

Nomination of Iain D. Johnston
United States District Court for the Northern District of Illinois
Questions for the Record
Submitted July 1, 2020

QUESTIONS FROM SENATOR BOOKER

1. In 2017, you authored a presentation titled, “The George Costanza List of What NOT To Do in a Settlement Conference” that contained a slide that advised litigants to avoid using “racial or ethnic slurs” in settlement letters or during the conference.¹ On the slide with the advice appeared images of a bucket of fried chicken and Klu Klux Klan members.² Please explain why you believe it was appropriate to include racially insensitive images that traffic in common racial stereotypes in a public presentation?

By 2017, as a United States magistrate judge, I had presided over 200 settlement conferences. During some of those settlement conferences, I was stunned by the actions and statements of litigants, attorneys, and representatives. The images on the particular slide you reference specifically relate to statements made to me by litigants in settlement conferences. These statements and others like them were so reprehensible that I was compelled to confront them immediately during the settlement conference. These experiences caused me to create the presentation referenced in your question: “The George Costanza List of What NOT To Do in a Settlement Conference.”

As you probably know, George Costanza is a character in *Seinfeld*. In episode 12 of season three (“The Red Dot”), George Costanza has sexual relations with Evie, the cleaning woman at work. When his supervisor confronts George about this, George asserts that he was unaware of a rule against this activity, which is comically absurd. And, of course, George is fired for this behavior. On the first slide of the presentation, this scene is played. The whole point being that there are some actions and statements that are so wrong that I, as a United States magistrate judge, should not have to call out. Yet unfortunately and shockingly, I was required to call out these behaviors. These images were not used for a general stereotype but because they conveyed the racial and ethnic slurs that were used. So the slide and presentation did more than “advise[] litigants to avoid using ‘racial and ethnic slurs;’” instead, the presentation specifically and emphatically instructed them not to use bigoted language. It is sad that in 2017, I would have to call out these behaviors and instruct attorneys and litigants not to engage in them. I will not tolerate anybody making these types of statements. I did and will continue to confront these types of statements.

2. You have written several articles on racial profiling. In one article, you wrote about the “troubling ramifications” of lawsuits concerning racial profiling by law enforcement, “including huge money damages, exorbitant legal fee awards, oversight of police operations by the courts or plaintiffs, lower police morale, and diminished respect for law enforcement.”³ In another article, you said that “a department is vulnerable to unfounded allegations of racial profiling, regardless of the quality of its training programs and

¹ SJQ at pp. 1686–99.

² *Id.*

³ Iain Johnston, Jeremy Margolis & Darren Watts, *Proactive Defense Strategies Can Minimize Risk*, *The Police Chief*, July 2000 (SJQ attachments at p. 224).

command infrastructure.”⁴

Numerous studies have found that law enforcement frequently engages in racial profiling. In fact, the Stanford Open Policing Project examined almost 100 million traffic stops from 2011 to 2017 and found that “police stopped and searched [B]lack and Latino drivers on the basis of less evidence than used in stopping white drives, who are searched less often but are more likely to be found with illegal items.”⁵

- a. Do you stand by what you wrote in those articles?

This article was written for a law enforcement audience, the readers of *The Police Chief* magazine. Huge money damages show that law enforcement egregiously violated a person’s rights, which is troubling. A consent decree requires a factual predicate to support a finding of a violation of federal law, which is troubling. And low police morale and the public’s lack of confidence in police departments to fairly enforce the law is also troubling. Huge damages, consent decrees, low morale, and the public’s lack of confidence in law enforcement are all signs of problems. Furthermore, law enforcement departments are vulnerable to lawsuits regardless of the quality of training and command infrastructure because training and supervision are necessary, but not sufficient, to address the problems; more needs to be done.

- b. Did you rely on any statistics or data regarding the prevalence of racial profiling in policing? If so, what data did you rely on?

At the time the article was written in 2000, I was not aware of any accurate and reliable statistics.

- c. Do you believe law enforcement racially profiles Black and Latino Americans?

I believe that some law enforcement officials racially profile Black and Latino Americans.

- d. Do you believe there is systemic racism in our criminal justice system?

I cannot speak to the entire criminal justice system. But I have deep concerns that racists exist in the criminal justice system and that they act on those racist beliefs. I also have concerns that some of those people hold supervisory and command roles in their respective departments, causing their racist beliefs to infect and affect their departments, which in turn affects the department members’ enforcement actions.

3. In 1996, you wrote an article about the Supreme Court’s decision in *Adarand Constructors v. Pena*.⁶ The case involved an affirmative action policy and the issue was whether the presumption of disadvantage based on race alone is a discriminatory practice that violates the equal protection component of the Fifth Amendment’s Due Process

⁴ SJQ attachments at p. 228.

⁵ Erik Ortiz, *Inside 100 million police traffic stops: New evidence of racial bias*, NBC NEWS (Mar. 13, 2019), <https://www.nbcnews.com/news/us-news/inside-100-million-police-traffic-stops-new-evidence-racial-bias-n980556>.

⁶ *Stare Decisis and Adarand Constructors v. Pena: Is the Constitution Written on an Etch-a-Sketch?*, Const. L. & Liberty, (Ill. State B. Ass’n, Springfield, Ill.) (June 1996) (SJQ attachments at pp. 271-272).

Clause.⁷ The Supreme Court found that it did and held that all racial classifications—whether they are imposed by federal, state, or local authorities—must pass strict scrutiny review.⁸

You wrote the following of the Supreme Court’s opinion: “despite the perceived appearance of political concession or pure power being the force behind the Court’s decision in *Adarand* to overrule *Metro Broadcasting*, the Court’s decision was correct, both in its legal analysis and its more basic reasoning.”⁹

- a. Why did you believe the Court was correct in deciding *Adarand*?

As a rule, with the one exception noted below, it is not appropriate for a sitting United States magistrate judge and district judge nominee to weigh in on the correctness of Supreme Court decisions. This article, which I wrote many years before becoming a judge, argued that the decision was correct because the protections afforded by the Equal Protection Clause should be the same to all persons regardless of which government’s action is at issue. The words should have the same meaning and provide the same protections.

- b. Do you believe that having a diverse student body is a compelling government interest?

The Supreme Court in *Board of Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) held that universities have a compelling government interest in having a diverse student body. If confirmed as a district judge, I would faithfully follow that precedent.

- c. Do you believe that the Supreme Court’s landmark decisions upholding race-conscious admissions programs—in particular, *Regents of the University of California v. Bakke*,¹⁰ *Grutter v. Bollinger*,¹¹ and *Fisher v. University of Texas*¹²—were correctly decided?

As a rule, with the one exception noted below, it is not appropriate for a sitting United States magistrate judge and district judge nominee to weigh in on the correctness of Supreme Court decisions. The holdings of these cases are precedent, which I would faithfully follow.

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

My practice is to eschew labels as they can mean different things to different people and maybe even different things to the same people over time. My belief is that if there is an identifiable original meaning at the time of ratification of a constitutional provision or enactment of a statute, that meaning should guide future judicial interpretations of that provision. In any event, I will faithfully follow all precedent of the Supreme Court and the

⁷ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

⁸ *Id.* at 227.

⁹ SJQ attachments at p. 274.

¹⁰ 438 U.S. 265 (1978).

¹¹ 539 U.S. 306 (2003).

¹² 136 S. Ct. 2198 (2016).

Seventh Circuit.

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

Please see response to Question 4 above.

6. 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 held that when a statute is ambiguous, federal courts can consider legislative history. *Milner v. Dep't of the Navy*, 562 U.S. 562, 574 (2011). I would faithfully follow this precedent.

- 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 response to Question 6.a above.

7. 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 I understand the concept of judicial restraint, it can have several aspects, ranging from the narrow concept of deciding only the issues before the court in a particular case to the larger concept of separation of powers. In the narrow context, a judge should exercise judicial restraint to address the case or controversy before the court in a given case. In the larger context, under the separation of powers doctrine, a judge impartially applies the law to the facts of a case to reach a determination. A judge does not pass judgment on the policy decisions made by Congress, absent a constitutional implication. And if a constitutional implication arises, judicial restraint counsels judges to avoid deciding constitutional issues if a case can be decided on other grounds. *See Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C.*, 467 U.S. 138, 157 (1984). I believe judicial restraint is one of many important values that a federal judge—including a district court judge—should possess.

- a. The Supreme Court's decision in *District of Columbia v. Heller* dramatically changed the Court's longstanding interpretation of the Second Amendment.¹³ Was that decision guided by the principle of judicial restraint?

¹³ 554 U.S. 570 (2008).

As a United States magistrate judge and district judge nominee, it would not be appropriate for me to question the correctness of the *Heller* decision. Like all precedent, I would faithfully follow the Supreme Court's holding in *Heller*.

- b. The Supreme Court's decision in *Citizens United v. FEC* opened the floodgates to big money in politics.¹⁴ Was that decision guided by the principle of judicial restraint?

As a United States magistrate judge and district judge nominee, it would not be appropriate for me to question the correctness of the *Citizens United* decision. Like all precedent, I would faithfully follow the holding in *Citizens United*.

- c. The Supreme Court's decision in *Shelby County v. Holder* gutted Section 5 of the Voting Rights Act.¹⁵ Was that decision guided by the principle of judicial restraint?

As a United States magistrate judge and district judge nominee, it would not be appropriate for me to question the correctness of the *Shelby County* decision. Like all precedent, I would faithfully follow the holding in *Shelby County*.

8. 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 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.¹⁶ 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.¹⁷

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

Although I believe that both voter suppression and voter fraud are important issues to be addressed, these issues are the subject of legislation and being litigated in several courts, including courts in the Seventh Circuit, so it would be inappropriate for me to respond further to this question. See Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

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

Please see response to Question 8.a above.

- c. Do you agree with the statement that voter ID laws are the twenty-first-century

¹⁴ 558 U.S. 310 (2010).

¹⁵ 570 U.S. 529 (2013).

¹⁶ *Debunking the Voter Fraud Myth*, BRENNAN CTR. FOR JUSTICE (Jan. 31, 2017), <https://www.brennancenter.org/analysis/debunking-voter-fraud-myth>.

¹⁷ *Id.*

equivalent of poll taxes?

Please see response to Question 8.a above.

9. 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.¹⁸ Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.¹⁹ 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.²⁰ In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.²¹

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

Although I am not familiar with the study referenced in the question, I presume implicit racial bias exists in the criminal justice system.

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

Yes.

- 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.

Before my nomination, I have read several articles in various publications, including Illinois State Bar Association and American Bar Association publications, discussing implicit racial bias in the criminal justice system. Additionally, I have read *Thinking, Fast and Slow*, *Mindwise*, and *Sway*, all of which address the human decision-making process, including the unconscious aspect of the process. I have also taken the Implicit Association Test to increase my own awareness of the topic. Moreover, implicit bias has been the subject of several conferences I have attended. I have also spoken to Judge Mark Bennett (ret.) about the subject. Judge Bennett studies and provides training on this topic.

- 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.²² Why do you think that is the case?

I have not studied this issue in sufficient depth to offer an informed opinion. But one of the goals articulated by Congress is to avoid sentencing disparities. Likewise, the Constitution's

¹⁸ 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>.

¹⁹ *Id.*

²⁰ 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>.

²¹ *Id.*

²² 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.

Equal Protection Clause exists so that similarly situated people are treated similarly. If I am confirmed as a district judge, I will treat each defendant as an individual so as to avoid sentencing disparities, including disparities based upon race.

- 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.²³ Why do you think that is the case?

Please see the response to Question 9.d above.

- 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?

All judges—not just appeals judges—must be vigilant to be aware of and address racial bias in the criminal justice system. Like all problems, the first step in solving bias is to be aware that it exists so that steps can be taken to address the problem. As you know, certain situations lend themselves to people using implicit biases in making decisions. Often, those situations involve a circumstance in which information is lacking and time is limited. As a United States magistrate judge, I handle detention hearings. Because of the nature of those hearings, there is a risk for implicit biases to play a part in the decision-making process. To avoid that risk, at detention hearings, it is my practice to gather as much information as possible relating to all the factors a judge is required to consider under the Bail Reform Act of 1984, listen carefully to the arguments of the defense and government, critically review the information provided by the Pretrial Services Department, and then take a short recess to fully analyze the circumstances before making the detention decision. This process recognizes the possible risks and then addresses that possibility by using recognized techniques (gathering information and lengthening the decision-making process) to ameliorate the risks. If confirmed as a district court judge, I would use similar or additional techniques in the appropriate circumstances to address possible implicit bias.

- 10. 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.²⁴ In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.²⁵

- 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 have not studied this issue in sufficient depth to offer an informed opinion.

- b. Do you believe there is a direct link between decreases in a state's incarcerated

²³ Sonja B. Starr & M. Marit Rehani, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1323 (2014)

²⁴ 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>.

²⁵ *Id.*

population and decreased crime rates in that state? If you do not believe there is a direct link, please explain your views.

I have not studied this issue in sufficient depth to offer an informed opinion.

11. 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.

12. 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.

13. Do you believe that *Brown v. Board of Education*²⁶ was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

As a rule, it is not appropriate for a judicial nominee to comment on the correctness of a Supreme Court decision. In my view, because of the uniqueness of the decision in the American experience, the one exception is *Brown v. Board of Education*. I believe that decision was correctly decided.

14. Do you believe that *Plessy v. Ferguson*²⁷ was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

In *Brown v. Board of Education*, the Supreme Court overruled *Plessy v. Ferguson*, and as stated in response to Question 13 above, I believe *Brown* was correctly decided.

15. 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?

No. My answers are my own.

16. 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."²⁸ Do you agree with President Trump's view that a judge's race or ethnicity can be a basis for recusal or disqualification?

The recusal or disqualification of a federal judge is governed by statute. 28 U.S.C. Sections 144, 455. Race and ethnicity are not listed as factors in the statute. Because any additional response to this question would require me to opine on a matter of political debate that may be a subject

²⁶ 347 U.S. 483 (1954).

²⁷ 163 U.S. 537 (1896).

²⁸ 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>.

of litigation, it would not be appropriate for me to respond further. Code of Conduct for United States Judges, Canons, 2(A), 3(A)(6), and 5(C).

17. 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.”²⁹ Do you believe that immigrants, regardless of status, are entitled to due process and fair adjudication of their claims?

The Supreme Court has held that the Due Process Clause applies to all persons within the United States, including aliens, whether their presence in this country is lawful, temporary, or permanent. *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). The Court’s decision in *Zadvydas* is binding precedent that I would faithfully follow.

²⁹ Donald J. Trump (@realDonaldTrump), TWITTER (June 24, 2018, 8:02 A.M.), <https://twitter.com/realDonaldTrump/status/1010900865602019329>.