

Senator Dick Durbin
Written Questions for John Nalbandian, Dominic Lanza, and Joseph Hunt
March 14, 2018

For questions with subparts, please answer each subpart separately.

Questions for John Nalbandian

1. You say in your questionnaire that your representative clients include the tobacco company R.J. Reynolds and British Petroleum, but you did not describe any matters you handled for these clients. **Please discuss the work you have performed on behalf of these clients.**

I was a junior associate at a large law firm when I worked for those clients. Without betraying any confidences of those clients I will say that the work that I performed on behalf of those clients was work typical of junior associates at large firms working with teams of lawyers. That would have included legal research and drafting legal memoranda or possibly motions or briefs on certain discrete legal issues.

2.
 - a. **Do you believe there has ever been an instance where a state legislature has enacted voter ID requirements for the purpose of making it more difficult for a particular segment of the electorate to vote?**

I filed an amicus brief in *Crawford v. Marion Cty. Elec. Bd.*, 128 S. Ct. 1610 (2008), which concerned the Indiana voter identification law, which the Supreme Court upheld. The Supreme Court did not determine that the state legislature enacted the law to make it more difficult for some persons to vote. The adoption of voter ID laws is a political and public policy question and it would be inappropriate for me under the judicial canons to opine that issue. If I were presented with arguments regarding voter ID laws in a case as a judge, I would review the arguments of the parties and apply all applicable law and precedent to the facts of the case. I would be bound by the Supreme Court's decision in *Crawford* as well as all other Supreme Court cases involving voter qualifications and all other issues.

- b. **If a state legislature did enact voter ID requirements for that purpose, would that be wrong?**

Please see my answer to question 2(a) above.

3. You have an extensive history of involvement in Republican Party politics. For example, you say in your questionnaire that you were General Counsel to the Republican Party of Kentucky from 2010 to 2016; you have participated in Election Day operations and given advice to campaigns, including those of Senator McConnell and Senator Paul; you have been a member of the Republican National Lawyers Association since 2008; you were a member of the Boone County GOP Executive Committee from 2008-2012; you were either a delegate

or alternative delegate to the last three Republican National Conventions; and you have been a member of the board of directors of the Commonwealth Political Action Committee since 2001.

Given this partisan background, which is unusual in its scope for a federal judicial nominee, it seems that litigants might get the impression that you would be more favorable to positions advocated by the Republican Party than positions associated with the Democratic Party. Of course, it is important for a judge to be able to separate himself from politics and to show no favoritism when it comes to the administration of justice. **What can you point to in your record to provide litigants with reassurance that you would not show political favoritism if confirmed to the federal bench?**

There are no Democratic and no Republican Judges as far as I'm concerned. I realize that being a judge is completely different than being an advocate or participating in political activity. I pledge that I would be, consistent with the judicial oath and the canons of judicial ethics, impartial and fair to all litigants and would set aside my personal and political views on any topic.

I am honored to have received letters of support from Democrats and I've successfully worked with many Democrats over the years, for example, on the Board of Directors of the State Justice Institute.

I clerked for a federal judge who himself had been politically active and in private practice and learned from him from the beginning of my career what it means to be impartial and act fairly and with humility.

4. **Please name the Supreme Court Justice, past or present, whose approach to constitutional interpretation you believe represents the best approach for removing a Justice's personal preferences from decisionmaking.**

I am reluctant to single out certain Supreme Court Justices to answer this question because I believe that all Supreme Court Justices strive to follow the law and keep their personal preferences from affecting their decisionmaking.

5. **In your view, is there any role for empathy when a judge is considering a criminal case – empathy for the victims of the alleged crime, for the defendant, or for their loved ones?**

I would follow the precedent from the Supreme Court and the Sixth Circuit with regard to what the appropriate considerations are for a judge with respect to criminal cases and sentencing. Also, please see my answer to Senator Whitehouse's question 2.

6. You say in your questionnaire that you have been a member of the Federalist Society since 1991.

- a. **Was it appropriate for President Trump to publicly thank 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."

The selection and confirmation of Judges is a task for the political branches and it would be inappropriate for me to comment on this issue under the Judicial Canons.

- b. **Please list each year that you have attended the Federalist Society's annual convention.**

I believe to the best of my recollection that my only attendance was in 2004.

- c. On November 17, 2017, Attorney General Sessions spoke before the Federalist Society's convention. At the beginning of his speech, Attorney General Sessions attempted to joke with the crowd about his meetings with Russians. Video of the speech shows that the crowd laughed and applauded at these comments. (See <https://www.reuters.com/video/2017/11/17/sessions-makes-russia-joke-at-speech?videoId=373001899>) **Did you attend this speech, and if so, did you laugh or applaud when Attorney General Sessions attempted to joke about meeting with Russians?**

I did not attend.

7.

- a. **Is waterboarding torture?**

I believe that there is legislation from Congress regarding torture. This is a political issue and I believe that it would be inappropriate for me to comment under the judicial canons of ethics. It is also inappropriate for me to comment on any issue that may someday come before me. If I were ever faced with a case that involved this issue, I would consider the arguments of the parties and apply all applicable law and precedent to the facts of the case.

- b. **Is waterboarding cruel, inhuman and degrading treatment?**

Please see my answer to question 7(a) above.

- c. **Is waterboarding illegal under U.S. law?**

Please see my answer to question 7(a) above.

8. **Was President Trump factually accurate in his claim that 3 to 5 million people voted illegally in the 2016 election?**

This is a political matter and I am constrained by the judicial canons of ethics from commenting.

9. **Do you think the American people are well served when judicial nominees decline to answer simple factual questions?**

I believe that judicial nominees strive to answer questions posed to them to the best of their ability within the constraints of the canons of judicial ethics.

10. 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 a number President Trump's nominees.

- a. **Do you have any concerns about outside groups or special interests making undisclosed donations to front organizations like the Judicial Crisis Network in support of your nomination? Note that I am not asking whether you have solicited any such donations, I am asking whether you would find such donations to be problematic.**

I am not aware of any such donations being made in support of my nomination. And under the canons of judicial ethics, it would be inappropriate for me to comment on political issues or on any issue that could arise in the future in a case before me.

- b. **If you learn of any such donations, will you commit to call for the 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?**

Please see my response to question 10(a). Further, if the issue arose, I would consider all applicable rules concerning recusal including 28 U.S.C. §455, the Code of Conduct for United States Judges, and all other laws and rules regarding recusals.

- c. **Will you condemn any attempt to make undisclosed donations to the Judicial Crisis Network on behalf of your nomination?**

Please see my response to question 10(a).

11.

- a. **Can a president pardon himself?**

Under the canons of judicial ethics, it would be inappropriate for me to comment on political issues or on any issue that could come before me in a future case.

- b. **What answer does an originalist view of the Constitution provide to this question?**

Please see my answer to question 11(a).

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

Under the canons of judicial ethics, it would be inappropriate for me to comment on political issues or on any issue that could involve future litigation.

12. The Foreign Emoluments Clause in Article I, Section 9, Clause 8, of the Constitution provides that:

...no Person holding any Office of Profit or Trust under [the United States], shall, without the Consent of the Congress, accept of any present, Emolument, Office, or title, of any kind whatever, from any King, Prince, or foreign State.

- a. **What is your understanding of what the Founding Fathers intended this clause to mean? To the extent you may be unfamiliar with this provision of the Constitution, please familiarize yourself with it before answering.**

My understanding is that the meaning of the Foreign Emoluments Clause is currently the subject of litigation pending in federal court. Accordingly, under the canons of judicial ethics, it would be inappropriate for me to comment on this issue.

- b. **Do you believe that this original public meaning of the Foreign Emoluments Clause should be adhered to by courts in interpreting and applying the Clause today?**

Please see my answer to question 12.a.

13. **What is your favorite Supreme Court dissent, and why?**

I am reluctant to single out specific Supreme Court opinions for approval or disapproval. That said, one dissent worthy of recognition is the dissent of Kentuckian John Marshall Harlan in *Plessy v. Ferguson*, which was vindicated in *Brown v. Board of Education*.