Nomination of Roderick C. Young
to the United States District Court for the
Eastern District of Virginia
Questions for the Record
Submitted July 1, 2020

QUESTIONS FROM SENATOR WHITEHOUSE

1. If you have not already done so, please read a copy of the draft Advisory Opinion 117, circulated by the Codes of Conduct Committee of the Judicial Conference of the United States. A draft of the opinion is available here: https://fixthecourt.com/wp-content/uploads/2020/02/Guide-Vol02B-Ch02-AdvOp117.pdf. If the Committee formally adopts its draft Advisory Opinion as written, will you comply with it?

   If confirmed, I will abide by the Code of Conduct for United States Judges adopted by the Judicial Conference of the United States. If the draft of Advisory Opinion 117 is ultimately adopted by the Judicial Conference's Codes of Conduct Committee, I will consider Advisory Opinion 117 along with any subsequent advisory opinions from the Codes of Conduct Committee regarding a judges' involvement in law-related organizations.

2. A Washington Post report from May 21, 2019 ("A conservative activist's behind-the-scenes campaign to remake the nation's courts") documented that Federalist Society Executive Vice President Leonard Leo raised $250 million, much of it contributed anonymously, to influence the selection and confirmation of judges to the U.S. Supreme Court, lower federal courts, and state courts. If you haven't already read that story and listened to recording of Mr. Leo published by the Washington Post, I request that you do so in order to fully respond to the following questions.
   a. Have you read the Washington Post story and listened to the associated recordings of Mr. Leo?

      Prior to preparing answers to these questions, I had not read the Washington Post article or listened to the recording referenced in this question. I have now read the article and listened to the recording.

   b. Do you believe that anonymous or opaque spending related to judicial nominations of the sort described in that story risk corrupting the integrity of the federal judiciary? Please explain your answer.

      I am unfamiliar with the events described in the Washington Post's article and on the recording referenced in this question. To the extent the question calls for an opinion on matters of policy or political debate, or on the subject of pending or impending litigation, it would be inappropriate for me, as a sitting magistrate judge and district judge nominee, to comment further. *See* Canons 1, 2(A), 3(A)(6), and 5(C) of the Code of Conduct for United States Judges.

   c. Mr. Leo was recorded as saying: "We're going to have to understand that judicial confirmations these days are more like political campaigns." Is that a view you share? Do you believe that the judicial selection process would benefit from the same kinds of spending disclosures that are required for spending on federal elections? If not, why not?

      Please refer to my response in Question 2(b) above.

d. Do you have any knowledge of Leonard Leo, the Federalist Society, or any of the entities identified in that story taking a position on, or otherwise advocating for or against, your judicial nomination? If you do, please describe the circumstances of that advocacy.

No.

e. As part of this story, the Washington Post published an audio recording of Leonard Leo stating that he believes we "stand at the threshold of an exciting moment" marked by a "newfound embrace of limited constitutional government in our country [that hasn't happened] since before the New Deal." Do you share the beliefs espoused by Mr. Leo in that recording?

Please refer to my response to Question 2(b) above.

3. 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?

Yes, I generally agree that this metaphor is appropriate, because the role of a district judge is to fairly apply the law made by Congress or established by Supreme Court and circuit court precedents, to ensure a fair and impartial outcome in each case.

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

To the extent authority exists permitting the consideration of practical consequences, then such considerations should be factored into the judge's analysis. In the absence of such authority, the judge's decision-making should be based only on the facts and law relevant to the matter at hand.

4. Federal Rule of Civil Procedure 56 provides that a court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact" in a case. Do you agree that determining whether there is a "genuine dispute as to any material fact" in a case requires a trial judge to make a subjective determination?

No. The Supreme Court has held that the standard for determining whether a "genuine issue" exists for trial is an objective one. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986) (explaining that "the 'genuine issue' summary judgment standard is 'very close' to the 'reasonable jury' directed verdict standard" and that "the inquiry under each is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law") (quoting *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 745, n. 11 (1983)).

5. 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?

Empathy plays an important role in how judges treat the litigants and attorneys who appear before the court. Judges, litigants, and counsel all benefit from a judge who treats everyone in the courtroom with fairness, dignity, and respect, in an effort to work diligently toward having a full understanding of the arguments, positions, and disputes before the court.

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

Every judge brings to the bench his or her personal life experiences. However, personal life experiences are not a substitute for a judge's sworn duty to "administer justice without respect to persons, [to] do equal right to the poor and to the rich, and [to] faithfully and impartially discharge and perform all the duties incumbent upon [the judge] under the Constitution and laws of the United States." 28 U.S.C § 453.

6. 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?

Federal district courts are inferior to federal appellate courts and the Supreme Court. Accordingly, it is not appropriate for a federal district court to refuse to follow (or to contravene) an order from its federal appellate court or the Supreme Court.

7. When, if ever, is it appropriate for a district judge to publish an opinion that includes dicta challenging the correctness of a binding precedent?

A district judge is required to faithfully apply all binding Supreme Court precedent, as well as all binding precedent from the relevant circuit court. There may be rare instances in which a district judge may mention a gap in the law or circuit conflicts on an issue before the court, while adhering to his or her understanding of controlling precedent, in order to facilitate subsequent Supreme Court or circuit court review. *See e.g.*, *Eberhart v. United States*, 546 U.S. 12, 19-20 (2005).

8. When, if ever, is it appropriate for a district judge to publish an opinion that includes a proclamation of the judge's personal policy preferences or political beliefs?

A judge's personal preferences and viewpoints have no place in the judge's decision-making process. A judge's decisions must be based on application of the law to the facts of the case before the judge. Hence, a judge's decision should reflect the obligation to make fair and impartial decisions, in accordance with the law.

9. The Seventh Amendment ensures the right to a jury "in suits at common law."
   a. What role does the jury play in our constitutional system?

Juries play a critical role in our constitutional system in both criminal and civil cases. Defendants in criminal cases have a fundamental right to a trial by jury, guaranteed by the Sixth Amendment to the Constitution and incorporated against the states through the Fourteenth Amendment. *See Williams v. Florida*, 399 U.S. 78 (1970). Litigants in civil cases in the federal system have a right to trial by jury guaranteed by the Seventh Amendment.

b. Should the Seventh Amendment be a concern to judges when adjudicating issues related to the enforceability of mandatory pre-dispute arbitration clauses?

All constitutional provisions and statutes should be of concern to a judge. If confirmed, I will fully and faithfully follow all Supreme Court and Fourth Circuit precedents in resolving questions involving the interplay between the Seventh Amendment and the enforceability of mandatory pre-dispute arbitration clauses.

c. Should an individual's Seventh Amendment rights be a concern to judges when adjudicating issues surrounding the scope and application of the Federal Arbitration Act?

Please refer to my answer in Question 9(b) above.

10. What deference do congressional fact findings merit when they support legislation expanding or limiting individual rights?

I will fully and faithfully apply whatever deference is required by controlling precedents of the Supreme Court and the Fourth Circuit, which depends on the particularities of the legislation and the individual rights that it expands or limits.

11. The Federal Judiciary's Committee on the Codes of Conduct recently issued "Advisory Opinion 116: Participation in Educational Seminars Sponsored by Research Institutes, Think Tanks, Associations, Public Interest Groups, or Other Organizations Engaged in Public Policy Debates." I request that before you complete these questions you review that Advisory Opinion.
    a. Have you read Advisory Opinion #116?

    Yes.

    b. Prior to participating in any educational seminars covered by that opinion will you commit to doing the following?
        i. Determining whether the seminar or conference specifically targets judges or judicial employees.

        Advisory Opinion 116 states that such decisions should be undertaken on a case-by-case basis. Additionally, numerous canons of the Code of Conduct for United States Judges apply to a judge's decision whether to attend a particular educational seminar or conference. *See, e.g.*, Canon 4. I commit to consider each and every seminar that I attend carefully and to apply the standards and considerations set forth in the applicable canons as well as in Advisory Opinion 116.

        ii. Determining whether the seminar is supported by private or otherwise anonymous sources.

        Please see my response to Question 11(b)(i).

        Determining whether any of the funding sources for the seminar are engaged in litigation or political advocacy.

        Please see my response to Question 11(b)(i).

Determining whether the seminar targets a narrow audience of incoming or current judicial employees or judges.

Please see my response to Question 11(b)(i).

iii. Determining whether the seminar is viewpoint-specific training program that will only benefit a specific constituency, as opposed to the legal system as a whole.

Please see my response to Question 11(b)(i).

c. Do you commit to not participate in any educational program that might cause a neutral observer to question whether the sponsoring organization is trying to gain influence with participating judges?

Please see my response to Question 11(b)(i).

12. In your view, what is the evidentiary significance of Congress's failure to enact a proposed amendment to a previously enacted statute for how you would interpret the previously enacted statute? In general, what significance do you attach to evidence of Congress's failure to enact any piece of proposed legislation?

The Supreme Court has stated that when interpreting the meaning of a statutory provision, "subsequent legislative history is a 'hazardous basis for inferring the intent of an earlier' Congress." *Pension Benefit Guaranty Corp. v. LTV Corp*., 496 U.S. 633, 650 (1997) (quoting *United States v. Price*, 361 U.S. 304, 313 (1960)). According to the Supreme Court, subsequent legislative history "is a particularly dangerous ground on which to rest an interpretation of a prior statute when it concerns . . . a proposal that does not become law." *Id.* If confirmed, I will fully and faithfully apply Supreme Court and Fourth Circuit precedents when considering legislative history as it relates to statutory interpretation.

13. In your view, what constitutes the ordinary or plain meaning of statutory and constitutional text? When interpreting the text of a statute in the absence of binding precedent, is it proper for a district judge to (a) apply the text's plain meaning to current circumstances without considering its historical origins or (b) limit the text's meaning to how it would have been defined or understood at the time of enactment? If (b), how should a district judge determine how the text would have been defined or understood at the time of enactment?

Ordinary and plain meaning analysis is a method of constitutional and statutory interpretation wherein the words and phrases of a constitutional or statutory provision are given the meaning ascribed by an ordinary English speaker at the time of the enactment, rather than at the time of interpretation. The Supreme Court has analyzed constitutional provisions by looking to the original public meaning. For example, in *District of Columbia v. Heller*, 554 U.S. 570 (2008), both Justice Scalia's majority opinion and Justice Stevens's dissenting opinion were based on their respective understanding of originalism. The Supreme Court has recognized the importance of the Constitution's text, structure, and original understanding in interpreting a constitutional provision. *See*, *e.g.*, *Gamble v. United States*, 139 S. Ct. 1960 (2019); *Heller*, 554 U.S. 570 (2008). The Supreme Court has also determined that statutory interpretation begins with the text

and, where the text is clear, that is the end of the inquiry. *See*, *e.g.*, *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). A district judge should defer to Supreme Court and circuit court precedents for guidance on methods and sources to use to determine how a particular word or phrase would have been defined or understood at the time of enactment. If confirmed, I will fully and faithfully follow Supreme Court and Fourth Circuit precedents in an effort to discern the meaning of any constitutional or statutory text.