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 WHITEHOUSE

1. If you have not already done so, please read a copy of the draft Advisory Opinion 117, circulated by the Codes of Conduct Committee of the Judicial Conference of the United States. A draft of the opinion is available here: https://fixthecourt.com/wp-content/uploads/2020/02/Guide-Vol02B-Ch02-AdvOp117.pdf. If the Committee formally adopts its draft Advisory Opinion as written, will you comply with it?

   Should the draft of Advisory Opinion #117 be formally adopted by the Codes of Conduct Committee of the Judicial Conference of the United States, I will consider it, together with any advisory opinions related to judges' membership in law-related organizations. If confirmed, I will comply with the Code of Conduct for United States Judges.

2. A Washington Post report from May 21, 2019 ("A conservative activist's behind-the-scenes campaign to remake the nation's courts") documented that Federalist Society Executive Vice President Leonard Leo raised $250 million, much of it contributed anonymously, to influence the selection and confirmation of judges to the U.S. Supreme Court, lower federal courts, and state courts. If you haven't already read that story and listened to recording of Mr. Leo published by the Washington Post, I request that you do so in order to fully respond to the following questions.

   a. Have you read the Washington Post story and listened to the associated recordings of Mr. Leo?

      Per the request, I did read the story and listened to the recording.

   b. Do you believe that anonymous or opaque spending related to judicial nominations of the sort described in that story risk corrupting the integrity of the federal judiciary? Please explain your answer.

      I have no actual or personal knowledge of anonymous or opaque spending related to judicial nominations. Further, I have not adequately studied or investigated these issues so as to be able to form a knowledgeable opinion regarding them. Respectfully, it would be inappropriate for as a nominee for me to comment relative to these issues. See Code of Conduct for United States Judges, Canon 2(A) and 5(C).

   c. Mr. Leo was recorded as saying: "We're going to have to understand that judicial confirmations these days are more like political campaigns." Is that a view you share? Do you believe that the judicial selection process would benefit from the same kinds of spending disclosures that are required for spending on federal elections? If not, why not?

      I have not adequately studied or investigated these issues so as to be able to form a knowledgeable opinion regarding them. Respectfully, it would be inappropriate for as a nominee for me to comment relative to these issues. See Code of Conduct for United States Judges, Canon 2(A) and 5(C).

d. Do you have any knowledge of Leonard Leo, the Federalist Society, or any of the entities identified in that story taking a position on, or otherwise advocating for or against, your judicial nomination? If you do, please describe the circumstances of that advocacy.

No. I do not know Mr. Leonard Leo.

e. As part of this story, the Washington Post published an audio recording of Leonard Leo stating that he believes we "stand at the threshold of an exciting moment" marked by a "newfound embrace of limited constitutional government in our country [that hasn't happened] since before the New Deal." Do you share the beliefs espoused by Mr. Leo in that recording?

I do not know what Mr. Leo meant by the statements, and I am not otherwise aware of or have knowledge of his beliefs.

3. During his confirmation hearing, Chief Justice Roberts likened the judicial role to that of a baseball umpire, saying "'[m]y job is to call balls and strikes and not to pitch or bat."

a. Do you agree with Justice Roberts' metaphor? Why or why not?

As a general metaphor, I believe there is truth to it, particularly for trial judges and federal district court judges, because they should act as arbiters, not advocates, in the cases before them.

b. What role, if any, should the practical consequences of a particular ruling play in a judge's rendering of a decision?

Generally speaking, a judge should be aware of the practical consequences of a particular decision, but that awareness should not be allowed to serve as a basis to depart from the obligation and duty to faithfully follow precedent.

4. Federal Rule of Civil Procedure 56 provides that a court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact" in a case. Do you agree that determining whether there is a "genuine dispute as to any material fact" in a case requires a trial judge to make a subjective determination?

The case of *Anderson v Liberty Lobby, Inc*. 477 U.S. 242 (1986), may provide some insight. There, the Supreme Court stated: "we are convinced that the inquiry involved in a ruling on a motion for summary judgment or for a directed verdict necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits. If the defendant in a run-of-the-mill civil case moves for summary judgment or for a directed verdict based on the lack of proof of a material fact, the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict." *Id.* at 252.

5. During Justice Sotomayor's confirmation proceedings, President Obama expressed his view that a judge benefits from having a sense of empathy, for instance "to recognize what it's like to be a young teenage mom, the empathy to understand what it's like to be poor or African-American or gay or disabled or old."

    a. What role, if any, should empathy play in a judge's decision-making process?

    Empathy, in the sense of the of the human quality of the ability to understand and share the feelings of others, while possibly helpful in assessing a person's motive or purpose, should not otherwise be permitted to serve as a basis for departing from obligation and duty to apply fairly the law to the facts in a given case.

    b. What role, if any, should a judge's personal life experience play in his or her decision-making process?

    All judges have their own life experiences that have shaped and contoured their beliefs, biases, and even prejudices. All judges must take all measures to separate their personal beliefs, biases and prejudices from the decision-making process.

6. In your view, is it ever appropriate for a judge to ignore, disregard, refuse to implement, or issue an order that is contrary to an order from a superior court?

    No.

7. When, if ever, is it appropriate for a district judge to publish an opinion that includes dicta challenging the correctness of a binding precedent?

    I do not envision a scenario whereby such conduct would be appropriate.

8. When, if ever, is it appropriate for a district judge to publish an opinion that includes a proclamation of the judge's personal policy preferences or political beliefs?

    I do not believe that a judge should allow his or her personal policy preferences or political beliefs to enter into the decision-making process or in any way be reflected in the decision itself.

9. In an interview during your state judicial election campaign in 2018, you stated: "[J]udges must be independent and free from the influence of politics and special interest organizations."

    a. What constitutes being "independent and free" from politics and special interest groups?

    This statement was made as part of a political speech and interview prior to my nomination. The statement reflected my views at that time that elected state judges should endeavor to minimize the involvement of party politics in judicial campaigns so as to avoid being viewed as "robed politicians", and to preserve public confidence in its state judiciary.

    b. When and in what capacity is it appropriate for a district judge to have ties to special interest groups or political organizations?

    The Code of Conduct for United States Judges governs the conduct of federal judges in terms of upholding the integrity and independence of the Judiciary (Canon 1); avoidance

of impropriety in all activities (Canon 2); performing judicial duties fairly and impartially (Canon 3); engaging in extrajudicial activities (Canon 4); and engaging in certain political activity (Canon 5). I will, if confirmed by the Senate, faithfully and fully adhere to the Code of Conduct for United States Judges as well as any other statute or rule that governs the conduct of federal judges.

c. Do you believe your present involvement with the National Rifle Association jeopardizes your independence or appearance of independence as a federal judge?

I have neither sought nor accepted leadership or policy making positions or roles with the NRA, and have limited my "involvement" with the NRA to simple membership without active participation. I will, if confirmed, consider and comply with 28 U.S.C. §§455, 144, the Code of Conduct for United States Judges, and all other relevant statutes regarding the assessment of whether disqualification or recusal is appropriate.

d. Do you believe your past involvement with Alliance Defending Freedom and Options-Now jeopardizes your independence or appearance of independence as a federal judge?

As I testified, I had no formal involvement with Alliance Defending Freedom. To the best of my recollection, I had only two encounters with anyone from ADF. My first contact consisted of a meeting with my former client and ADF counsel regarding legal representation. My second and last contact with ADF consisted of a referral of a potential client. I will, if confirmed, consider and comply with 28 U.S.C. §§455, 144, the Code of Conduct for United States Judges, and all other relevant statutes regarding the assessment of whether disqualification or recusal is appropriate.

10. The Seventh Amendment ensures the right to a jury "in suits at common law."

a. What role does the jury play in our constitutional system?

As the Sixth Amendment ensures the right to a trial by an "impartial jury" in criminal cases, and the Seventh Amendment preserves "the right of trial by jury" in suits at common law, juries play a vital role in our system of justice. The reverence that these Amendments receive in our system reflect the long-held belief that a group of ordinary citizens can collectively ensure, as much as possible, a fair, unbiased and impartial decision.

b. Should the Seventh Amendment be a concern to judges when adjudicating issues related to the enforceability of mandatory pre-dispute arbitration clauses?

I have not encountered this issue in my legal career. However, if confirmed I would faithfully and dutifully follow all applicable Supreme Court and Seventh Circuit precedent in addressing this issue.

c. Should an individual's Seventh Amendment rights be a concern to judges when adjudicating issues surrounding the scope and application of the Federal Arbitration Act?

Please see my response to Question 10.b.

11. What deference do congressional fact findings merit when they support legislation expanding or limiting individual rights?

    Congress is free, of course, to investigate and make findings with regard to historical and systemic patterns of unequal treatment for the purpose addressing and fashioning legislation to remedy such unequal treatment. Our Supreme Court has ruled that Congress' chosen remedy must be congruent and in proportion to its object and purpose. *Tennessee v. Lane*, 541 U.S. 509, 531 (2004) (in relation to the Americans with Disabilities Act); And that "Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct." *Nevada Dept. of Human Res. v. Hibbs*, 538 U.S. 721, 727-28 (Family Medical Leave Act). If confirmed, I will faithfully and dutifully follow Supreme Court and Seventh Circuit precedent if presented with these issues.

12. The Federal Judiciary's Committee on the Codes of Conduct recently issued "Advisory Opinion 116: Participation in Educational Seminars Sponsored by Research Institutes, Think Tanks, Associations, Public Interest Groups, or Other Organizations Engaged in Public Policy Debates." I request that before you complete these questions you review that Advisory Opinion.
    a. Have you read Advisory Opinion #116?

       Yes.

    b. Prior to participating in any educational seminars covered by that opinion will you commit to doing the following?
        i. Determining whether the seminar or conference specifically targets judges or judicial employees.

           Advisory opinion 116 provides that "it is essential for judges to assess each invitation to participate or attend a seminar on a case-by-case basis." The opinion also points to nine factors relating to the sponsoring organization and three factors relating to the program itself that should be considered when deciding whether it is appropriate to attend a particular seminar. I will consult and consider those factors when determining whether to attend any particular seminar and I will, if confirmed, adhere to the Code of Conduct for United States Judges.

        ii. Determining whether the seminar is supported by private or otherwise anonymous sources.

           Please see my response to Question 12.b.i above.

        iii. Determining whether any of the funding sources for the seminar are engaged in litigation or political advocacy.

           Please see my response to Question 12.b.i above.

        iv. Determining whether the seminar targets a narrow audience of incoming or current judicial employees or judges.

Please see my response to Question 12.b.i above.

v. Determining whether the seminar is viewpoint-specific training program that will only benefit a specific constituency, as opposed to the legal system as a whole.

Please see my response to Question 12.b.i above.

c. Do you commit to not participate in any educational program that might cause a neutral observer to question whether the sponsoring organization is trying to gain influence with participating judges?

Please see my response to Question 12.b.i above.

13. In your view, what is the evidentiary significance of Congress's failure to enact a proposed amendment to a previously enacted statute for how you would interpret the previously enacted statute? In general, what significance do you attach to evidence of Congress's failure to enact any piece of proposed legislation?

The Supreme Court has recognized that "the problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. (citation omitted) Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. (citation omitted) The legislature may select one phase of one field and apply a remedy there, neglecting the others. *Williamson v. Lee Optical of Oklahoma Inc.*, 348 U.S. 483, 489, 75 S. Ct. 461, 465, 99 L. Ed. 563 (1955). In a related vein, the Supreme Court has also remarked 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)

14. In your view, what constitutes the ordinary or plain meaning of statutory and constitutional text? When interpreting the text of a statute in the absence of binding precedent, is it proper for a district judge to (a) apply the text's plain meaning to current circumstances without considering its historical origins or (b) limit the text's meaning to how it would have been defined or understood at the time of enactment? If (b), how should a district judge determine how the text would have been defined or understood at the time of enactment?

The Supreme Court provided some possible guidance that may address these questions. In the case of *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1730 (2020), the Supreme Court stated that "[t]his Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment. After all, only the words on the page constitute the law adopted by Congress and approved by the President. If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations, we

would risk amending statutes outside the legislative process reserved for the people's representatives. And we would deny the people the right to continue relying on the original meaning of the law they have counted on to settle their rights and obligations." *Id* at 1738. To determine a text's meaning or usage at the time of enactment, the Supreme Court consulted the act (Title VII) as a whole to see what it had to say about the text in question, and it consulted dictionary definitions in existence at the time of enactment and at the time of interpretation. *Id* at 1739. If confirmed, I will faithfully and dutifully apply all Seventh Circuit and Supreme Court precedent, including *Bostock*, when called upon to interpret or construe a statute or provision.