

Senator Dick Durbin
Written Questions for Allison Eid, Thomas Farr and William Ray
September 27, 2017

For questions with subparts, please answer each subpart separately.

Questions for Justice Allison Eid

1. During your hearing, I asked you about the 2015 case *Westin Operator LLC v. Groh*. In this case, 22-year-old Jillian Groh and two friends had rented a room at a Denver Westin hotel so they could go out for a night on the town and then not have to drive home. They returned around 2 a.m. to their room with several more friends and ended up in an argument with hotel security guards over noise. The guards told Ms. Groh that she and her group had to leave the premises and they escorted her out of the hotel, even though the group told the guards they could not leave, saying “we are drunk, we can’t drive.”

One of the friends asked if they could wait in the lobby while they called a taxi because it was freezing outside, but a security guard refused, blocked them from re-entering, and told them to “get the f*** out of here.” So seven people loaded into Ms. Groh’s car and drove off. The driver was drunk and they got in an accident. One person in the car was killed, others were injured, and Ms. Groh suffered a traumatic brain injury.

Ms. Groh’s parents sued the Westin hotel for negligence, alleging that the hotel failed to exercise a minimum level of due care for her safety when they evicted her. The hotel moved for summary judgment. The majority of the Colorado Supreme Court affirmed a denial of this motion for summary judgment, holding that hotels must refrain from evicting an intoxicated guest into a foreseeably dangerous environment. The majority thought the case should proceed to trial to give the Grohs the chance to develop the facts about the freezing weather, the level of intoxication, and the availability of alternative transportation.

You wrote a dissent where you agreed that the hotel owed a duty not to evict a guest into an unreasonably dangerous environment, but you would have dismissed the case on summary judgment because in your view Ms. Groh and her friends could have just taken a taxi. You said in your dissent “there is no suggestion that she was so intoxicated that she could not call or get into a taxi.” You saw no material dispute of fact and said that in your view there was no concern with the freezing weather or Ms. Groh’s intoxication that would have precluded summary judgment. During your hearing, you said it was a “critical fact” that “the party walked by waiting cabs, and that was caught on videotape....and in my view, that was dispositive.”

However, the majority in this case did not view this as dispositive. The majority opinion said:

Video footage from hotel security cameras shows two taxis in the vicinity during the general timeframe of the eviction. No taxi is visible on screen during the time in which the group exited the hotel and walked to the

parking lot en masse, but there is a police car parked at the entrance. It is unclear from the record whether the taxis visible at other times in the video were occupied or available for service, whether any member of the group saw the taxis, and whether the security guards evicting the group were aware if a taxi was immediately available. One of the people evicted testified at his own deposition that he tried to look for a cab outside the hotel but didn't see one.

- a. Do you believe it is clear from the record whether the taxis visible in the video were available for service?

Response: As stated in my dissent, “the group discussed taking a taxi, Groh’s brother told her to take a taxi, video footage shows Groh and her companions walking by two taxi cabs on the way to her car, and there is no suggestion that Groh was so intoxicated that she could not call or get into a taxi.”

- b. Do you believe it is clear from the record whether any member of the group saw the taxis you referenced?

Response: As stated in my dissent, “the group discussed taking a taxi, Groh’s brother told her to take a taxi, video footage shows Groh and her companions walking by two taxi cabs on the way to her car, and there is no suggestion that Groh was so intoxicated that she could not call or get into a taxi.”

- c. Do you believe it is clear from the record that Ms. Groh and her group were not so intoxicated that they would be unable to identify whether a nearby cab were available for service?

Response: As stated in my dissent, “the group discussed taking a taxi, Groh’s brother told her to take a taxi, video footage shows Groh and her companions walking by two taxi cabs on the way to her car, and there is no suggestion that Groh was so intoxicated that she could not call or get into a taxi.”

- d. Why did you not want to allow this case to proceed to trial to resolve these questions of fact?

Response: As stated in my dissent, “[b]ecause undisputed evidence demonstrates that Groh was evicted into an environment where alternative transportation was available, summary judgment” was appropriate.

- e. You said in your dissent that

[T]he majority fails to look at the larger picture, which is that its reasoning would apply to impose a duty to provide safe transportation for evicted guests on the entire Colorado hotel industry....While it is not possible to precisely quantify the burden

that the majority is placing on Colorado businesses at this stage, surely it is not the trivial obligation the majority makes it out to be.

When you considered the burdens that the decision in this case would place on the hotel industry, did you also consider the burdens that the decision would place on these young adults and their families?

Response: As stated in my dissent, the above-quoted passage was made in response to the majority's suggestion that "ensuring that evicted guests actually take alternative transportation off the property would be a '[r]elatively low-cost option [.]'."

2. You wrote a dissent in the 2014 case *City of Brighton v. Rodriguez*. This case involved Helen Rodriguez, a city employee who was walking to her office in the basement of City Hall when she fell down the stairs to her office and hit her head. She ended up with multiple injuries, including four aneurysms in her brain for which she needed surgery.

The City argued that these injuries were not compensable under the Colorado Workers' Compensation Act, saying that the cause of Ms. Rodriguez's fall was unexplained and that the fall did not arise out of her employment. The majority of the Colorado Supreme Court held that Ms. Rodriguez's fall was compensable, because the fall would not have occurred but for the fact that her obligations of employment placed her in the position where she was injured.

You dissented, arguing that unexplained injuries like Ms. Rodriguez's fall should not be treated the same as injuries with neutral or known causes. You said "by holding that unexplained injuries are compensable, the majority significantly expands the scope of workers' compensation coverage in Colorado." You would have ruled in favor of Ms. Rodriguez's employer in the case and denied Ms. Rodriguez compensation for the extensive injuries she suffered.

- a. Why do you think the majority of the Court disagreed with you?

Response: As stated in the majority opinion, the majority concluded that "when the cause of any employee's fall is truly unknown, it necessarily arises from a neutral risk" and is therefore compensable.

- b. The majority wrote that when injuries are unexplained, "demanding more precision about the exact mechanism of a fall is inconsistent with the spirit of a statute that is designed to compensate workers for workplace accidents regardless of fault." Did you feel it was inappropriate for the majority to reference the spirit of the statute?

Response: As stated in my dissent, "the majority's position extends" the scope of the statute, and such "expansion is an issue best left to the legislature."

3. In the 2017 case *People v. Boyd*, the Colorado Supreme Court considered the prosecution of Pamela Boyd for possessing a small amount of marijuana. Ms. Boyd had been arrested in 2011 for possessing less than one ounce of marijuana and she was found guilty in August 2012 of possession and attempt to distribute. She was sentenced in November 2012.

Then, on December 10, 2012, Amendment 64 became effective. This was a Colorado citizen initiative that legalized the possession of up to one ounce of marijuana for personal use. Ms. Boyd then filed a timely notice of appeal and argued that because Amendment 64 legalized possession while she still had a pending right to appeal, her conviction for possession should be vacated.

The Colorado Supreme Court majority found for Ms. Boyd, holding that Amendment 64 deprived the State of its power to continue to prosecute cases where there was a non-final conviction of possession and where there was a pending right to appeal when the Amendment became effective.

You dissented, criticizing the majority's decision as "retroactive" and saying that the majority's ruling meant that "criminal acts committed prior to Amendment 64's effective date will go unprosecuted and unpunished." You said that in your view there was no indication that the voters intended the Amendment to apply retroactively.

- a. How could the State prosecute Ms. Boyd on appeal after December 10, 2012 based on a marijuana possession statute that was no longer operative?

Response: As stated in my dissent, "Because marijuana possession 'constitute[d] an offense' prior to the effective date of Amendment 64, the defendants are properly subject to prosecution for that defense."

- b. Why did you call the majority's decision "retroactive" when it simply required the State to apply the Amendment to cases that were still pending?

Response: As stated in my dissent, the majority opinion held the Amendment to be retroactive because under its decision "criminal acts committed prior to Amendment 64's effective date will go unprosecuted and unpunished."

4. In the 2012 case *Larson v. Sinclair Transportation Company*, the Colorado Supreme Court majority held that the legislature did not grant the power of eminent domain to companies for the purpose of building oil pipelines.

In this case the oil company, Sinclair, sought to condemn a portion of the Larson family's property to put down an oil pipeline. Sinclair cited a statute that gave electric companies the power of eminent domain for rights-of-way. The Supreme Court majority ruled against Sinclair, noting that "neither the word petroleum nor the word oil is found anywhere" in the relevant statute. The majority noted that precedent required them to narrowly construe statutes that confer condemnation power upon private entities, and they held that this statute

neither expressly nor impliedly gave eminent domain authority for companies to lay down oil pipelines.

You dissented. You construed the language of the eminent domain statute more broadly to include oil pipelines. Basically, you and the majority disagreed on the interpretation of the statute, and your reading would have favored the oil company while the majority's reading favored the Larson family.

How do you think the majority read the same text as you and came up with a different outcome in the case?

Response: As stated in the majority opinion, the majority interpreted the statutory term "pipeline" to refer "to pipes involved in delivering electric power through the power grid, such as those pipes encasing underground electric wiring." As stated in my dissent, "I agree with the majority that we should not lightly infer the grant of condemnation authority in this, or any, condemnation case," but that the plain meaning of term "pipeline" would include a pipe "carry[ing] liquid petroleum."

5. You note in your questionnaire that in 1999 you served as the chair of Colorado Senator Wayne Allard's Federal Judicial Selection Committee.

- a. Please describe the work you did on Senator Allard's committee.

Response: The Committee received applications, interviewed candidates, and made recommendations to the Senator.

- b. Do you think Senate Judicial Selection Committees perform an important function when it comes to vetting candidates for judgeships?

Response: I believe it is better left to others, including the President who is responsible for nominating candidates, and Senators who are tasked with approving nominees, to determine whether such committees perform an important function.

6. You say in your questionnaire that you have been a member of the Federalist Society since 1988. Are you aware that President Trump publicly thanked the Federalist Society for helping compile his Supreme Court shortlist? For example, in an interview with Breitbart News' Steve Bannon on June 13, 2016, Trump said "[w]e're going to have great judges, conservative, all picked by the Federalist Society." In a press conference on January 11, 2017, he said his list of Supreme Court candidates came "highly recommended by the Federalist Society."

Response: Yes, I have read press accounts of the statements to which you refer.

7. What message does it send to young lawyers and law students, like the students you've taught at the University of Colorado Law School, when the President designates interest groups like the Federalist Society as gatekeepers for judicial selection?

Response: I am not aware of any of my students' reactions to the press accounts of the above-referenced statements.

8. Why do you think you made the list of 21 Supreme Court candidates that the Federalist Society helped assemble for President Trump?

Response: I do not know.

9. During the confirmation process of Justice Gorsuch, special interests contributed millions of dollars in undisclosed dark money to a front organization called the Judicial Crisis Network that ran a comprehensive campaign in support of the nomination. It is likely that many of these secret contributors have an interest in cases before the Supreme Court. I fear this flood of dark money undermines faith in the impartiality of our judiciary.

The Judicial Crisis Network has also spent money on advertisements supporting President Trump's Circuit Court nominees, including Justice Joan Larsen.

- a. Justice Eid, do you want outside groups or special interests to make undisclosed donations to front organizations like the Judicial Crisis Network in support of your nomination?

Response: To my knowledge, no such efforts have been made.

- b. Will you condemn any attempt to make undisclosed donations on behalf of your nomination?

Response: To my knowledge, no such efforts have been made.

- c. Will you call for any such undisclosed donors to make their donations public so that if you are confirmed you can have full information when you make decisions about recusal in cases that these donors may have an interest in?

Response: To my knowledge, no such efforts have been made.

10.

- a. Can a president pardon himself?

Response: As a nominee for federal judicial office and a sitting justice on the Colorado Supreme Court bound by our state's code of judicial ethics, it would be inappropriate for me to offer a view of a legal question that might come before me.

- b. Can an originalist view of the Constitution provide the answer to this question?

Response: As a nominee for federal judicial office and a sitting justice on the Colorado Supreme Court bound by our state's code of judicial ethics, it would be inappropriate for me to offer a view of a legal question that might come before me.

- c. If the original public meaning of the Constitution does not provide a clear answer, to what should a judge look to next?

Response: A judge may also look to history and tradition.

11. Do you agree, as a factual matter, with President Trump's claim that 3 to 5 million people voted illegally in the 2016 election?

Response: I have made no effort to investigate the basis for the President's assertion and any answer I would provide would be mere speculation. More importantly, as a sitting justice on the Colorado Supreme Court bound by our state's code of judicial ethics, I do not get involved in politics.