Nomination of Stephen P. McGlynn
to the United States District Court for the
Southern District of Illinois
Questions for the Record
Submitted July 20, 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?

   Yes.

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?

      Yes.

   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.

      As a judicial nominee, it would not be proper for me to comment on political matters related to the selection and confirmation of federal judges.

   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 answer to 2(b).

   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 answer to 2(b).

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?

    Yes. It is easy to understand. I used the same metaphor on July 7, 2005, when I was sworn is as a Justice of the Illinois Appellate Court. Judges are impartial arbiters with no stake in the outcome of the matters before them.

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

    A judge should consider the practical consequences of any ruling when directed to do so by statute or by controlling authority. As an example, when ruling on requests for injunctive relief, a judge has to consider what would be necessary to preserve the status quo ante, whether a denial of emergency relief would result in irreparable harm. Often Courts all called upon to determine what the intentions of the parties were to a contract and understanding the practical consequences of a ruling assists in determining the intent of the parties. Any time a Court is called upon to award damages in a case, the Court should consider the practical consequences of the award to assure that it is fair and just.

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?

    In *Anderson v. Liberty Lobby, Inc.*, 447 U.S. 242, 251 (1986), the Supreme Court held that "the 'genuine issue' summary judgement standard is 'very close' to the 'reasonable jury' directed verdict standard" and that "the inquiry under each is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." I agree that there are some subjective aspects when requested to rule on a summary judgement motion. I have a profound respect for the right to have factual disputes determined by a jury. Therefore, I take very seriously the fact that a grant of summary judgment is tantamount to denying a party a right to have a jury decide any disputed facts.

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 is understanding. Empathy is an important aspect in understanding the human condition. And, it is the ability to appreciate the matter before the court from the perspective of each party. Empathy is an important part of wisdom. Ultimately, a judge's decision must be based upon the applicable law and relevant facts, and not based upon personal feelings.

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

We instruct jurors to draw upon their own life experiences or common sense when evaluating a case submitted to them. They are given instructions as to the law that they must follow, but we recognize that life does not occur in a vacuum and our own life experiences help us develop a deeper understanding of the matters before the court.

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?

No circumstances come to mind, and it would not be my practice. As a former Appellate Court Justice, I understand the benefit of having a group of judges study an issue and then rule based upon their collective considered judgement. I am content to abide with binding precedent.

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?

Never.

9. When is it appropriate for a district judge to have ties to special interest groups or political organizations? Would your present involvement with the National Rifle Association jeopardize your independence or appearance of independence as a federal judge?

The independence of the judiciary is of vital importance. I will faithfully follow the Code of Conduct for United States Judges with regard to this issue. If confirmed, it is my present intent to not renew my membership.

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?

    The role of a jury is of profound importance. In fact, trial by jury of one's peers was a part of the Declaration of Independence, it was that important to the Founders. Citizens deciding factual disputes strengthens the community and is an important check on the power of the judiciary.

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

    The Supreme Court has issued important decisions regarding arbitration clauses. As a judge I will fully and faithfully follow those precedents, taking into consideration all appropriate constitutional and statutory provisions.

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?

Yes. See also my answer to 10(c).

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

It is the province of the Legislative branch to formulate policy. The Court must respect the role of Congress in making policy decisions that expand the rights of individuals. The Courts must be vigilant in defending individual rights against improper intrusion by government. A District Court must apply the required level of scrutiny as established by the Supreme Court or the Circuit Court in determining whether an intrusion or limitation upon an individual right is appropriate under the Constitution and applicable statutes.

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.
        ii. Determining whether the seminar is supported by private or otherwise anonymous sources.
        iii. Determining whether any of the funding sources for the seminar are engaged in litigation or political advocacy.
        iv. Determining whether the seminar targets a narrow audience of incoming or current judicial employees or judges.
        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.

    Before participating in any educational seminar, I will ensure that my participation conforms to the Code of Conduct for United States Judges, and I will consider any advisory opinions from the Committee of Codes of Conduct relating to participation in any educational seminar.

    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?

    See my answer to b.

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?

There are two schools of thought on the subject. One is to disregard the information entirely, another is to examine such information to see if it reflects how the Congress is interpreting its own law. In *United States v. Wise*, 370 U.S. 405 (1962), the court noted that congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn including the inference that the existing legislation already incorporated the offered change. *Id.* at 411. On the other hand, in *Bostock v. Clayton County ,* 590 U.S. ___ (2020), Justice Alito in his dissent looked at Congress' efforts to amend Title VII of the Civil Rights to add additional text to expand the scope and reach of that Act as evidence that Congress has a more narrow interpretation of that Act necessitating that it amend the law to broaden its scope and reach.

It is a sound practice of judicial restraint to defer to the legislative branch to update old statutes so that they better reflect the current values of society. Both schools of thought have value. Sometimes examining legislative history after the enactment of a statute offers valuable insights. Other times, such an examination is futile. I will consider the arguments of counsel when encouraged to examine legislative history post-enactment and make a considered judgment as to whether such an exercise is enlightening as there is only one tenable inference that may be drawn, or an exercise in futility when several equally tenable inferences may be drawn.

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?

I believe the ordinary meaning of statutory or constitutional text is what a reasonable person would have understood it to mean the time of its enactment. The historical origins of a law are always relevant to developing a complete understanding of that law. Often, understanding the historical origins of the law does not prevent applying the plain language of the law to current circumstances. There are times when the language may have expressed one concept when enacted and could embrace an entirely new concept in today's parlance. The key for the District Judge is to determine if impressing upon the statutory or constitutional language today's meaning would be tantamount to creating new policy. As an example, concluding that a text message is speech protected by the First Amendment is not tantamount to making new policy. However, a statute enacted in 1930 regulating information set by cable could only have meant via landline telephone or telegraph. Information sent by the modern understanding of cable today is exponentially greater and more diverse. As a matter of prudent judicial restraint and practice, the District Judge should refrain from making new policy and leave that to the legislative branch.

Very often, an examination of the statutory scheme in place at the time of enactment of the legal text is very informative. There may also be caselaw, while not precedent, that may offer insight as to how the meaning, scope and reach of the legal text in question was understood at times more proximate to the law's enactment.