Nomination of Stephen P. McGlynn, 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?

   I would examine our Nation's history, legal traditions and practices.

   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. I would look to our founding documents and Supreme Court decisions.

   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?

      Yes and yes.

   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 and yes.

   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 focus on the considerations previously identified.

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 held in *United States v. Virginia* 518 U.S. 515 (1996), that the Fourteenth Amendment's Equal Protection Clause prohibits distinctions on the basis of sex unjustified by an "exceedingly persuasive justification." If confirmed, I will fully and faithfully follow *United States v. Virginia.*

   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?

      It would not be proper for me to respond to that argument. I will let the Supreme Court respond to that argument as to how the courts have historically evolved from the immediate concerns of the drafters of the 13th and 14th Amendment to present day. I will faithfully and fully follow the decisions of the Supreme Court and the Seventh Circuit on this matter.

   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?

      Please see my answers to 2 (a) and (b).

3.

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

      This relates to issues presently pending or impending litigation before courts at the District Court level up though the Supreme Court. Thus, I believe it would be improper for me to answer these questions given the dictates of the Canons of Judicial Conduct.

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

      See my answer to 3(a).

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

   Yes, see *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

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

Yes, see *Roe v. Wade*, 410 U.S. 113 (1973), *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), and *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

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?

Yes, 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 answers above.

5. 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?

   You point out the case that gives us guidance on that very question: *United States v. Virginia.* I will faithfully and fully follow the precedent of that case.

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

   Courts are faced with many complex factual issues that would benefit from the insight of learned individuals that have developed an advanced understanding of complex questions and issues. District Judges play a very important role as a gatekeeper in assuring that the finder of fact only considers competent and studied expert opinion. See Federal Rule of Evidence 702. Courts shall also look to the guidance provided by the Supreme Court in *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). I will faithfully apply Rule 702 and *Daubert* in determining what opinion evidence and scientific evidence is admitted for the consideration of the finder(s) of fact. Such reliable scientific evidence and data may be relevant to judicial analysis if it is necessary for the court to engage in such analysis to answer a question as to the proper application of a legal text. However, sociology and scientific evidence are not substitutes for sound legal analysis of the meaning of a legal text.

6. 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?

      I will fully and faithfully apply *Obergefell.*

      The Supreme Court has held that same-sex couples have a right to privacy. *Lawrence v. Texas,* 539 U.S. 558 (2003), and a right to marry, *Obergefell v. Hodges*, 135 S. Ct. 5484 (2015). The Supreme Court has further held instructed that "our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth." *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission,* 138 S. Ct.1719, 1727 (2018). I will fully and faithfully follow these binding precedents.

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

      I will follow all binding and controlling precedent in cases raising issues of substantive due process claims.

7. 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.

   a. 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 will fully and faithfully follow *Brown v. Board of Education*. I have no opinion as to whether the opinion in *Brown* is simpatico to or antithetical to those who deem themselves Originalists.

   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).

It would not be proper to respond to such questions. I will faithfully and fully follow the precedents of the Supreme Court and the Seventh Circuit.

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 has recognized the importance of the Constitution's text, structure and original public meaning in interpreting a constitutional provision. If confirmed, I will fully and faithfully follow all Supreme Court and Seventh Circuit precedent, regardless of the analytical framework the Court employed in reaching its decision.

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

See my answer to 7(c). The people are always free to amend the Constitution should they believe it needs to be expanded, updated, corrected or amended.

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

See my answer to 7(c).

8. In a television interview in 2016, you stated that the Obama administration and decisions of the United States Supreme Court had constituted a "full-frontal assault on people's religious liberties." Please explain the ways in which the Obama administration and decisions of the United States Supreme Court constituted a "full-frontal assault" on religious liberties.

I have reviewed that television interview, and I did not express an opinion on ACA or about any legislation or executive order as being a full-frontal assault on people's religious liberties. I was merely describing arguments advanced by some and the opinions and dissents of Justice Antonin Scalia.

9. In that same 2016 interview, you called the Affordable Care Act a "bad law" and said it had "serious problems."

I have reviewed that interview, and I did not opine that the ACA was a bad law. I appreciate the opportunity to correct that misunderstanding.

a. Please explain what you meant by these comments.

The relevant comments relate to what others who opposed the ACA where asserting. I remained neutral as to the ACA.

b. You were a sitting judge when you made these comments. Will you recuse yourself from challenges to the Affordable Care Act?

No, as I did not express such opinions as I have described in previous answers.

10. In a 2012 interview published in the *Shelbyville Daily Union*, you are quoted as saying that "[w]e are over litigated and we are over regulated, and the courts have to do something about that."
    a. What did you mean by "over litigated" and "over regulated"?

The cost of litigation has overwhelmed many citizens' ability to secure a trial on the merits of their claims or the claims against them. Thankfully, both Federal and State Courts have taken steps since my expressed concerns in 2012 to make the courts more accessible and a trial on the merits less costly and time consuming. I used specific examples of overregulation. I also expressed concerned that redundant regulations at both the State level and Federal level were overly burdensome and not necessary to advance government's legitimate interests.

b. What is it that you believed that courts have to do about this issue?

Make the legal system more accessible and assure justice is not a luxury only the rich can afford. Also, strike down any arbitrary or capricious regulation.

c. What have you done as an Illinois circuit judge about this issue?

I led the way to develop a mandatory mediation program in residential foreclosure cases in my Circuit. I made sure approved legal fees were actually reasonable and properly tailored to the value those services added to the client's interests. I intervened early in litigation to advance a fair resolution of all disputes before attorney's fees became excessive.

11. You served as chairman of the committee responsible for publishing the 2004 Platform of the Illinois Republican Party. That platform warned of "judicial fiat" infringing on the sanctity of marriage between a man and a woman. Do you believe the Supreme Court's opinion in *Obergefell* is an example of judicial fiat?

The Republican Party Platform was the product of a Committee attempting to capture the sentiment of the Republican Party on the issues of the day in 2004. It was not my personal political statement. Neither the political opinions expressed in that document nor my own personal opinions are relevant to how I would treat the holding in *Obergefell.* I will fully and faithfully follow *Obergefell* as a District Court Judge.