Nomination of Iain D. Johnston
to the United States District Court for the
Northern 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?

I will comply with all requirements of 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?

I had not read this story or listened to the recording before responding to this questionnaire but have now done so based upon your request.

    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.

Although I am unfamiliar with the issues raised in the story and was unfamiliar with this issue until I read the story based upon your request, I believe that everybody should be committed to ensuring the integrity, objectivity, fairness, and lack of political influence in the selection of federal judges. But as a current United States magistrate judge and nominee to be a district court judge, to the extent that this question seeks to have me express my views on a policy matter that may be subject to legislation or litigation, it would not be appropriate for me to further comment on this question. Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), 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?

Please see my response to Question 2.b above.

    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.

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?

Please see my response to Question 2.b above.

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?

Metaphors and analogies are rarely perfect. To some extent, I agree with Chief Justice Roberts' metaphor as described in this question but also believe that the metaphor as stated is incomplete. To the extent that Chief Justice Roberts' metaphor is making the point that a judge should be a neutral arbiter, not subject to influence, I agree with the metaphor. And to the extent that the metaphor is making the point that judges are not the litigants, I agree with the metaphor. Everybody before the court should be treated equally. The strike zone should be the same regardless of which team is at bat. Judges, like umpires, are bound by the rules. But umpires' decisions in calling balls and strikes are binary. A pitch is either a ball or a strike. A nasty, knee-buckling curve ball that drops in and catches the inside corner of the plate at the batter's knees is a strike regardless of how much of the corner it catches. Like umpires' ball and strike decisions, some judicial decisions are binary. Civil defendants are liable or not; criminal defendants are guilty or not. Those are binary decisions. But much of what trial judges, including federal district court judges, do is discretionary and requires the exercise of judgment. For example, when parties seek to take more than ten depositions, judges use their discretion in making that ruling. Similarly, a judge uses judgment in determining whether to sentence a defendant to the low end or high end of the sentencing guidelines. These types of discretionary rulings are on a continuum; they are not binary. Consequently, in this regard, the metaphor is incomplete.

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

The law allows for practical consequences to be considered in rendering a decision in a variety of contexts. The following are three examples. When deciding to grant injunctive relief, a court must consider whether irreparable harm will occur if the injunction is not granted. This is a practical consideration. Next, in the area of sentencing, Seventh Circuit precedent requires the sentencing judge to consider the practical consequences of a lengthy sentence on a person of advanced age, so that the judge considers that the practical consequence of the sentence may be a life sentence. That practical consideration must be assessed in light of the sentencing goals identified in 18 U.S.C. Section 3553. Finally, under the Bail Reform Act of 1984, a judicial officer may not impose a financial condition that results in the pretrial detention of the person. 18 U.S.C. Section 3142(c)(2). The practical consequence of a bond that is so onerous that the person cannot pay it is a consideration in that circumstance. So, to the extent that precedent counsels a judge to consider the practical consequences of a ruling, it should be considered.

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?

Seventh Circuit precedent has squarely addressed this issue. The purpose of summary judgment is to decide if there is a genuine issue of material fact that requires a trial. This is the trial judge's singular task. A trial judge does not resolve swearing contests between parties; those disputes are left to a fact finder at trial. In ruling on a summary judgment motion, a court may not make credibility determinations, weigh the evidence, or decide which inferences to draw from the facts. *See Payne v. Pauley*, 337 F. 3d 767, 770 (7th Cir. 2003).

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?

Judges are human beings, not robots. A decent human being, and therefore a decent judge, should have a sense of empathy. But judges must impartially apply the law to the facts in reaching a decision. Indeed, in the Seventh Circuit, jurors are routinely instructed that sympathy cannot drive their decisions. Federal Civil Jury Instructions of the Seventh Circuit, 1.01 (2010). If judges instruct jurors not to be driven by sympathy, then judges themselves should likewise not reach decisions based on sympathy. But sympathy is different than empathy. Judges should not leave their sense of empathy at the courthouse door. Because empathy is the ability to understand the perspective of another person, empathy should play a role at times. For example, at sentencing, empathy for not only the crime victim but also the defendant may be important. Moreover, empathy for attorneys' or litigants' circumstances as to why a deadline was missed or an extension of a deadline is needed might be an important consideration. So, empathy can and should play a role in the decision-making process in the appropriate circumstances.

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

The law allows a judge to use personal life experiences in a variety of contexts. For example, just as jurors are instructed that they should use common sense in weighing evidence and consider the evidence in light of their own observations in life, judges can likewise use their life experiences in making certain decisions, including weighing evidence at a trial or making discovery rulings. Federal Civil Jury Instructions of the Seventh Circuit, 1.11 (2010). However, it is nevertheless critical that judges remember that their decisions must be based on a neutral application of the law to the facts. So, any life experiences that may cause bias for or against a particular party must be set aside.

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?

Occasionally, a court of appeals might issue two (or more) conflicting opinions on a specific issue. In that context, a district judge should discuss these conflicting authorities to bring the issue to the attention of the court of appeals, and to explain to the parties, the court of appeals, and readers of the opinion, why the district judge ruled a particular way.

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?

It is not appropriate for a district judge to publish an opinion stating the judge's personal policy preferences or political beliefs.

9. 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?

The civil jury (like the criminal jury) plays a critical role in our constitutional system. Among other things, a civil jury helps ensure community participation in deciding civil justice. This participation not only benefits the parties to a civil case, but also the jurors themselves and the community at large.

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

All Constitutional provisions, just as all statutory provisions and precedent, should be a concern to a judge. The issue of the enforceability of mandatory arbitration clauses has been and will likely continue to be litigated before me in my current role as a magistrate judge and likely will continue to be raised before me if I were to be confirmed as a district judge. Moreover, arbitration clauses have been the subject of recent legislation. Consequently, it would not be appropriate for me to further comment on this question. Code of Conduct for United States Judges Canons 2(A), 3(A)(6) and 5(C).

    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 response to question 9.b above.

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

The Supreme Court has decided several cases addressing the level of deference that should be given to congressional fact findings. *See, e.g., City of Boerne v. Flores*, 521 U.S. 507 (1997). As with any applicable precedent, I will fully and faithfully follow precedent, including the precedent on this issue.

11. 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.

Before participating in any educational conference or seminar, I will ensure that my participation complies with the Code of Conduct for United States Judges, and will consider Advisory Opinion #116 as well as the input and advice I may receive from the Administrative Office of the U.S. Courts or the Seventh Circuit's ethics advisor.

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

Please see response to question 11.b.i above.

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

Please see response to question 11.b.i above.

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

Please see response to question 11.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 response to question 11.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 response to question 11.b.i above.

12. 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 stated that "subsequent legislative history is a 'hazardous basis for inferring the intent of an earlier' Congress," and "a particularly dangerous ground on which to rest an interpretation of a prior statute when it concerns . . . a proposal that does not become law." *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990). If confirmed as a district court judge, I would apply Supreme Court and Seventh Circuit precedent.

13. 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 ordinary and plain meaning of statutory and constitutional text is the common understanding of the text at the time it was enacted or ratified. Absent binding precedent, a district court must determine the plain meaning of a statute at the time of its enactment, and in doing so, it can look to the definition of terms in the statute contained in a contemporaneous dictionary. Having said that, a specific statutory term cannot be determined by simply applying the dictionary term in isolation. Instead, a statutory term or phrase must be interpreted within the context of the statutory provision and the statute as a whole. When interpreting a statute, the understanding of a term or phrase must be determined in context. But the law is

not static. For example, the First Amendment's protections of free speech is not limited to pamphlets published on a printing press.