Court held that state laws prohibiting interracial marriage violate the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment. Beyond that reference, it would be inappropriate for me as a nominee to comment on this issue as it is likely to arise in the future. See Code of Conduct for United States Judges, Canon 3(A)(6). In any event, I will fully and faithfully follow all Supreme Court precedent regarding this issue.

12. You indicated on your Senate Questionnaire that you have been a member of the Federalist Society since 2017—more than 30 years after you began practicing law. The Federalist Society's "About Us" webpage explains the purpose of the organization as follows: "Law schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society. While some members of the academic community have dissented from these views, by and large they are taught simultaneously with (and indeed as if they were) the law." It says that the Federalist Society seeks to "reorder[] priorities within the legal system to place a premium on individual liberty, traditional values, and the rule of law. It also requires restoring the recognition of the importance of these norms among lawyers, judges, law students and professors. In working to achieve these goals, the Society has created a conservative and libertarian intellectual network that extends to all levels of the legal community."

    a. Could you please elaborate on the "form of orthodox liberal ideology which advocates a centralized and uniform society" that the Federalist Society claims dominates law schools?

    Respectfully, I am not familiar with the statement, and I do not know what the Federalist Society means by it.

    b. How exactly does the Federalist Society seek to "reorder priorities within the legal system"?

Please see my response to question 12.a.

c. What "traditional values" does the Federalist society seek to place a premium on?

Please see my response to question 12.a.

d. Have you had any contact with anyone at the Federalist Society about your possible nomination to any federal court? If so, please identify when, who was involved, and what was discussed.

To the best of my recollection, I have had no contact with anyone at the Federalist Society regarding a possible nomination.

e. When you joined the Federalist Society in 2017—30 years after you began practicing law—did you believe it would help your chances of being nominated to a position within the federal judiciary or within the Trump Administration? Please answer either "yes" or "no."

No.

i If your answer is "no," then why did you decide to join the Federalist Society in 2017, more than 30 years after you began practicing law?

To the best of my recollection, shortly after I became a state court judge, I received a mailed invitation to begin receiving one of its publications, *Harvard Journal of Law & Public Policy* and I accepted by joining. I have enjoyed reading that particular publication.

ii Was it at any time communicated to you that membership in the Federalist Society would make your judicial nomination more likely? If so, who communicated it to you and in what context?

No.

13. In January 2020, the Committee on Codes of Conduct of the U.S. Judicial Conference circulated a draft ethics opinion which stated that "membership in the ACS or the Federalist Society is inconsistent with obligations imposed by the Code [of Judicial Conduct]." (*Draft Ethics Opinion No. 117: Judges' Involvement With the American Constitution Society, the Federalist Society, and the American Bar Association* (Jan. 2020))

a. Were you aware of this ethics opinion? If so, did you consider relinquishing your membership when you were nominated for this position? If not, why not?

I have become aware of the draft ethics opinion. Upon reviewing the draft, I considered whether it or Canon 4 required me to relinquish membership. I determined that, in light of my having never been in a leadership or governance role with the Federalist Society, I would defer that decision until such time that a final ethics opinion is issued.

b. If confirmed to the District Court, will you relinquish your membership in the Federalist Society? If not, how do you reconcile membership in the Federalist Society with Canon 4 of the Code of Judicial Conduct?

Please see my response to 12.a.

14. On your Senate Judiciary Questionnaire, you state that you have been a "Life Member" of the National Rifle Association (NRA) since 2008.

a. Are you currently a member of the NRA?

Yes.

b. If confirmed to the District Court, will you remain a member or renew your membership with the NRA?

Presently, it is my intention to remain a member of the NRA.

c. Do you commit to recusing yourself from any cases that come before you that present legal issues upon which the NRA has taken a position? If not, why not?

A judge is obligated to hear and decide matters assigned, unless disqualified. *See* Code of Conduct for United States Judges, Canon 3(A)(2). It is the duty of a district court federal judge to address and evaluate whether recusal or disqualification is appropriate under 28 U.S.C., §§ 455 and 144. If confirmed, I would address and evaluate each matter for appropriateness of recusal or disqualification as required by these statutes, the Canons, and other appropriate laws, and I will faithfully follow and adhere to Supreme Court and Seventh Circuit precedent regarding recusal and disqualification issues.

d. Can you cite any issue areas where you disagree with the NRA's publicly stated positions?

I am not aware of all of NRA's publicly stated positions. In any event, as a nominee it would not be appropriate for me to publicly comment or opine regarding political issues. See Code of Conduct for United States Judges, Canons 2(A), 3(A)(6) and 5(C).

e. Why did you join the National Rifle Association?

I have enjoyed for many years shooting sports such as trap and target. I would like to be able to continue to enjoy those things.

15. On February 22, 2018, when speaking to the Conservative Political Action Conference (CPAC), former White House Counsel Don McGahn told the audience about the Administration's interview process for judicial nominees. He said: "On the judicial piece … one of the things we interview on is their views on administrative law. And what you're seeing is the President nominating a number of people who have some experience, if not expertise, in dealing with the government, particularly the regulatory apparatus. This is different than judicial selection in past years…"

    a. Did anyone in this Administration, including at the White House or the Department of Justice, ever ask you about your views on any issue related to administrative law, including your "views on administrative law"? If so, by whom, what was asked, and what was your response?

    Not to my recollection.

    b. Since 2016, has anyone with or affiliated with the Federalist Society, the Heritage Foundation, or any other group, asked you about your views on any issue related to administrative law, including your "views on administrative law"? If so, by whom, what was asked, and what was your response?

    Not to my recollection.

    c. What are your "views on administrative law"?

    I have no particular views on administrative law generally. It would be inappropriate for me as a nominee to comment on my personal views on administrative law to the extent those views would bear on how I would decide particular cases. *See* Code of Conduct for United States Judges, Canons 2(A) and 3(A)(6). If confirmed, I will faithfully and dutifully adhere to Supreme Court and Seventh Circuit precedent in all issues before me.

16. Do you believe that human activity is contributing to or causing climate change?

    Respectfully, I have not thoroughly and adequately studied the issue so as to have developed an informed basis for an opinion as to whether human activity is contributing to or causing climate change. I do recognize the issue as a current political topic, and that the topic may give rise to litigation. As such, it would be inappropriate for me, as a nominee to comment on this issue. See Code of Conduct for United States Judges, Canons 2(A) and 3(A)(6).

17. When is it appropriate for judges to consider legislative history in construing a statute?

If confirmed, I will consult legislative history as called for by precedent of the Supreme Court or Seventh Circuit. The Supreme Court has held, that "[a]s we have repeatedly held, the authoritative statement is the statutory text, not the legislative history or any other extrinsic material. Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms. Not all extrinsic materials are reliable sources of insight into legislative understandings, however, and legislative history in particular is vulnerable to two serious criticisms. First, legislative history is itself often murky, ambiguous, and contradictory. Judicial investigation of legislative history has a tendency to become, to borrow Judge Leventhal's memorable phrase, an exercise in "looking over a crowd and picking out your friends." *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 568, (2005); *Cf 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.")

18. At any point during the process that led to your nomination, did you have any discussions with anyone — including, but not limited to, individuals at the White House, at the Justice Department, or any outside groups — about loyalty to President Trump? If so, please elaborate.

    Not to my recollection**.**

19. Please describe with particularity the process by which you answered these questions.

    Once received from the Office of Legal Policy, I reviewed each question. I then reviewed my Senate Judiciary Questionnaire. I next reviewed the Senate Judiciary Questionnaire supporting documents. Where necessary, I conducted research while preparing my responses to each question. Once completed, I forwarded to the OLP a draft of my responses. I then provided my authorization to file my responses to each of the Senators' questions.