

**Nomination of Stephen P. McGlynn**  
**United States District Court for the Southern District of Illinois**  
**Questions for the Record**  
**Submitted July 1, 2020**

**QUESTIONS FROM SENATOR BOOKER**

1. In a television interview in 2016, you stated that Supreme Court decisions in the *National Federation of Independent Business v. Sebelius*<sup>1</sup> and *Obergefell v. Hodges*<sup>2</sup> were a “full- frontal assault on people’s religious liberties.”<sup>3</sup> You also said that the Affordable Car Act was a “bad law” and it has “very serious problems.”<sup>4</sup>
  - a. Why did you believe the decision in *Federation of Independent Business v. Sebelius* was a “full-frontal assault on people’s religious liberties”?

Thank-you for giving me the opportunity to correct a misunderstanding that exists with respect to that interview in question. Justice Antonin Scalia died on February 13, 2016. I was invited to appear on a program to discuss his death, his legacy and Justice Scalia’s judicial philosophy. During the course of the interview I attempted to synopsise the positions of opposing sides to *Sebelius*. I remained neutral throughout that interview with respect the ACA, *Sebelius*, and *Obergefell*. My comments were intended to convey Justice Scalia’s dissents and his judicial philosophy. At one point in the interview I begin to try to explain Chief Justice Roberts’ rationale for upholding ACA who the dissenters thought was constitutionally infirm. The host of the program interrupted my explanation to characterize the opponents of the ACA who thought it was “a bad law.” I took that as a cue that he wanted me to avoid a lengthier explanation of the position of the dissenters and opponents of the ACA.

I did not express the personal opinion that *Sebelius* was a frontal assault on religious liberties. I will fully and faithfully apply *Sebelius* and all other related Supreme Court and Seventh Circuit precedent with respect to the ACA.

- b. Why did you believe the decision in *Obergefell v. Hodges* was a “full-frontal assault on people’s religious liberties”?

Please see my answer to 1(a).

- c. Why did you believe the Affordable Car Act was a “bad law”?

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<sup>1</sup> 567 U.S. 519 (2012).

<sup>2</sup> 576 U.S. 644 (2015).

<sup>3</sup> Lee Presser, *A Conversation with Judge Steve McGlynn*, YOUTUBE at 6:25-6:50 (Feb. 23, 2016), <https://www.youtube.com/watch?v=rGrFDFCWpSM>.

<sup>4</sup> *Id.*

Please see my answer to 1(a)

- d. In your view, what “very serious problems” did the Affordable Care Act have?

Please see my answer to 1(a).

2. In 2006, you spoke about your judicial philosophy and compared the way you approach the Constitution to Chief Justice Roberts and Justices Scalia, Jackson, Harlan, and Frankfurter.<sup>5</sup> You said that you are “extremely reticent to find constitutional rights or powers that are not clearly reflected in the plain language of the Constitution.”<sup>6</sup>

- a. Was this a critique of substantive due process? If not, please explain what you meant and why it is not a critique of substantive due process.

No. It was merely my expression that as a judge, it is proper to be humble and exercise restraint, especially if one were inclined to find a new constitutional right that was neither expressly set out in the constitution or previously articulated or pronounced by the Supreme Court or one of the Circuits.

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

I think it is problematic to embrace certain labels. Originalist is one of those terms that seems to mean different things to different people. I would define an originalist as one who seeks to interpret a law by considering what the public would believe the text to mean at the time it was initially enacted to determine how it should be interpreted. This is the method of legal analysis I most often employ in interpreting legal text.

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

Textualism is the doctrine or method on interpreting law by focusing on the plain language of the legal text without consideration of non-textual sources when interpreting what the law means. That is a method of legal analysis I most frequently employ in interpreting legal text.

3. 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.

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<sup>5</sup> SJQ Attachment at pp. 13-14 (Judicial Candidate Survey, 2006) (emphasis in original).

<sup>6</sup> *Id.*

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

Yes.

- 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?

Yes.

4. 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?

- a. The Supreme Court's decision in *District of Columbia v. Heller* dramatically changed the Court's longstanding interpretation of the Second Amendment.<sup>7</sup> Was that decision guided by the principle of judicial restraint?

It would be improper for me to characterize or critique that opinion.

- b. The Supreme Court's decision in *Citizens United v. FEC* opened the floodgates to big money in politics.<sup>8</sup> Was that decision guided by the principle of judicial restraint?

It would be improper for me to characterize or critique that opinion.

- c. The Supreme Court's decision in *Shelby County v. Holder* gutted Section 5 of the Voting Rights Act.<sup>9</sup> Was that decision guided by the principle of judicial restraint?

It would be improper of me to characterize or critique that opinion.

5. 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.<sup>10</sup> In fact,

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<sup>7</sup> 554 U.S. 570 (2008).

<sup>8</sup> 558 U.S. 310 (2010).

<sup>9</sup> 570 U.S. 529 (2013).

<sup>10</sup> *Debunking the Voter Fraud Myth*, BRENNAN CTR. FOR JUSTICE (Jan. 31, 2017), <https://www.brennancenter.org/analysis/debunking-voter-fraud-myth>.

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.<sup>11</sup>

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

I have no opinion.

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

The right to vote is fundamental and is preservative of all other rights. However, I believe that this question raises issues that involve pending or impending litigation. Thus, the Canons of Judicial Conduct prohibit me from answering this question.

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

This question relates directly to matter pending or impending in the Federal Courts and I am prohibited by the Canons of Judicial Conduct from answering this question.

6. 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.<sup>12</sup> Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.<sup>13</sup> 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.<sup>14</sup> In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.<sup>15</sup>

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

I believe that allegations of implicit racial bias will be asserted in cases that will appear before me and the issue is likely to be the subject of litigation throughout the Federal Courts. Therefore, it is improper for me to express any opinions on the subject.

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

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<sup>11</sup> *Id.*

<sup>12</sup> 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>.

<sup>13</sup> *Id.*

<sup>14</sup> 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>.

<sup>15</sup> *Id.*

I am aware of statistical data that supports that assertion.

- 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.

As a Circuit Judge in Illinois, I received training and information on the subject. However, I have not made an independent study of the subject.

- 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.<sup>16</sup> Why do you think that is the case?

I am not familiar with that report and therefore express no opinion about it.

- 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.<sup>17</sup> Why do you think that is the case?

I do not know the academic study to which you refer. My experience in the criminal justice system has been in State Court and not Federal. I am not in a position to express an opinion about the unidentified academic 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?

I do not have an opinion about the role that federal appeals judges may play in addressing such concerns in the criminal justice system. As a former civil rights attorney and as one who has represented many persons of color in the criminal justice system, I have been extremely vigilant to guard against any bias effecting the way any case is handled from start to finish in my courtroom.

If confirmed, I will do the same on the federal bench.

- 7. 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.<sup>18</sup> In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an

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<sup>16</sup> 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](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114_Demographics.pdf).

<sup>17</sup> Sonja B. Starr & M. Marit Rehani, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1323 (2014)

<sup>18</sup> 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>.

average of 8.1 percent.<sup>19</sup>

- 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 fact sheet you cite in your question. I do not want to guess or speculate about such a profoundly important subject as this.

- 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 my answer to 7(a).

8. 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.

9. 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,

10. Do you believe that *Brown v. Board of Education*<sup>20</sup> was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

Yes.

11. Do you believe that *Plessy v. Ferguson*<sup>21</sup> was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

No, it was not. It was properly reversed by *Brown*.

12. 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. I was encouraged to read the applicable Canons and Codes on Judicial Conduct that provide guidance and instruction about such questions.

13. As a candidate in 2016, President Trump said that U.S. District Judge Gonzalo Curiel,

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<sup>19</sup> *Id.*

<sup>20</sup> 347 U.S. 483 (1954).

<sup>21</sup> 163 U.S. 537 (1896).

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.”<sup>22</sup> Do you agree with President Trump’s view that a judge’s race or ethnicity can be a basis for recusal or disqualification?

I do not believe a judge’s race or ethnicity can form the basis for recusal or disqualification.

14. 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.”<sup>23</sup> Do you believe that immigrants, regardless of status, are entitled to due process and fair adjudication of their claims?

I have not handled immigration matters either as a judge or in private practice. I am therefore reticent to answer questions about the subject. I will faithfully follow *Zadvydas v. Davis*, 533 U. S. 678, 693 (2001) which held that the Due Process Clause applies to “all persons” within the United States, including aliens, whether their presence here is lawful, unlawful, temporary or permanent. If confirmed I will fully and faithfully follow the law and apply the precedents of the Supreme Court and the Seventh Circuit.

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<sup>22</sup> 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>.

<sup>23</sup> Donald J. Trump (@realDonaldTrump), TWITTER (June 24, 2018, 8:02 A.M.), <https://twitter.com/realDonaldTrump/status/1010900865602019329>.