

**Nomination of Robert Anthony Molloy**  
**United States District Court of the Virgin Islands**  
**Questions for the Record**  
**Submitted July 3, 2019**

**QUESTIONS FROM SENATOR BOOKER**

1. During your time as a judge of the Superior Court of the Virgin Islands, you have recused yourself in more than 80 cases, for a number of reasons described in your Questionnaire responses, including various family and personal relationships and your professional history.<sup>1</sup> You noted, among other things: “I automatically recuse myself from hearing any case in which my brother, Attorney Jeffrey B.C. Moorhead, represents a litigant. I also recuse myself from any case involving Attorney Kye Walker as she is my family attorney as well as a personal friend. Additionally, I automatically recuse myself on cases in which I previously represented the Government of the Virgin Islands in any action or proceeding involving the same issues when I was the attorney in that particular action.”<sup>2</sup> If you’re confirmed to be a district judge, would you apply the same recusal standards, in addition to any applicable federal rules and guidelines?

Yes, if confirmed, I intend to apply the same recusal standards indicated above. In all other situations, I intend to exercise due diligence and review all applicable law, rules, and regulations to determine whether I may have a conflict of interest in any case in which I am assigned.

2. It appears that you lacked significant criminal litigation experience during your time as a practicing attorney.<sup>3</sup> However, on the Superior Court of the Virgin Islands, you have presided over a number of criminal cases.<sup>4</sup> How have those experiences presiding over criminal cases shaped your view of how judges should address the rights of criminal defendants? Please explain if and how your views have evolved based on your exposure to criminal litigation.

Criminal defendants should be treated with dignity and respect just as any other litigant who appears in a case, whether criminal or civil. Additionally, under the system of justice in the United States, all individuals charged with a criminal offense are innocent until proven guilty. He or she should be accorded all the rights and privileges associated with the presumption of innocence as dictated by the law.

My views of the rights of criminal defendants have not changed since becoming a judge of the Superior Court of the Virgin Islands. Whether working as an attorney, serving as a judge, or conducting my affairs as an everyday citizen, I believe that all individuals should be treated with dignity and respect, whether a criminal defendant, convicted felon, or otherwise.

3. You have given a number of talks to “young males between the ages of 12 and 18” about “topics relating to respect for women, the disadvantages of early fatherhood, drug use, sexually transmitted diseases, and benefits of having a college degree”; about “positive decision making, peer pressure, and legal consequences”; and about “careers in the legal

justice system and law enforcement.”<sup>5</sup>

- a. What motivated you to give those talks?

I was (and still am) motivated to give those talks based on a sense of duty and my obligation to educate the young males in my community. There are not many programs in this community to provide a forum for young males to have these discussions with positive male role models on these topics.

- b. You stated in your Questionnaire response that you have no notes, transcripts, or recordings of those talks. To the best of your recollection, what message did you convey about these issues?

The general overall message that I conveyed about these issues is that life is about choices. Hopefully, armed with the certain knowledge and when confronted with certain issues, these young men will make the right decision free from negative influences and end up leading successful lives.

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

I do not consider myself to fit within any particular label as it relates to my judicial philosophy. If confirmed, I pledge to fully and faithfully follow all Supreme Court and Third Circuit precedent and apply the law in a fair and impartial manner.

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

Please see my response to Question #4 above.

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<sup>1</sup> SJQ at 28-38.

<sup>2</sup> *Id.* at 28.

<sup>3</sup> SJQ at 40.

<sup>4</sup> SJQ at 10.

<sup>5</sup> SJQ at 7-9.

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?

Yes. It would be appropriate to consider legislative history in construing a statute if the language of the statute is ambiguous. *See Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) ("When the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms."). If confirmed, I pledge to fully and faithfully apply the canons of statutory construction, including considering legislative history, as deemed appropriate by Supreme Court 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?

Yes. Please see my 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?

Yes. My understanding of judicial restraint is that a judge should decide a case based on the particular facts of a case and the law as applied to those facts. A judge should not decide a case based on his or her personal views or what he or she believes the outcome should be independent of the law.

a. The Supreme Court's decision in *District of Columbia v. Heller* dramatically changed the Court's longstanding interpretation of the Second Amendment.<sup>6</sup> Was that decision guided by the principle of judicial restraint?

As a current sitting trial court judge and a federal district court judicial nominee, I do not believe that it would be appropriate for me to comment on whether the *Heller* decision was guided by the principle of judicial restraint. *See* Virgin Islands Code of Judicial Conduct, Canons 2 and 3; Code of Conduct for United States Judges, Canons 2(A) and 3(A)(6).

b. The Supreme Court's decision in *Citizens United v. FEC* opened the floodgates to big money in politics.<sup>7</sup> Was that decision guided by the principle of judicial restraint?

As a current sitting trial court judge and a federal district court judicial nominee, I

do not believe that it would be appropriate for me to comment on whether the *Citizens United* decision was guided by the principle of judicial restraint. See Virgin Islands Code of Judicial Conduct, Canons 2 and 3; Code of Conduct for United States Judges, Canons 2(A) and 3(A)(6).

- c. The Supreme Court's decision in *Shelby County v. Holder* gutted Section 5 of the Voting Rights Act.<sup>8</sup> Was that decision guided by the principle of judicial restraint?

As a current sitting trial court judge and a federal district court judicial nominee, I do not believe that it would be appropriate for me to comment on whether the *Shelby County* decision was guided by the principle of judicial restraint. See Virgin Islands Code of Judicial Conduct, Canons 2 and 3; Code of Conduct for United States Judges, Canons 2(A) and 3(A)(6).

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.<sup>9</sup> 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.<sup>10</sup>

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

I have not had the opportunity to research this issue, and therefore, I do not believe that I can intelligently comment on this topic.

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<sup>6</sup> 554 U.S. 570 (2008).

<sup>7</sup> 558 U.S. 310 (2010).

<sup>8</sup> 570 U.S. 529 (2013).

<sup>9</sup> *Debunking the Voter Fraud Myth*, BRENNAN CTR. FOR JUSTICE (Jan. 31, 2017), <https://www.brennancenter.org/analysis/debunking-voter-fraud-myth>.

<sup>10</sup> *Id.*

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

I am aware that the issues raised in this question is the subject pending and, perhaps, impending litigation. As a current sitting judge and federal judicial nominee, I do not believe that it would be appropriate to comment on this issue. *See* Virgin Islands Code of Judicial Conduct, Canons 2 and 3; Code of Conduct for United States Judges, Canons 2(A) and 3(A)(6).

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

Please see my response to Question #8(b) 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.<sup>11</sup> Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.<sup>12</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>13</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>14</sup>

- 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?

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.

Yes. To my recollection, while serving as a judge of the Superior Court of the Virgin Islands, I attended a course at the National Judicial College which included a session on implicit bias.

- 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>15</sup> Why do you think that is the case?

I have not had the opportunity to research this issue, and therefore, I do not believe that I can intelligently comment on this topic.

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

I have not had the opportunity to research this issue, and therefore, I do not believe that I can intelligently comment on this topic.

- 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 should endeavor to ensure that racism plays no part in the criminal justice system and the outcome of any case should be dictated by the applicable law. Judges should also ensure that individuals be treated fairly without regard to race or any other non-pertinent factor.

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<sup>11</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>12</sup> *Id.*

<sup>13</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>14</sup> *Id.*

<sup>15</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>16</sup> Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1323 (2014)

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.<sup>17</sup> In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.<sup>18</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 have not had the opportunity to research this issue, and therefore, I do not believe that I can intelligently comment on this topic.

- 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 response to Question #10(a) above.

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*<sup>19</sup> was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

Ordinarily, as a judicial nominee, I do not believe that it is appropriate for a lower court judge to comment on the correctness of decisions of the Supreme Court. Such comments can have the effect of eroding the integrity of the judiciary. However, as stated during my nomination hearing before the Senate Committee on the Judiciary, in light of the fact that *Brown v. Board of Education* is a landmark case that has been re-affirmed on multiple occasions over the last 65 years and that no one can legitimately question that racial segregation in a public school system is unconstitutional, I believe that this case falls within an exception wherein I can publicly state that *Brown* was correctly decided.

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

I do not.

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?

Throughout this confirmation process, I have had many discussions with officials from the White House and the Department of Justice. No one has ever instructed me to give a particular answer in response to a question during my nomination hearing, in response to any Question for the Record, or at any other time. All of the responses that I gave 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.”<sup>21</sup> Do you agree with President Trump’s view that a judge’s race or ethnicity can be a basis for recusal or disqualification?

A judge must determine for him or herself whether recusal or disqualification is appropriate under the federal recusal statute (*see* 28 U.S.C. §§ 144 and 455), as well as under the Code of Conduct for United States Judges.

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,

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<sup>17</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>.

<sup>18</sup> *Id.*

<sup>19</sup> 347 U.S. 483 (1954).

<sup>20</sup> 163 U.S. 537 (1896).

<sup>21</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>.



bring them back from where they came.”<sup>22</sup> Do you believe that immigrants, regardless of status, are entitled to due process and fair adjudication of their claims?

In *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Supreme Court stated 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.” *Id.* at 693. If confirmed, I pledge to fully and faithfully apply all Supreme Court precedent, including *Zadvydas*.

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<sup>22</sup> Donald J. Trump (@realDonaldTrump), TWITTER (June 24, 2018, 8:02 A.M.), <https://twitter.com/realDonaldTrump/status/1010900865602019329>.