

**Nomination of Franklin Ulyses Valderrama
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?

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.

Canon 1 of the Code of Judicial Conduct for United States Judges instructs judges to “uphold the integrity and independence of the judiciary.” If confirmed, I will follow binding precedent, and do my part to uphold both the rule of law in our society and the integrity and independence of the federal judiciary. Under the Canons of Judicial Conduct, it would be inappropriate for me to offer my personal views on matters that might be litigated in the federal courts. See Code of Conduct for United States Judges, Canon 3(A)(6).

- 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?

Canon 5 of the Code of Judicial Conduct for United States Judges warns judges to refrain from pursuing political activities. Further Canon 2 instructs judges to avoid even the appearance of impropriety and to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary. If confirmed, I will follow these and the other Canons of Judicial Conduct, without inserting my personal views into the decision making process.

- 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?

Pursuant to the Code of Judicial Conduct for United States Judges, it would be inappropriate for a nominee like me to comment on political matters. See Code of Conduct for United States Judges, Canon 5.

- 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?

I generally agree with the metaphor. The role of a judge is to apply neutral rules to both sides in an impartial manner. Like an umpire, a judge does not root for either party, does not allow his personal views to affect his decision and does not change or ignore the rules to help a particular litigant. If confirmed, I will be fair and impartial to all parties and not allow my personal views or policy preferences to affect the outcome of the case.

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

The practical consequences of a particular ruling should be taken into account where the governing legal doctrine or standard demands it. Otherwise, in discharging his or her judicial function, a judge must base his or her ruling upon the applicable law.

- 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?

A court, when ruling on a motion for summary judgment must find that there is “no genuine issue of dispute as to any material fact and that the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56 (a). In performing this function, a judge is not to “weigh the evidence and determine the truth of the matter [,] but to determine whether there is a genuine issue for trial...” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

- 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 the ability to understand what another is feeling. It is an essential human attribute. Judges are not immune from this emotion. However, a judge is obligated to apply the law in an impartial manner and cannot allow his or her personal feelings to influence his or her decision.

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

A judge, like every other person, is the sum of his or her personal experiences. In certain circumstances, I think it is appropriate for a judge to rely upon his or her personal experiences. However, a judge should not allow personal viewpoints or preferences to play a role in deciding cases. The role of the judge is to faithfully apply the laws without favor or prejudice.

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?

A judge must always follow 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. 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?

A jury plays a fundamental role in our constitutional system. As Thomas Jefferson wrote in 1789, "I consider the trial by jury as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution." 15 The Papers of Thomas Jefferson 267 (Julian P. Boyd, 1958) (Letter to Thomas Paine dated Paris, July 11, 1789).

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

Issues relating to pre-dispute arbitration clauses are the subject of litigation in federal courts. As such, it would be inappropriate for me to comment on this topic pursuant to Canon 3(A) (6) of the Code of Conduct for United States Judges.

- 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?

Because issues relating to the Federal Arbitration Act are and may be litigated in federal court, it would be inappropriate for me to comment on this topic pursuant to Canon 3(A) (6) of the Code of Conduct for United States Judges.

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

Several precedents of the Supreme Court address the level of deference owed to Congressional fact finding. If confirmed, I will fully and faithfully apply these precedents.

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.

Yes.

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

Yes.

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

Yes.

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

Yes.

- 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.

Yes.

- 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?

Canon 2 of the Code of Conduct for United States Judges discusses the importance of avoiding even the appearance of impropriety and promoting public confidence in the integrity and impartiality of the judiciary. If confirmed, I will adhere to the standards, including Canon 2 and will carefully consider each of the factors listed in Advisory Opinion #116 when deciding whether to participate in any educational program sponsored by an organization other than the Federal Judicial Center of the Administrative Office of the Courts.

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 when interpreting the meaning of a statutory provision, the analysis begins with an examination of the statutory text. If that "examination yields a clear answer, judges must stop." *Food Marketing Institute v. Argus Leader Media*, 139 S.Ct. 2356, 2364 (2019). If, on the other hand, the statutory language is ambiguous, the Supreme Court has stated that legislative history can be considered. See *Exxon Mobil v. Allapattah Servs., Inc.*, 545 U.S. 546, 568. If confirmed, I would faithfully follow Supreme Court and Seventh Circuit precedent concerning statutory interpretation.

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 Supreme Court has stated that it "normally interprets a statute in accord with the ordinary public meaning of its terms at the time of enactment." *Bostock v. Clayton County*, 2020 U.S. LEXIS 3252, ¶ 12. In ascertaining how the text would have been understood at the time of enactment, the Court has relied on dictionary definitions of the word or phrase at the time of enactment. See e.g. *District of Columbia v. Heller*, 554 U.S. 570 (2008). If confirmed, I would fully and faithfully follow Supreme Court and Seventh Circuit precedent concerning constitutional and statutory interpretation.