Nomination of Douglas Russell Cole
United States District Court for the Southern District Of Ohio
Questions for the Record
Submitted July 3, 2019

QUESTIONS FROM SENATOR BOOKER

1. As the State Solicitor of Ohio, you were the counsel of record on briefing before the Sixth Circuit in a challenge to a state law that limited access to abortion procedures.

   One provision "require[d] women seeking abortions to attend, for informed-consent purposes, an in-person meeting with a physician at least twenty-four hours prior to receiving the abortion."[1] The clinic challenging this provision maintained that the in-person requirement "would increase the probability that abusive partners would learn about the pregnancy or the attempt to obtain an abortion, thereby causing an undue burden on the abortion-seeking woman's constitutional right to an abortion."[2] As the clinic argued, "the in-person meeting is all but impossible for women 'in abusive situations,'" because "[f]or abused women, appearing in person twice is difficult and, in some cases, life-threatening."[3] The lower court had also found that the in-person requirement "could have the effect of delaying abortions up to two weeks" and could impose additional costs.[4]

   Another provision of this state law "limit[ed] minors seeking a judicial bypass of the statutory parental-consent requirement to one petition per pregnancy."[5] This single-petition rule would affect "women with changed circumstances who would apply for another bypass if allowed," such as "increased medical knowledge about abortion" or "pregnant minors who discover that their fetus has a medical anomaly."[6] The Sixth Circuit found this single-petition rule to be "facially unconstitutional."[7]

   a. In your briefing before the Sixth Circuit, you defended this law's in-person requirement. You argued that claims about the burdens on women in abusive relationships were a "speculative prediction" that "failed to establish that Ohio's law would prevent abused women from obtaining an abortion."[8] Why, in your office's view, was this burden merely "speculative"?

      The district court itself had found that the evidence that plaintiff presented on the issue of the impact of a waiting period with an in-person requirement on women in abusive relationships was speculative. On appeal, the State argued that the district court's factual finding should be affirmed, citing a variety of evidence from the record, much of which is summarized on pages 13-16 of the brief.

   b. To your knowledge, did your office, or any other governmental office, attempt to measure the impact of the in-person requirement on women in abusive relationships?

      I did not handle the case in the trial court, nor was I responsible for developing the factual record. Thus, beyond the facts contained in the factual record of the case on appeal, I am unaware of what other investigations may have occurred.

c. On the single-petition rule, you also argued before the Sixth Circuit that the changed circumstances identified by the clinic were situations that had not been shown to

[1] *Cincinnati Women's Servs., Inc. v. Taft*, 468 F.3d 361, 363 (6th Cir. 2006).
[2] *Id.* at 366.
[3] *Id.* at 372-73.
[4] *Id.* at 366.
[5] *Id.* at 363.
[6] *Id.* at 370.
[7] *Id.* at 371.
[8] Final Brief of Defendants-Appellees at 34-37, *Cincinnati Women's Servs.*, 468 F.3d 361 (No. 05-4174).

"ha[ve] ever actually happened or [be] likely to happen in the future."[9] Why, in your office's view, were the scenarios not "likely to happen"?

The Ohio law at issue stated said that, if a minor were denied a judicial bypass on a first petition, the minor could not later file a second petition for judicial bypass. The clinic had argued in the district court that a minor, after denial of the first petition, may develop a serious medical condition or learn of a fetal anomaly, but that the parents still would not consent to an abortion, and that this would be an undue burden under *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). In its brief, the State identified various types of evidence in the record as to why plaintiff had failed to show that this factual situation would be likely to occur. This evidence is summarized in the brief on pages 16-20, with the corresponding argument at pages 46-56. This included record evidence such as testimony from plaintiff's own physician witness that he "ha[d] never heard of, nor could he imagine, a situation where a pregnant minor was ill with cancer or some other serious medical condition, but her family was not involved in the decision-making about the pregnancy or refused to allow an abortion." (State of Ohio Appellee Br. at 54). Based on this and the other record evidence cited in the brief, the State argued that plaintiff had failed to show that the prohibition on second petitions by minors would constitute an undue burden as the term was used in *Casey*.

d. To your knowledge, did your office, or any other governmental office, attempt to measure the impact of the one-petition rule on women facing the kinds of changed circumstances described above?

I did not handle the case in the trial court, nor was I responsible for developing the factual record. Thus, beyond the facts contained in the factual record of the case on appeal, I am unaware of what other investigations may have occurred.

2. Do you consider yourself an originalist? If so, what do you understand originalism to mean?

When it comes to statutory or constitutional interpretation, I believe it is a district court judge's obligation to faithfully apply Supreme Court and Sixth Circuit instructions regarding permissible interpretive tools. To the extent that precedent from those courts on a particular issue adopts an originalist position – in which the court interprets the constitutional or statutory text according to the original understanding of that text at the time it was adopted or enacted – I would apply that originalist understanding.

3. Do you consider yourself a textualist? If so, what do you understand textualism to mean?

When it comes to statutory or constitutional interpretation, I believe it is a district court judge's obligation to faithfully apply Supreme Court and Sixth Circuit instructions regarding permissible interpretive tools. To the extent that precedent from those courts on a particular issue adopts a textualist position – in which the court interprets the constitutional or statutory text strictly according to its text, without reference to consideration of issues apart from the text – I would apply that textualist understanding.

4. Legislative history refers to the record Congress produces during the process of passing a bill into law, such as detailed reports by congressional committees about a pending bill or statements by key congressional leaders while a law was being drafted. The basic idea is that by consulting these documents, a judge can get a clearer view about Congress's intent. Most federal judges are willing to consider legislative history in analyzing a statute, and the Supreme Court continues to cite legislative history.

    a. If you are confirmed to serve on the federal bench, would you be willing to consult and cite legislative history?

    The Supreme Court has opined on circumstances in which it is appropriate for lower court judges to consult legislative history in connection with statutory interpretation. If confirmed as a district court judge, I would faithfully apply Supreme Court and Sixth Circuit precedent on this issue.

    b. If you are confirmed to serve on the federal bench, your opinions would be subject to review by the Supreme Court. Most Supreme Court Justices are willing to consider legislative history. Isn't it reasonable for you, as a lower-court judge, to evaluate any relevant arguments about legislative history in a case that comes before you?

    Please see answer to Question 4.a.

5. Do you believe that judicial restraint is an important value for an appellate judge to consider in deciding a case? If so, what do you understand judicial restraint to mean?

    As a nominee for a district court judgeship, I believe it would be inappropriate for me to opine on how appellate judges should do their job. I understand judicial restraint to mean a judge who carefully follows rule of law principles, including giving appropriate deference to stare decisis.

    a. The Supreme Court's decision in *District of Columbia v. Heller* dramatically changed the Court's longstanding interpretation of the Second Amendment.[10] Was that decision guided by the principle of judicial restraint?

    The Supreme Court gave the basis for its decision in *Heller* in the case itself. It would be inappropriate for me, as a nominee for the district court, to comment upon, criticize, or voice approval for, the Court's decision. If confirmed as a district court judge, I would faithfully apply *Heller* and all Supreme Court and Sixth Circuit precedent.

    b. The Supreme Court's decision in *Citizens United v. FEC* opened the floodgates to big money in politics.[11] Was that decision guided by the principle of judicial restraint?

    The Supreme Court gave the basis for its decision in *Citizens United* in the case itself. It would be inappropriate for me, as a nominee for the district court, to comment upon, criticize, or voice approval for, the Court's decision. If confirmed as a district court judge, I would faithfully apply *Citizens United* and all Supreme Court

and Sixth Circuit precedent.

c. The Supreme Court's decision in *Shelby County v. Holder* gutted Section 5 of the Voting Rights Act.[12] Was that decision guided by the principle of judicial restraint?

The Supreme Court gave the basis for its decision in *Shelby County* in the case itself. It would be inappropriate for me, as a nominee for the district court, to comment upon, criticize, or voice approval for, the Court's decision. If confirmed as a district court judge, I would faithfully apply *Shelby County* and all Supreme Court and Sixth Circuit precedent.

6. Since the Supreme Court's *Shelby County* decision in 2013, states across the country have adopted restrictive voting laws that make it harder for people to vote. From stringent voter ID laws to voter roll purges to the elimination of early voting, these laws disproportionately

[9] *Id.* at 50.
[10] 554 U.S. 570 (2008).
[11] 558 U.S. 310 (2010).
[12] 570 U.S. 529 (2013).

disenfranchise people in poor and minority communities. These laws are often passed under the guise of addressing purported widespread voter fraud. Study after study has demonstrated, however, that widespread voter fraud is a myth.[13] In fact, in-person voter fraud is so exceptionally rare that an American is more likely to be struck by lightning than to impersonate someone at the polls.[14]

a. Do you believe that in-person voter fraud is a widespread problem in American elections?

I have not studied the issue and thus do not have an evidentiary basis to offer an opinion on that topic.

b. In your assessment, do restrictive voter ID laws suppress the vote in poor and minority communities?

I have not studied the issue and thus do not have an evidentiary basis to offer an opinion on that topic.

c. Do you agree with the statement that voter ID laws are the twenty-first-century equivalent of poll taxes?

I have not studied the issue and thus do not have an evidentiary basis to offer an opinion on that topic.

7. According to a Brookings Institution study, African Americans and whites use drugs at similar rates, yet blacks are 3.6 times more likely to be arrested for selling drugs and 2.5 times more likely to be arrested for possessing drugs than their white peers.[15] Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.[16] These shocking statistics are reflected in our nation's prisons and jails. Blacks are five times more likely than whites to be incarcerated in state prisons.[17] In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.[18]

a. Do you believe there is implicit racial bias in our criminal justice system?

Yes.

b. Do you believe people of color are disproportionately represented in our nation's jails and prisons?

I am generally aware of statistics showing that people of color are overrepresented on a percentage basis in prison populations.

c. Prior to your nomination, have you ever studied the issue of implicit racial bias in our criminal justice system? Please list what books, articles, or reports you have reviewed on this topic.

Not that I recall.

d. According to a report by the United States Sentencing Commission, black men who commit the same crimes as white men receive federal prison sentences that are an average of 19.1 percent longer.[19] Why do you think that is the case?

I have not reviewed that report, and thus do not have a basis for offering an opinion regarding the conclusions stated in the report.

---

[13] *Debunking the Voter Fraud Myth*, BRENNAN CTR. FOR JUSTICE (Jan. 31, 2017), https://www.brennancenter.org/analysis/debunking-voter-fraud-myth.
[14] *Id.*
[15] Jonathan Rothwell, *How the War on Drugs Damages Black Social Mobility*, BROOKINGS INST. (Sept. 30, 2014), https://www.brookings.edu/blog/social-mobility-memos/2014/09/30/how-the-war-on-drugs-damages-black-social-mobility.
[16] *Id.*
[17] Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, SENTENCING PROJECT (June 14, 2016), http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons.
[18] *Id.*
[19] U.S. SENTENCING COMM'N, DEMOGRAPHIC DIFFERENCES IN SENTENCING: AN UPDATE TO THE 2012 *BOOKER* REPORT 2 (Nov. 2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114_Demographics.pdf.

e. According to an academic study, black men are 75 percent more likely than similarly situated white men to be charged with federal offenses that carry harsh mandatory minimum sentences.[20] Why do you think that is the case?

I have not reviewed the academic study that is cited in the question, and thus do not have a basis for commenting on the conclusions stated in the study.

f. What role do you think federal appeals judges, who review difficult, complex criminal cases, can play in addressing implicit racial bias in our criminal justice system?

As a nominee for the federal district court, I do not believe it would be appropriate for me to comment on how federal appeals court judges should perform their job.

8. According to a Pew Charitable Trusts fact sheet, in the 10 states with the largest declines in their incarceration rates, crime fell by an average of 14.4 percent.[21] In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.[22]

a. Do you believe there is a direct link between increases in a state's incarcerated population and decreased crime rates in that state? If you believe there is a direct link, please explain your views.

I am not familiar with the Pew Charitable Trusts fact sheet, nor any studies or other data that were, or may have been, considered in connection with preparing that fact sheet. Thus, I do not believe that I have an appropriate evidentiary basis to comment on that issue.

b. Do you believe there is a direct link between decreases in a state's incarcerated population and decreased crime rates in that state? If you do not believe there is a direct link, please explain your views.

Please see answer to Question 8.a.

9. Do you believe it is an important goal for there to be demographic diversity in the judicial branch? If not, please explain your views.

Yes.

10. Would you honor the request of a plaintiff, defendant, or witness in a case before you who is transgender to be referred to in accordance with that person's gender identity?

Yes.

11. Do you believe that *Brown v. Board of Education*[23] was correctly decided? If you cannot

give a direct answer, please explain why and provide at least one supportive citation.

Yes. As I noted at my confirmation hearing, as a general matter, I believe it is inappropriate for nominees to the federal bench to offer their views on their personal agreement with or disagreement with Supreme Court opinions. Now-Justice Kagan described it at her confirmation hearing as "grading Supreme Court opinions," and noted that she believed judicial nominees should not engage in that task. That is even more true of nominees to the district court bench, who must apply Supreme Court decisions without reference to their personal beliefs. As I also noted, however, there are a few cases that are so well established, and whose central holdings are so unlikely to be the subject of new litigation, that it is acceptable for a nominee to answer. The Supreme Court's landmark decision in *Brown v. Board of Education* is one such case, and I believe it was correctly decided. If I am confirmed as a district court judge, I would faithfully apply all Supreme Court and Sixth Circuit precedent.

12. Do you believe that *Plessy v. Ferguson*[24] was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

No. In *Brown v. Board of Education*, the Supreme Court overruled the central holding of *Plessy v. Ferguson*, a case that had caused great pain and harm in our society. As a later-decided case, *Brown* controls over *Plessy*. If confirmed, I will faithfully apply all Supreme Court precedent, giving no deference to *Plessy* or any other case that has been overruled.

13. Has any official from the White House or the Department of Justice, or anyone else involved in your nomination or confirmation process, instructed or suggested that you not opine on whether any past Supreme Court decisions were correctly decided?

In advance of my confirmation hearing, I met with Department of Justice personnel. In general terms, we discussed the confirmation hearing and the types of questions that may be asked. I was not instructed, however, on how to answer any particular questions or types of questions. As discussed above, as a nominee to a lower court I believe that it would be inappropriate for me to opine on whether Supreme Court decisions were correctly decided, and doing so, except in rare circumstances, could be contrary to Canons 1 and 3 of the Code of Conduct for United States Judges. The role of a district court judge is to apply Supreme Court decisions, not debate whether they were correctly decided.

---

[20] Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1323 (2014)
[21] Fact Sheet, *National Imprisonment and Crime Rates Continue To Fall*, PEW CHARITABLE TRUSTS (Dec. 29, 2016), http://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2016/12/national-imprisonment-and-crime-rates-continue-to-fall.
[22] *Id.*
[23] 347 U.S. 483 (1954).
[24] 163 U.S. 537 (1896).

14. As a candidate in 2016, President Trump said that U.S. District Judge Gonzalo Curiel, who was born in Indiana to parents who had immigrated from Mexico, had "an absolute conflict" in presiding over civil fraud lawsuits against Trump University because he was "of Mexican heritage."[25] Do you agree with President Trump's view that a judge's race or ethnicity can be a basis for recusal or disqualification?

    The Code of Conduct for United States Judges prohibits judges from engaging in political activity, such as making political statements. Accordingly, I believe it would be inappropriate for me to comment on a statement made by the President of the United States, except where it is relevant to a decision in a matter before me.

15. President Trump has stated on Twitter: "We cannot allow all of these people to invade our Country. When somebody comes in, we must immediately, with no Judges or Court Cases, bring them back from where they came."[26] Do you believe that immigrants, regardless of status, are entitled to due process and fair adjudication of their claims?

    The Supreme Court has made clear that all litigants, including immigrants regardless of their immigration status, are entitled to due process in our courts. *Plyler v. Doe*, 457 U.S. 202, 210 (1982). If I am confirmed as a district court judge, I would faithfully apply United States Supreme Court and Sixth Circuit precedent on this, and all, topics.

[25] Brent Kendall, *Trump Says Judge's Mexican Heritage Presents 'Absolute Conflict*,' WALL ST. J. (June 3, 2016), https://www.wsj.com/articles/donald-trump-keeps-up-attacks-on-judge-gonzalo-curiel-1464911442.
[26] Donald J. Trump (@realDonaldTrump), TWITTER (June 24, 2018, 8:02 A.M.), https://twitter.com/realDonaldTrump/status/1010900865602019329.