

**Senator Dick Durbin**  
**Written Questions for Robert Summerhays**  
**April 18, 2018**

For questions with subparts, please answer each subpart separately.

**Questions for Robert Summerhays**

- 1. Have you ever handled a bankruptcy case in which a debtor sought to discharge his or her student loans under the “undue hardship” exception to student loan nondischargeability? If so, please discuss the case or cases.**

Yes. An undue hardship discharge in a bankruptcy case under 11 U.S.C. § 523(a)(8) requires that the debtor commence an adversary proceeding by filing a complaint in the bankruptcy court. *See* Fed. R. Bankr. P. 4007(a). An adversary proceeding in bankruptcy is a traditional federal court civil action governed by the Federal Rules of Civil Procedure. The adversary proceeding unfolds like a normal civil action with discovery, motions for summary judgment and, ultimately, a bench trial. My case search shows that I have presided over five (5) adversary proceedings seeking to discharge student loans under section 523(a)(8) since I have been on the bench: *Malveaux v. Sallie Mae Servicing L.P. (In re Malveaux)*, Ch. 7 Case No. 05-20936, Adv. No. 05-2048 (Bankr. W.D. La.); *Lancon v. United States Dep’t of Educ. (In re Lancon)*, Ch. 7 Case No. 05-21956, Adv. No. 06-2007 (Bankr. W.D. La.); *Landry v. Sallie Mae, Inc. (In re Landry)*, Ch. 13 Case No. 08-51335, Adv. No. 09-5002 (Bankr. W.D. La.); *Broussard v. Educational Credit Mgmt. Corp. (In re Broussard)*, Ch. 7 Case No. 12-50033, Adv. No. 12-5025 (Bankr. W.D. La.); and *Fontenot v. Navient Solutions, Inc. (In re Fontenot)*, Ch. 7 Case No. 15-51377, Adv. No. 15-5019 (Bankr. W.D. La.).

None of these cases proceeded to trial or a final determination of dischargeability. Three (3) of these cases (*Malveaux*, *Broussard*, and *Fontenot*) were resolved early in the case with joint or agreed motions to dismiss. My recollection is that the cases were dismissed after the debtors and the student loan creditors entered into settlements, but the terms of the settlements were not filed into the record. One (1) case (*Lancon*) was dismissed upon a joint motion later in the case – after a summary judgment motion was filed, but before a ruling – when the parties entered into a settlement. One (1) case (*Landry*) was jointly dismissed by the parties upon the completion of plan payments in a Chapter 13 case because the student loan debt was provided for in the Chapter 13 plan.

I also handled one student loan case where there was a final determination on an objection to the student loan creditor’s proof of claim: *Roberts v. United Student Aid Funds, Inc. (In re Carla Roberts)*, 04-51851 (W.D. La. 2004). While the debtor was not alleging grounds for a hardship discharge, she alleged that the creditor improperly credited her account and that she did not owe anything on her loan. The creditor argued that the debtor owed over \$80,000. I found that the creditor had engaged in a pattern of delays with respect to discovery and the prosecution of the case, and had repeatedly failed to respond to the debtor’s discovery requests. I ultimately deemed the debtor’s requests for admissions as “admitted.” I also entered a ruling in favor of the debtor that the loan was fully satisfied.

2. **In your view are bankruptcy judges too reluctant to find “undue hardship” when handling cases involving student loan debtors?**

I am not aware of the extent to which other bankruptcy judges may be reluctant to find “undue hardship” when handling cases involving student loan debtors. As explained in my answer to Question 1, I have never reached the question of whether any of my student loan debtors have met the “undue hardship” standard. However, if I am ever required to decide whether to discharge a student loan under the “undue hardship” provision of the Bankruptcy Code, I would apply the statutory standard in light of any governing circuit precedent and the factual record. If a case satisfies the statutory standard, I would have no reluctance in granting the debtor a discharge of his or her student debt.

3. You say in your questionnaire that you have been a member of the Federalist Society since 2016.

a. **Why did you join the Federalist Society in 2016?**

I joined the Federalist Society for access to scholarship and programming that was relevant to some of the bankruptcy jurisdiction topics that I covered in presentations at bankruptcy conferences.

b. **Did anyone advise you that joining the Federalist Society would enhance your chances of being nominated for a district court judgeship?**

No.

c. **Was it appropriate for President Trump to publicly thank the Federalist Society for helping compile his Supreme Court shortlist?** For example, in an interview with Breitbart News’ Steve Bannon on June 13, 2016, Trump said “[w]e’re going to have great judges, conservative, all picked by the Federalist Society.” In a press conference on January 11, 2017, he said his list of Supreme Court candidates came “highly recommended by the Federalist Society.”

I am not aware of these comments or their context, and, to my knowledge, I was not picked by the Federalist Society. However, I do not believe that it is appropriate for me to comment on or otherwise intrude into the process used by the President to nominate federal judges. The selection and nomination of federal judges is the prerogative of the President. It would also be improper for me to comment on statements made by the President or other members of the political branches on matters of politics and policy.

d. **Please list each year that you have attended the Federalist Society’s annual convention.**

I have never attended the Federalist Society’s annual convention.

- e. On November 17, 2017, Attorney General Sessions spoke before the Federalist Society's convention. At the beginning of his speech, Attorney General Sessions attempted to joke with the crowd about his meetings with Russians. Video of the speech shows that the crowd laughed and applauded at these comments. (See <https://www.reuters.com/video/2017/11/17/sessions-makes-russia-joke-at-speech?videoId=373001899>) **Did you attend this speech, and if so, did you laugh or applaud when Attorney General Sessions attempted to joke about meeting with Russians?**

Please see my answer to Question 3(d).

4.

- a. **Is waterboarding torture?**

While I have not studied this area in depth, I believe that torture in general is illegal under various federal statutes. I also understand that it is proscribed by various international treaties. Whether specific conduct amounts to torture and thus violates federal law is a question that may come before the federal courts. If I am confirmed and called upon to make a decision with respect to whether certain conduct amounts to torture under federal law, I will apply the relevant statutes, controlling precedents, and make a decision based on the record. However, it would be inappropriate for me to comment on a specific factual or legal question that may come before me as a judge.

- b. **Is waterboarding cruel, inhuman and degrading treatment?**

See my answer to Question 4(a).

- c. **Is waterboarding illegal under U.S. law?**

See my answer to Question 4(a).

5. **Was President Trump factually accurate in his claim that 3 to 5 million people voted illegally in the 2016 election?**

I have not studied this issue and have no basis to comment on whether this assertion is factually accurate. Moreover, as a sitting federal judge, I do not believe that it would be appropriate under the Canons of Judicial Conduct for me to comment on statements made by the President or other members of the political branches.

6. **Do you think the American people are well served when judicial nominees decline to answer simple factual questions?**

In my view, judicial nominees should be open and forthcoming in answering questions to the best of their ability, consistent with the constraints imposed by the canons of conduct.

7. During the confirmation process of Justice Gorsuch, special interests contributed millions of dollars in undisclosed dark money to a front organization called the Judicial Crisis Network that ran a comprehensive campaign in support of the nomination. It is likely that many of these secret contributors have an interest in cases before the Supreme Court. I fear this flood of dark money undermines faith in the impartiality of our judiciary.

The Judicial Crisis Network has also spent money on advertisements supporting a number President Trump's nominees.

- a. **Do you have any concerns about outside groups or special interests making undisclosed donations to front organizations like the Judicial Crisis Network in support of your nomination? Note that I am not asking whether you have solicited any such donations, I am asking whether you would find such donations to be problematic.**

I am not familiar with the Judicial Crisis Network or their fundraising efforts. Nor am I aware of any efforts by this organization to support my nomination. Personally, I would never solicit such private donations or support in connection with my nomination. However, I do not believe that it is appropriate for a federal judge to take a position on the President's nomination process, or the conduct of private groups that may take positions on the judicial nomination process.

- b. **If you learn of any such donations, will you commit to call for the undisclosed donors to make their donations public so that if you are confirmed you can have full information when you make decisions about recusal in cases that these donors may have an interest in?**

If I am confirmed and learn of any such donations, I will decide whether recusal is appropriate based upon 28 U.S.C. § 455, Canon 3 of the Code of Conduct for United States Judges, and any and all other laws, rules, and practices governing such circumstances. However, I believe that it would be inappropriate for me, as a sitting federal judge, to take a position on whether such organizations should be required to disclose their donors.

- c. **Will you condemn any attempt to make undisclosed donations to the Judicial Crisis Network on behalf of your nomination?**

Please see my answers to Questions 7(a) and 7(b).

8.
  - a. **Can a president pardon himself?**

I have not studied the question of the scope or extent of a president's pardon power. If I am called upon to address this question in a case or controversy, I will consider the language of the relevant clause, the arguments of counsel, and any precedent or other authority that might inform my decision.

b. **What answer does an originalist view of the Constitution provide to this question?**

See my answer to Question 8(a).

9. The Foreign Emoluments Clause in Article I, Section 9, Clause 8, of the Constitution provides that:

...no Person holding any Office of Profit or Trust under [the United States], shall, without the Consent of the Congress, accept of any present, Emolument, Office, or title, of any kind whatever, from any King, Prince, or foreign State.

a. **What is your understanding of what the Founding Fathers intended this clause to mean? To the extent you may be unfamiliar with this provision of the Constitution, please familiarize yourself with it before answering.**

I am not aware of any statements reflecting the Founding Fathers' intent with respect to the Foreign Emoluments Clause in Article I, Section 9, Clause 8, of the Constitution. I have read the provision, but have not done any research into the history of this provision. My understanding is that this clause is the subject of litigation in the federal court system. Accordingly, it would not be appropriate for me to opine on the meaning of this clause.

b. **Do you believe that this original public meaning of the Foreign Emoluments Clause should be adhered to by courts in interpreting and applying the Clause today?**

See my answer to Question 9(a).

**Nomination of Robert R. Summerhays to the  
United States District Court  
For the Western District of Louisiana  
Questions for the Record  
Submitted April 18, 2018**

**QUESTIONS FROM SENATOR WHITEHOUSE**

1. 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?

There is no perfect metaphor to describe the role of a judge. I think Chief Justice Robert’s metaphor is accurate to the extent that, like an umpire, a judge must fairly and impartially apply rules (or law) to the facts at hand. Like an umpire, a judge cannot allow his or her personal preferences to affect his or her rulings. On the other hand, the judicial process tends to require longer-term deliberative decision-making than can be afforded in the split second period within which an umpire must make a call.

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

In general, the practical consequences of a particular ruling should not factor into a judge’s decision-making. An exception would be where the law requires the court to consider the consequences of a ruling. For example, in issuing an injunction, the law requires the court to consider the effect of injunctive relief on the parties, such as whether the movant would suffer irreparable harm if the injunction were not granted and the costs and benefits of injunctive relief.

2. 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?

A judge’s legal decision-making process should be governed by the facts and the law, not empathy or personal convictions. However, the personal circumstances and history of a party may be relevant to a judge’s decision where the law requires consideration of these factors. For example, the personal circumstances and history of a defendant are relevant to sentencing under 18 U.S.C. § 3553.

I also believe that empathy factors into how judges treat the lawyers and parties that appear before them. As a bankruptcy judge, I have a docket of over 5,000 cases, more than 90% of which are individual consumer cases. On a typical hearing day for consumer cases, I may have as many as 100 people who come before me. Many of these consumer debtors are at the lowest points in their lives. I address each consumer debtor one by one and rule on their cases. I listen to their counsel’s arguments and I am careful to give each debtor the opportunity to speak. Even though I am bound to rule according to the facts and the law, I treat them with compassion and respect when I address them and ultimately rule on

their cases. I think that this compassion and respect is critical to maintaining faith in and respect for the judiciary.

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

As with empathy, a judge's legal decision-making process should be governed by the law and the factual record, not the judges' personal convictions or life experiences.

3. 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?

I am not aware of any situation where it would be appropriate for a district court judge to ignore, disregard, refuse to implement, or issue an order that is contrary to an order from a superior court.

4. What assurance can you provide this Committee and the American people that you would, as a federal judge, equally uphold the interests of the "little guy," specifically litigants who do not have the same kind of resources to spend on their legal representation as large corporations?

My assurance is my record of more than 11 years as a bankruptcy judge. I rule based on where the law and the facts take me regardless of which party wins or loses. I have ruled in favor of consumer debtors against large financial institutions on many occasions where the law and the facts support the debtors' positions. I strive to ensure that these individual debtors are on equal footing with larger, more powerful interests as far as being able to fairly present their case. I provide the opportunity for a hearing on almost every motion, which gives me the opportunity to hear from individual consumer debtors on the merits of their case. In the end, the law and the facts should decide the case, not the parties' resources.

- a. In civil litigation, well-resourced parties commonly employ "paper blizzard" tactics to overwhelm their adversaries or force settlements through burdensome discovery demands, pretrial motions, and the like. Do you believe these tactics are acceptable? Or are they problematic? If they are problematic, what can and should a judge do to prevent them?

I do not believe that use of "paper blizzard" tactics or other "trial by attrition" tactics are appropriate, and I am vigilant to ensure that these abusive tactics are not employed in the cases over which I preside. I use scheduling orders and conferences to control the pace of discovery and pre-trial preparation. If abusive tactics are brought to my attention, I deal with these tactics swiftly through phone conferences or, if necessary, appropriate orders limiting discovery. For example, in a case involving a dispute between a debtor and a large student loan creditor, I found that the creditor had engaged in a pattern of delays with respect to discovery and the prosecution of the case, and had repeatedly failed to respond to the debtor's discovery requests. I ultimately deemed the debtor's requests for admissions as "admitted." If I am fortunate enough to be confirmed as a district court judge, I will work the magistrate judges and the lawyers to ensure that discovery and pre-trial motion practice is

properly managed.



**Nomination of Robert R. Summerhays to the  
United States District Court for the Western District of Louisiana  
Questions for the Record  
Submitted April 18, 2018**

**QUESTIONS FROM SENATOR BOOKER**

1. According to a Brookings Institute 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>1</sup> Notably, the same study found that whites are actually *more likely* to sell drugs than blacks.<sup>2</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>3</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>4</sup>

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

I believe that racism and racial bias has long been a problem in our country. I have read studies (including the studies cited below) that cite evidence of bias in the criminal justice system. I think that judges have a critical role in preventing bias from affecting court proceedings. All judges take an oath to fairly and impartially administer justice without respect to persons. I take this oath seriously and would not tolerate racial bias in my courtroom.

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

Yes, based on studies and statistics such as those cited below.

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.

A number of years ago I attended a presentation on implicit bias in judicial decision-making at a workshop for bankruptcy judges sponsored by the Federal Judicial Center. My memory is that the presentation discussed ways of identifying and preventing bias from affecting judicial decision-making. The

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<sup>1</sup> JONATHAN ROTHWELL, HOW THE WAR ON DRUGS DAMAGES BLACK SOCIAL MOBILITY, BROOKINGS INSTITUTE (Sept. 30, 2014), available at <https://www.brookings.edu/blog/social-mobility-memos/2014/09/30/how-the-war-on-drugs-damages-black-social-mobility/>.

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

<sup>3</sup> ASHLEY NELLIS, PH.D., THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS, THE SENTENCING PROJECT 14 (June 14, 2016), available at <http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/>.

<sup>4</sup> *Id.* at 8.

presentation offered ideas for promoting mindfulness, deliberation, and self-awareness in decision-making.

2. According to a Pew Charitable Trusts fact sheet, in the 10 states with the largest declines in their incarceration rates, crime fell an average of 14.4 percent.<sup>5</sup> In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an 8.1 percent average.<sup>6</sup>

- a. Do you believe there is a direct link between increases of 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 the relationship between crime rates and incarceration. My sense is that there are many factors that influence the crime rate in a given area. Incarceration levels may be only one of many such factors.

- b. Do you believe there is a direct link between decreases of 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.

See answer to Question 2(a) above.

3. 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.

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<sup>5</sup> THE PEW CHARITABLE TRUSTS, NATIONAL IMPRISONMENT AND CRIME RATES CONTINUE TO FALL 1 (Dec. 2016), available at [http://www.pewtrusts.org/~media/assets/2016/12/national\\_imprisonment\\_and\\_crime\\_rates\\_continue\\_to\\_fall\\_web.pdf](http://www.pewtrusts.org/~media/assets/2016/12/national_imprisonment_and_crime_rates_continue_to_fall_web.pdf).

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

**Questions for the Record from Senator Kamala D. Harris**  
**Submitted April 18, 2018**  
**For the Nominations of**

**Robert R. Summerhays, to be United States District Judge for the Western District of Louisiana**

1. District court judges have great discretion when it comes to sentencing defendants. It is important that we understand your views on sentencing, with the appreciation that each case would be evaluated on its specific facts and circumstances.

**a. What is the process you would follow before you sentenced a defendant?**

If confirmed as a district judge, I would consider the Presentence Report and any sentencing memoranda filed with the court. I would consider any evidence introduced at the sentencing hearing, as well as the statements of any victims, the statements of the defendant's family or other supporters (including requests for leniency), and the defendant's own statements. I would calculate the applicable sentencing range under the United States Sentencing Guidelines and then consider any grounds for departure from the Guidelines range. Then I would then apply all of the factors enumerated in 18 U.S.C. § 3553(a) and consider the commentary and any relevant policy statements in the Guidelines. After careful deliberation, I would impose a sentence that is "sufficient, but not greater than necessary" to achieve the purposes set out by Congress in 18 U.S.C. § 3553(a)(2).

**b. As a new judge, how do you plan to determine what constitutes a fair and proportional sentence?**

Please see my answer to Question 1(a) above.

**c. When is it appropriate to depart from the Sentencing Guidelines?**

In making a decision whether to depart from the United States Sentencing Guidelines, I would give careful consideration to the Guidelines' standards and relevant commentary. Specifically, Part K of section 5 of the Sentencing Guidelines enumerates the circumstances where it would be appropriate to make "departures" above or below the sentencing range provided by the Sentencing Guidelines. I would further have to consider whether any factors listed in 18 U.S.C. § 3553(a) call for imposing a sentence above or below the Sentencing Guidelines range.

**d. Judge Danny Reeves of the Eastern District of Kentucky – who also serves on the U.S. Sentencing Commission – has stated that he believes mandatory minimum sentences are more likely to deter certain types of crime than**

**discretionary or indeterminate sentencing.<sup>1</sup>**

**i. Do you agree with Judge Reeves?**

I am not familiar with Judge Reeves' comments or the basis for his statement that mandatory minimum sentences are more likely to deter certain types of crime than discretionary or indeterminate sentencing. Mandatory minimum sentences are incorporated in statutes passed by Congress and enacted into law. If I am confirmed as a district court judge, I would be bound to apply those statutory mandatory minimum sentences.

**ii. Do you believe that mandatory minimum sentences have provided for a more equitable criminal justice system?**

Please see my answer to Question 1(d)(i).

**iii. Please identify instances where you thought a mandatory minimum sentence was unjustly applied to a defendant.**

Please see my answer to Question 1(d)(i). Regardless of my personal views on mandatory minimum sentences, I would be bound to apply the applicable statute.

**iv. Former-Judge John Gleeson has previously criticized mandatory minimums in various opinions he has authored, and has taken proactive efforts to remedy unjust sentences that result from mandatory minimums.<sup>2</sup> If confirmed, and you are required to impose an unjust and disproportionate sentence, would you commit to taking proactive efforts to address the injustice, including:**

**1. Describing the injustice in your opinions?**

I am aware that mandatory minimum sentences have generated significant controversy and debate. Nevertheless, if I am confirmed as a district court judge, I would be bound to apply those statutory mandatory minimum sentences. With respect to my actions in a specific case where I sentence a defendant, I would consider what actions I could take consistent with the Judicial Canons and consistent with my role as a judge.

**2. Reaching out to the U.S. Attorney and other federal prosecutors to discuss their charging policies?**

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<sup>1</sup> <https://www.judiciary.senate.gov/imo/media/doc/Reeves%20Responses%20to%20QFRs1.pdf>

<sup>2</sup> See, e.g., "Citing Fairness, U.S. Judge Acts to Undo a Sentence He Was Forced to Impose," NY Times, July 28, 2014, <https://www.nytimes.com/2014/07/29/nyregion/brooklyn-judge-acts-to-undo-long-sentence-for-francois-holloway-he-had-to-impose.html>

Please see my answer to Question 1(d)(iv)(1).

**3. Reaching out to the U.S. Attorney and other federal prosecutors to discuss considerations of clemency?**

Please see my answer to Question 1(d)(iv)(1).

- e. 28 U.S.C. Section 994(j) directs that alternatives to incarceration are “generally appropriate for first offenders not convicted of a violent or otherwise serious offense.” If confirmed as a judge, would you commit to taking into account alternatives to incarceration?**

Yes.

2. Judges are one of the cornerstones of our justice system. If confirmed, you will be in a position to decide whether individuals receive fairness, justice, and due process.

- a. Does a judge have a role in ensuring that our justice system is a fair and equitable one?**

Yes, judges have a critical role in ensuring that judicial proceedings are fair, impartial, and equitable.

- b. Do you believe that there are racial disparities in our criminal justice system? If so, please provide specific examples. If not, please explain why not.**

I believe that racism and racial disparities have long been problems in our country. I have read studies that cite evidence of bias and racial disparities in the criminal justice system, including studies indicating that people of color are disproportionately represented in our nation’s jails and prisons. *See, e.g.,* ASHLEY NELLIS, PH.D., THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS, THE SENTENCING PROJECT 14 (June 14, 2016). I think that judges have a critical role in preventing bias from affecting court proceedings. All judges take an oath to fairly and impartially administer justice without respect to persons. I take this oath seriously and would not tolerate racial bias in my courtroom.

3. If confirmed as a federal judge, you will be in a position to hire staff and law clerks.

- a. Do you believe that it is important to have a diverse staff and law clerks?**

Yes.

**b. Would you commit to executing a plan to ensure that qualified minorities and women are given serious consideration for positions of power and/or supervisory positions?**

Yes. I will commit to doing everything I can do to ensure that qualified minorities and women are given serious consideration for positions of power and/or supervisory positions, mindful of the fact that I will be one district judge in a multi-judge district court.