

**Nomination of David Cleveland Joseph to the United States District Court for the
Western District of Louisiana
Questions for the Record
Submitted January 15, 2020**

QUESTIONS FROM SENATOR FEINSTEIN

1. Question 10(b) of the Senate Judiciary Committee’s Questionnaire asks judicial nominees to list each court in which they have been admitted to practice. On your Questionnaire, you did not list the U.S. District Court for the Western District of Louisiana.

Have you been admitted to practice before the U.S. District Court for the Western District of Louisiana? Please include the dates of admission, any lapses in membership, and the reasons for any lapses in membership.

When I joined the U.S. Attorney’s Office as an Assistant United States Attorney in 2014, I was automatically admitted to practice in the Western District of Louisiana in that capacity. I have represented the United States in the Western District of Louisiana continuously since 2014.

2. In the days before the 2018 midterm elections, you gave a number of media interviews in which you advised voters to be on the lookout for “election fraud.” In one interview, you noted that “vote buying has happened in the past, people voting more than one time.” (KLFY NEWS 10 (Oct. 30, 2018))

- a. **Did you decide to do these media interviews on your own initiative? If not, please identify who asked you to talk about this issue publicly.**

My office sent out a press release derived from a template sent to our Public Information Officer by the Justice Department’s Office of Public Affairs (“OPA”). The purpose of the press release was to inform voters in the Western District of Louisiana that I had assigned two Assistant United States Attorneys from my office to monitor the federal election in order to ensure all voters had access to the polls and to report any irregularities or suspected fraud. In response to this press release, certain media outlets requested interviews.

- b. **Did you discuss with or seek approval from anyone in the Justice Department regarding these public remarks? If so, please identify with whom and when you discussed your remarks.**

The Department of Justice Office of Public Affairs sent my office a template for a suggested press releases to let the public know that we were monitoring the election in order to ensure all voters had access to the polls and to report any irregularities or suspected fraud. I otherwise neither discussed nor sought approval from anyone at the Justice Department regarding my statements to the press.

- c. Before making these comments, did you conduct any research into the prevalence of in-person voter fraud? If so, please detail the results of your research on how often in-person voter fraud occurs in the United States.**

No, I did not do any research on voter fraud in preparation for the interview. The election monitoring done by my office and other components of the Department of Justice is focused primarily on ensuring that voters have access to the polls.

3. As U.S. Attorney, you gave a speech in which you suggested that you oppose any path to citizenship for undocumented immigrants. You stated, “If we allow those who immigrate to our shores to ignore our laws as their first act, we are doing great damage to our country.” (Speech to the North Shreveport Lions Club (Aug. 15, 2019)) Historically, the United States has at times offered a path to citizenship to some undocumented immigrants. For example, in 1986 President Ronald Reagan signed the Immigration Reform and Control Act, which provided a pathway to citizenship for nearly 3 million undocumented immigrants.

Please detail what you see as the “great damage to our country” that came about as a result of laws like the 1986 Immigration Reform and Control Act.

Immediately prior to the quoted remarks, I stated that “[t]he promise of the American Dream has brought immigrants from across the globe seeking life, liberty, and the pursuit of happiness. Those immigrants have contributed greatly to our country and have made it what it is today. But the foundation of the success of America, and what allows our democracy to flourish, is our shared commitment to the rule of law.” I believe that supremacy of the Rule of Law is a bedrock principle in our country and that we all must endeavor to follow the law. My comments were not intended to imply that any given immigration law has been harmful to the country.

4. Please respond with your views on the proper application of precedent by judges.
- a. When, if ever, is it appropriate for lower courts to depart from Supreme Court precedent?**

It is not ever appropriate for an inferior court to depart from Supreme Court precedent.

- b. Do you believe it is proper for a district court judge to question Supreme Court precedent in a concurring opinion? What about a dissent?**

District court judges are under a duty to observe and apply binding Supreme Court precedent. While it is generally improper for a district court judge to question Supreme Court precedent, there may be instances where a district court judge may choose to highlight in an opinion an issue well-positioned for Supreme Court.

- c. When, in your view, is it appropriate for a district court to overturn its own precedent?**

District courts are not bound by the decisions of the other district courts, but should generally endeavor to render similar decisions when faced with similar facts. If the Fifth Circuit or the Supreme Court overrules or otherwise renders an opinion on a district court's decision, the district court must faithfully apply that precedent when ruling in a subsequent case involving the same issue.

d. When, in your view, is it appropriate for the Supreme Court to overturn its own precedent?

The Supreme Court has identified circumstances in which it believes that overturning its precedent is justified. *See, e.g., Montejo v. Louisiana*, 556 U.S. 778, 792-93 (2009).

5. When Chief Justice Roberts was before the Committee for his nomination, Senator Specter referred to the history and precedent of *Roe v. Wade* as “super-stare decisis.” A text book on the law of judicial precedent, co-authored by Justice Neil Gorsuch, refers to *Roe v. Wade* as a “super-precedent” because it has survived more than three dozen attempts to overturn it. (The Law of Judicial Precedent, Thomas West, p. 802 (2016).) The book explains that “superprecedent” is “precedent that defines the law and its requirements so effectively that it prevents divergent holdings in later legal decisions on similar facts or induces disputants to settle their claims without litigation.” (The Law of Judicial Precedent, Thomas West, p. 802 (2016))

a. Do you agree that *Roe v. Wade* is “super-stare decisis”? Do you agree it is “superprecedent”?

As an inferior court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Fifth Circuit precedent, including *Roe v. Wade*.

b. Is it settled law?

Yes, *Roe v. Wade* is binding Supreme Court precedent and is therefore settled insofar as its application by inferior courts. If confirmed, I will fulfill my duty to observe and apply all binding Supreme Court and Fifth Circuit precedent, including *Roe v. Wade*.

6. In *Obergefell v. Hodges*, the Supreme Court held that the Constitution guarantees same-sex couples the right to marry. **Is the holding in *Obergefell* settled law?**

Yes, *Obergefell* is binding Supreme Court precedent and is therefore settled insofar as its application by inferior courts. If confirmed, I will fulfill my duty to observe and apply all binding Supreme Court and Fifth Circuit precedent, including *Obergefell*.

7. In Justice Stevens's dissent in *District of Columbia v. Heller* he wrote: “The Second Amendment was adopted to protect the right of the people of each of the several States to

maintain a well-regulated militia. It was a response to concerns raised during the ratification of the Constitution that the power of Congress to disarm the state militias and create a national standing army posed an intolerable threat to the sovereignty of the several States. Neither the text of the Amendment nor the arguments advanced by its proponents evidenced the slightest interest in limiting any legislature's authority to regulate private civilian uses of firearms.”

a. Do you agree with Justice Stevens? Why or why not?

I will fulfill my duty to observe and apply all binding Supreme Court and Fifth Circuit precedent, including *Heller*. As a nominee for an inferior court judgeship, it is inappropriate for me to opine on the correctness of Supreme Court decisions, including Justice Steven's dissent in *Heller*.

b. Did *Heller* leave room for common-sense gun regulation?

The Supreme Court in *Heller* recognized that “[l]ike most rights, the right secured by the Second Amendment is not unlimited”, and specifically stated that “nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.” *District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008).

c. Did *Heller*, in finding an individual right to bear arms, depart from decades of Supreme Court precedent?

Heller does not expressly overrule or abrogate any prior Supreme Court precedent. Beyond that, it is, as a general rule, inappropriate for me, as an inferior court judicial nominee, to opine on Supreme Court decisions.

8. In *Citizens United v. FEC*, the Supreme Court held that corporations have free speech rights under the First Amendment and that any attempt to limit corporations' independent political expenditures is unconstitutional. This decision opened the floodgates to unprecedented sums of dark money in the political process.

a. Do you believe that corporations have First Amendment rights that are equal to individuals' First Amendment rights?

In *Citizens United*, the Supreme Court identified prior cases in which it had “recognized that the First Amendment protection extends to corporations.” *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 342 (2010). The Supreme Court extended these protections in *Citizens United* to corporate expenditures on political communications in elections. Beyond that I would only state that, if confirmed, I will faithfully follow all Fifth Circuit and Supreme Court precedent, but that it is generally inappropriate for me to opine on Supreme Court decisions.

b. Do individuals have a First Amendment interest in not having their individual speech drowned out by wealthy corporations?

See my response to Question 7.a.

c. Do you believe corporations also have a right to freedom of religion under the First Amendment?

In *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2012), the Supreme Court addressed whether the protections afforded by the Religious Freedom Restoration Act applied to corporations, but the issue of the applicability of the Free Exercise Clause to corporations was not resolved in that case. Because there may be litigation implicating this unanswered question, I respectfully refrain from further responding pursuant to Canon 3(A)(6) of the Code of Conduct for United States Judges, which directs that “[a] judge should not make public comment on the merits of a matter pending or impending in any court.” See also Canons 2 and 5, Code of Conduct for United States Judges.

9. Does the Equal Protection Clause of the Fourteenth Amendment place any limits on the free exercise of religion?

The Constitution guarantees equal protection under our laws and the right to the free exercise of religion. If confirmed, I will faithfully apply and protect the Constitution. As a sitting United States Attorney and federal judicial nominee, I am not at liberty to comment publicly this issue.

10. Would it violate the Equal Protection Clause of the Fourteenth Amendment if a county clerk refused to provide a marriage license for an interracial couple if interracial marriage violated the clerk’s sincerely held religious beliefs?

Please see my answer to Question 9. Additionally, if confirmed, I will faithfully apply all Supreme Court precedent, including *Loving v. Virginia*, 388 U.S. 1 (1967).

11. Could a florist refuse to provide services for an interracial wedding if interracial marriage violated the florist’s sincerely held religious beliefs?

Please see my responses to Questions 9 and 10.

12. Have you had any contact with anyone at the Federalist Society about your possible nomination to any federal court? If so, please identify when, who was involved, and what was discussed.

No, I have not had contact with anyone at the Federalist Society.

13. On February 22, 2018, when speaking to the Conservative Political Action Conference (CPAC), former White House Counsel Don McGahn told the audience about the Administration’s interview process for judicial nominees. He said: “On the judicial piece

... one of the things we interview on is their views on administrative law. And what you're seeing is the President nominating a number of people who have some experience, if not expertise, in dealing with the government, particularly the regulatory apparatus. This is different than judicial selection in past years..."

- a. Did anyone in this Administration, including at the White House or the Department of Justice, ever ask you about your views on any issue related to administrative law, including your "views on administrative law"? If so, by whom, what was asked, and what was your response?**

I was not asked my views on administrative law.

- b. Since 2016, has anyone with or affiliated with the Federalist Society, the Heritage Foundation, or any other group, asked you about your views on any issue related to administrative law, including your "views on administrative law"? If so, by whom, what was asked, and what was your response?**

I have not been asked about my views on any issues related to administrative law.

- c. What are your "views on administrative law"?**

I am aware of a number of relevant Supreme Court decisions that relate to administrative law. As in all other areas of law, I would fully and faithfully apply all binding precedents.

14. Do you believe that human activity is contributing to or causing climate change?

It is my understanding that there is currently pending or impending litigation which involves theories based on the allegation of injuries caused by climate change. Because there may be litigation related to this question, it would not be appropriate for me to opine on this issue. See Canon 3(A)(6), Code of Conduct for United States Judges ("A judge should not make public comment on the merits of a matter pending or impending in any court.")

15. When is it appropriate for judges to consider legislative history in construing a statute?

The Supreme Court has made clear that if a statute is ambiguous, as statutes can be, *see, e.g., Yates v. United States*, 135 S. Ct. 1074 (2015) (examining whether the term "tangible object" as used in the Sarbanes-Oxley Act includes undersized red groupers caught by fishermen in the Gulf of Mexico), then it is permissible for a court to look to legislative history to understand the meaning of the ambiguous term.

16. At any point during the process that led to your nomination, did you have any discussions with anyone — including, but not limited to, individuals at the White House, at the Justice Department, or any outside groups — about loyalty to President Trump? If so, please elaborate.

No.

17. Please describe with particularity the process by which you answered these questions.

I received these questions on Wednesday, January 15, 2020. I read them and prepared draft responses. I received comments on my draft responses, including from attorneys at the Department of Justice, Office of Legal Policy. I considered those comments in making final revisions. Each answer is my own.

Written Questions for David Cleland Joseph
Submitted by Senator Patrick Leahy
January 14, 2020

1. On your questionnaire, you did not indicate whether you have ever been admitted to practice before the U.S. District Court for the Western District of Louisiana.

(a) Have you been admitted to practice before the Western District of Louisiana?

When I joined the U.S. Attorney's Office as an Assistant United States Attorney in 2014, I was automatically admitted to practice in the Western District of Louisiana in that capacity. I have represented the United States in the Western District of Louisiana continuously since 2014.

2. In 2018, you initiated an election fraud prevention program just before the 2018 midterms. You stated in an interview regarding Assistant U.S. Attorneys who would be serving as election monitors at polling places that, "Louisiana hasn't seen huge numbers of election fraud allegations, but with today's political climate, voters need to be aware."

(b) Can you provide any examples of election fraud in Louisiana in recent years? Please provide all examples of which you are aware.

My office occasionally receives complaints about fraud or irregularities pertaining to voting. Such complaints are law enforcement sensitive. I am not aware of an election fraud case being prosecuted by my office or elsewhere in Louisiana in recent years.

3. In August of 2019, you praised the conditions at the LaSalle ICE Processing Center in Jena, Louisiana. Specifically, you said that "comfort and cleanliness are evident considerations[.]" However, earlier that summer, the Department of Homeland Security's Inspector General was quite critical of the conditions at the LaSalle facility, including that some food items were expired, and others were not properly limited.

(a) Does the DHS Inspector General's assessment of LaSalle give you any reason to revise your previous observation?

I visited the ICE detention facility in Jena, Louisiana in my role as United States Attorney for the Western District of Louisiana, wherein this and other ICE detention facilities are located. My purpose in visiting the facility was to gain an understanding of its operation and to ensure that the detainees were being treated in a humane manner consistent with the law. My office regularly prosecutes civil rights cases arising from abuse of inmates by correctional officers.

4. You have spoken often about the prevalence of firearms in the U.S. during your tenure as U.S. Attorney. In 2019, you said in prepared remarks that while your “goal is not to...fill up the prisons [or] see how many people we can put in jail[,]” your strategy to reduce violent crime is to “take guns out of the hands of convicted felons and take armed drug dealers out of our neighborhoods and into prison.”

(a) These goals are inherently contradictory. Can you clarify?

As I stated in those remarks, one of my primary goals as U.S. Attorney is to reduce the number of victims of violent crime in the Western District of Louisiana. As a prosecutor, my primary tool to effect this goal is the arrest, prosecution, and incarceration of armed offenders.

(b) Do you believe that there are solutions besides putting people back in prison that could reduce the prevalence of violent crime? For example, by making it harder for convicted felons and other dangerous individuals to obtain firearms?

As U.S. Attorney, the prosecution of gun crimes has been a priority for my office. In addition to increased prosecutions, we have engaged proactively with local law enforcement and community groups to reduce prevalence of firearms violence through public education, media campaigns, and other direct engagement.

5. In a radio interview, you referred to the goals of criminal justice system as being “on a pendulum” between punishment and rehabilitation.

(a) What is the role of the courts as the pendulum swings?

The courts must follow the laws passed by Congress and fairly adjudicate the criminal cases brought by the Department of Justice. These are the appropriate forums for policy decisions pertaining to the goals of criminal justice. Pertaining to sentencing, I would consider each of the factors listed in 18 U.S.C. 3553(a).

6. Chief Justice Roberts wrote in *King v. Burwell* that

“oftentimes the ‘meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.’ So when deciding whether the language is plain, we must read the words ‘in their context and with a view to their place in the overall statutory scheme.’ Our duty, after all, is ‘to construe statutes, not isolated provisions?’”

Do you agree with the Chief Justice? Will you adhere to that rule of statutory interpretation – that is, to examine the entire statute rather than immediately reaching for a dictionary?

As a district court judge, my primary obligation would be to follow binding precedent on the meaning of any statutory term. Beyond that, I believe that looking to the text and structure of statutes as a whole is a useful method of statutory interpretation and analysis.

7. President Trump has issued several attacks on the independent judiciary. Justice Gorsuch called them “disheartening” and “demoralizing.”

(a) Does that kind of rhetoric from a President – that a judge who rules against him is a “so-called judge” – erode respect for the rule of law?

The independence of the federal judiciary is established in Article III of the Constitution. Consistent with the Free Speech and the Free Press Clauses of the First Amendment, judges may from time to time be subject to criticism, but that does not erode the independence of the federal judiciary.

(b) While anyone can criticize the merits of a court’s decision, do you believe that it is ever appropriate to criticize the legitimacy of a judge or court?

Please see my response to Question 7(a).

8. President Trump praised one of his advisers after that adviser stated during a television interview that “the powers of the president to protect our country are very substantial *and will not be questioned.*” (Emphasis added.)

(a) Is there any constitutional provision or Supreme Court precedent precluding judicial review of national security decisions?

The Supreme Court held in *Webster v. Doe* that, due to national security concerns, a plaintiff’s case under the Administrative Procedure Act could not proceed. 486 U.S. 592 (1988). However, the Supreme Court permitted the plaintiff’s constitutional claims to proceed, explaining that “where Congress intends to preclude judicial review of constitutional claims, its intent to do so must be clear.” *Id.* at 603 (internal quotations omitted).

9. Many are concerned that the White House’s denouncement of “judicial supremacy” was an attempt to signal that the President can ignore judicial orders. And after the President’s first attempted Muslim ban, there were reports of Federal officials refusing to comply with court orders.

(a) If this President or any other executive branch official refuses to comply with a court order, how should the courts respond?

Separation-of-powers principles rely, in part, on mutual respect among the three co-equal branches of government. Accordingly, each branch should

recognize Constitutional powers granted to the other branches. Generally, if a party does not comply with a court order, the opposing party may seek injunctive relief or other remedies from the court to enforce that order, depending on the facts and the law applicable to the case.

10. In *Hamdan v. Rumsfeld*, the Supreme Court recognized that the President “may not disregard limitations the Congress has, in the proper exercise of its own war powers, placed on his powers.”

- (a) **Do you agree that the Constitution provides Congress with its own war powers and Congress may exercise these powers to restrict the President – even in a time of war?**

The Constitution states that Congress has the power to declare war as well as the power of the purse to make or deny appropriations. As the Supreme Court stated in *Hamdi v. Rumsfeld*, “We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.” 542 U.S. 507, 536 (2004).

- (b) **In a time of war, do you believe that the President has a “Commander-in-Chief” override to authorize violations of laws passed by Congress or to immunize violators from prosecution? Is there any circumstance in which the President could ignore a statute passed by Congress and authorize torture or warrantless surveillance?**

The Supreme Court has acted to enjoin Executive Branch actions, even during time of war. As a general matter, I believe in the Rule of Law.

11. How should courts balance the President’s expertise in national security matters with the judicial branch’s constitutional duty to prevent abuse of power?

If an issue arises related to the Executive Branch’s power in matters of national security, I will fulfill my duty to observe and apply all binding Supreme Court and Fifth Circuit precedent. Because there may be litigation implicating this issue, as a sitting judge, I respectfully refrain from further responding to this question pursuant to Canon 3(A)(6) of the Code of Conduct for United States Judges, which directs that “[a] judge should not make public comment on the merits of a matter pending or impending in any court.” *See also* Canons 2 and 5, Code of Conduct for United States Judges.

12. In a 2011 interview, Justice Scalia argued that the Equal Protection Clause does not extend to women.

- (a) **Do you agree with that view? Does the Constitution permit discrimination against women?**

The Supreme Court has applied the Equal Protection Clause to classifications that discriminate against women. *See, e.g., United States v. Virginia*, 518 U.S. 515 (1996); *Frontiero v. Richardson*, 411 U.S. 677 (1973).

13. Do you agree with Justice Scalia’s characterization of the Voting Rights Act as a “perpetuation of racial entitlement?”

I do not agree with this characterization of the Voting Rights Act and, if confirmed, will faithfully apply all binding precedent and uphold the laws of the United States.

14. What does the Constitution say about what a President must do if he or she wishes to receive a foreign emolument?

Article I, section 9, clause 8 provides that “No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept any present, Emolument, Office, or Title, of any kind whatsoever, from any King, Prince, or foreign State.”

15. In *Shelby County v. Holder*, a narrow majority of the Supreme Court struck down a key provision of the Voting Rights Act. Soon after, several states rushed to exploit that decision by enacting laws making it harder for minorities to vote. The need for this law was revealed through 20 hearings, over 90 witnesses, and more than 15,000 pages of testimony in the House and Senate Judiciary Committees. We found that barriers to voting persist in our country. And yet, a divided Supreme Court disregarded Congress’s findings in reaching its decision. As Justice Ginsburg’s dissent in *Shelby County* noted, the record supporting the 2006 reauthorization was “extraordinary” and the Court erred “egregiously by overriding Congress’ decision.”

(a) When is it appropriate for the Supreme Court to substitute its own factual findings for those made by Congress or the lower courts?

As a general rule, appellate courts do not engage in fact-finding, but rather evaluate the record on appeal. Federal Rule of Appellate Procedure 10(a) addresses the composition of the record on appeal. As an inferior court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Fifth Circuit precedent.

16. How would you describe Congress’s authority to enact laws to counteract racial discrimination under the Thirteenth, Fourteenth, and Fifteenth Amendments, which some scholars have described as our Nation’s “Second Founding”?

Each of those amendments contains an enforcement clause, *see, e.g.,* U.S. Const. amend. XIII, § 2; amend. XIV, § 5; amend. XV, § 2. Those enforcement clauses provide

Congress the ability to enforce the amendment by appropriate legislation. As a district court judge, I would faithfully apply the laws of the United States.

17. Justice Kennedy spoke for the Supreme Court in *Lawrence v. Texas* when he wrote: “liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct,” and that “in our tradition, the State is not omnipresent in the home.”

(a) Do you believe the Constitution protects that personal autonomy as a fundamental right?

As a district court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Fifth Circuit precedent, including *Lawrence v. Texas*.

18. In the confirmation hearing for Justice Gorsuch, there was extensive discussion of the extent to which judges and Justices are bound to follow previous court decisions by the doctrine of stare decisis.

(a) In your opinion, how strongly should judges bind themselves to the doctrine of stare decisis? Does the commitment to stare decisis vary depending on the court? Does the commitment vary depending on whether the question is one of statutory or constitutional interpretation?

The Supreme Court has summarized the importance of adhering to precedent in stating, “*stare decisis* ... the idea that today’s Court should stand by yesterday’s decisions, is ‘a foundation stone of the rule of law.’” *Kimble v. Marvel Entm’t, LLC*, 135 S. Ct. 2401, 2409 (2015) (quoting *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2036 (2014)). Adhering to prior precedent “promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.” *Payne v. Tenn.*, 501 U.S. 808, 827 (1991). As an inferior court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Fifth Circuit precedent.

19. Generally, federal judges have great discretion when possible conflicts of interest are raised to make their own decisions whether or not to sit on a case, so it is important that judicial nominees have a well-thought out view of when recusal is appropriate. Former Chief Justice Rehnquist made clear on many occasions that he understood that the standard for recusal was not subjective, but rather objective. It was whether there might be any appearance of impropriety.

- (a) How do you interpret the recusal standard for federal judges, and in what types of cases do you plan to recuse yourself? I'm interested in specific examples, not just a statement that you'll follow applicable law.**

I would assess whether a recusal is required or would be necessary to uphold the integrity of the judiciary using applicable conflict rules and ethical standards. Specifically, I would recuse myself from any case in which either myself or my office has participated as an attorney, or any case under investigation by my office during my tenure as U.S. Attorney. As a sitting judge, I will evaluate any other real or potential conflict, or relationship that could give rise to appearance of conflict, on a case-by-case basis and determine appropriate action with the advice of parties and their counsel including recusal where necessary.

20. It is important for me to try to determine for any judicial nominee whether he or she has a sufficient understanding the role of the courts and their responsibility to protect the constitutional rights of individuals, especially the less powerful and especially where the political system has not. The Supreme Court defined the special role for the courts in stepping in where the political process fails to police itself in the famous footnote 4 in *United States v. Carolene Products*. In that footnote, the Supreme Court held that “legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.”

- (b) Can you discuss the importance of the courts' responsibility under the *Carolene Products* footnote to intervene to ensure that all citizens have fair and effective representation and the consequences that would result if it failed to do so?**

Footnote 4 of *Carolene Products* is one of the most significant footnotes in constitutional law due to its role in the development of tiers of constitutional scrutiny. Specifically, the footnote contemplated more exacting judicial scrutiny in certain spheres, such as the right to vote, while the opinion itself employed rational basis review for economic legislation. For context, the full sentence quoted above from footnote 4 states, “It is unnecessary to consider now whether legislation which restricts those political process which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.” *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

21. Both Congress and the courts must act as a check on abuses of power. Congressional oversight serves as a check on the Executive, in cases like Iran-Contra or warrantless spying on American citizens and politically motivated hiring and firing at the Justice Department during the Bush administration. It can also serve as a self-check on abuses of Congressional power. When Congress looks into ethical violations or corruption, including inquiring into the Trump administration's conflicts of interest and the events discussed in the Mueller report we make sure that we exercise our own power properly.

(a) Do you agree that Congressional oversight is an important means for creating accountability in all branches of government?

Yes, it can be.

22. Do you believe there are any discernible limits on a president's pardon power? For example, President Trump claims he has an "absolute right" to pardon himself. Do you agree?

As a judicial nominee and sitting United States Attorney, it is not appropriate for me to comment or opine publicly about a President's ability to self-pardon. *See* Canons 2 and 5, Code of Conduct for United States Judges.

23. What is your understanding of the scope of congressional power under Article I of the Constitution, in particular the Commerce Clause, and under Section 5 of the Fourteenth Amendment?

The Constitution confers to Congress certain enumerated powers, including the two identified in this question. The Supreme Court has addressed the scope of those powers on a number of occasions. *See, e.g., Gonzales v. Raich*, 545 U.S. 1 (2005); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *City of Boerne v. Flores*, 521 U.S. 507 (1997); *United States v. Lopez*, 514 U.S. 549 (1995).

24. In *Trump v. Hawaii*, the Supreme Court allowed President Trump's Muslim ban to go forward on the grounds that Proclamation No. 9645 was facially neutral and asserted that the ban was in the national interest. The Court chose to accept the findings of the Proclamation without question, despite significant evidence that the President's reason for the ban was animus towards Muslims. Chief Justice Roberts' opinion stated that "the Executive's evaluation of the underlying facts is entitled to appropriate weight" on issues of foreign affairs and national security.

(a) What do you believe is the "appropriate weight" that executive factual findings are entitled to on immigration issues? Does that weight shift when additional constitutional issues are presented, as in the Establishment Clause claims of *Trump v. Hawaii*? Is there any point at

which evidence of unlawful pretext overrides a facially neutral justification of immigration policy?

In *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), the Supreme Court rejected the plaintiff's request for a searching inquiry into the justifications for Presidential Proclamation No. 9645, 82 Fed. Reg. 45161, because such an inquiry would be "inconsistent with the broad statutory text and the deference traditionally accorded the President in this sphere." *Trump v. Hawaii*, 138 S. Ct. at 2409. As an inferior court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Fifth Circuit precedent in this area.

25. How would you describe the meaning and extent of the "undue burden" standard established by *Planned Parenthood v. Casey* for women seeking to have an abortion? I am interested in specific examples of what you believe would and would not be an undue burden on the ability to choose.

The Supreme Court articulated the undue burden standard in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), using two passages from the plurality opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). Specifically, undue burden was described as: (i) "a statute which, while furthering a valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends," *Whole Woman's Health*, 136 S. Ct. at 2309 (quoting *Casey*, 505 U.S. at 877), and (ii) "unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right," *Whole Woman's Health*, 136 S. Ct. at 2309 (quoting *Casey*, 505 U.S. at 878). As an inferior court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Fifth Circuit precedent, including *Whole Woman's Health*. Because there may be litigation implicating this issue, as a sitting judge, I respectfully refrain from further responding to this question pursuant to Canon 3(A)(6) of the Code of Conduct for United States Judges.

26. Federal courts have used the doctrine of qualified immunity in increasingly broad ways, shielding police officers in particular whenever possible. In order to even get into court, a victim of police violence or other official abuse must show that an officer knowingly violated a clearly established constitutional right as specifically applied to the facts and that no reasonable officer would have acted that way. Qualified immunity has been used to protect a social worker who strip searched a four-year-old, a police officer who went to the wrong house, without even a search warrant for the correct house, and killed the homeowner, and many similar cases.

- (a) Do you think that the qualified immunity doctrine should be reined in? Has the “qualified” aspect of this doctrine ceased to have any practical meaning? Should there be rights without remedies?**

The Supreme Court established the applicable doctrine of qualified immunity in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and has refined it over time in cases such as *Pearson v. Callahan*, 555 U.S. 223 (2009). As an inferior court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Fifth Circuit precedent on qualified immunity.

27. The Supreme Court, in *Carpenter v. U.S.* (2018), ruled that the Fourth Amendment generally requires the government to get a warrant to obtain geolocation information through cell-site location information. The Court, in a 5-4 opinion written by Roberts, held that the third-party doctrine should not be applied to cellphone geolocation technology. The Court noted “seismic shifts in digital technology”, such as the “exhaustive chronicle of location information casually collected by wireless carriers today.”

- a. In light of *Carpenter* do you believe that there comes a point at which collection of data about a person becomes so pervasive that a warrant would be required? Even if collection of one bit of the same data would not?**

In *Carpenter v. United States*, 138 S. Ct. 2206 (2018), the Supreme Court found a Fourth Amendment violation using the trespass doctrine – recognizing that “[a]s technology has enhanced the Government’s capacity to encroach upon areas normally guarded from inquisitive eyes, this Court has sought to ‘assure preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.’” *Id.* at 2214 (quoting *Kyllo v. United States*, 533 U.S. 27, 34 (2001)). Because there may be litigation implicating this issue, as a sitting judge, I should not further respond to this question pursuant to Canon 3(A)(6) of the Code of Conduct for United States Judges, which directs that “[a] judge should not make public comment on the merits of a matter pending or impending in any court.” See also Canons 2 and 5, Code of Conduct for United States Judges.

28. Earlier this year, President Trump declared a national emergency in order to redirect funding toward the proposed border wall after Congress appropriated less money than requested for that purpose. This raised serious separation-of-powers concerns because the Executive Branch bypassed the congressional approval generally needed for appropriations. As a member of the Appropriations Committee, I take seriously Congress’s constitutional duty to decide how the government spends money.

- a. **With the understanding that you cannot comment on pending cases, are there situations when you believe a president can legitimately allocate funds for a purpose previously rejected by Congress?**

In *Lincoln v. Vigil*, 508 U.S. 182 (1993), the Supreme Court explained that “a fundamental principle of appropriations law is that where ‘Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions, and indicia in committee reports and other legislative history as to how funds should or are expected to be spent do not establish any legal requirements. . . .’” *Id.* at 192 (quoting *LTV Aerospace Corp.*, 55 Comp. Gen 307, 319 (1975)). Because there may be litigation implicating this question, I respectfully refrain from further responding to this question pursuant to Canon 3(A)(6) of the Code of Conduct for United States Judges, which directs that “[a] judge should not make public comment on the merits of a matter pending or impending in any court.” *See also* Canons 2 and 5, Code of Conduct for United States Judges.

29. During Justice Kavanaugh’s confirmation hearing, he used partisan language to align himself with Senate Republicans. For instance, he accused Senate Democrats of exacting “revenge on behalf of the Clintons” and warned that “what goes around comes around.” The judiciary often considers questions that have a profound impact on different political groups. The Framers sought to address the potential danger of politically-minded judges making these decisions by including constitutional protections such as judicial appointments and life terms for Article III judges.

- a. **Do you agree that the Constitution contemplates an independent judiciary? Can you discuss the importance of judges being free from political influence?**

Judicial independence is a Constitutional principle fundamental to our nation’s governance. As a co-equal branch of government designed to fairly interpret and apply the law, the judiciary must remain independent from the other two branches of government.

**Nomination of David Cleveland Joseph
to the United States District Court for the Western District of Louisiana
Questions for the Record
Submitted January 15, 2020**

QUESTIONS FROM SENATOR WHITEHOUSE

1. 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?

I had not read the article previously, but have now reviewed it per your request.

- 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.

Judicial independence and impartiality are fundamental and essential principles underlying the Constitution and our judicial system. Otherwise, it is inappropriate for me to comment because this is an issue that could come before the courts in pending or impending litigation.

- 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?

See response to Question 1(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?

Judicial independence and impartiality are fundamental and essential principles underlying the Constitution and our judicial system. Otherwise, it is inappropriate for me to comment because this is an issue that could come before the courts in pending or impending litigation.

2. 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?

I believe that Chief Justice Roberts was using this analogy to indicate that a judge's proper role is to resolve disputes presented by the parties based on the applicable law – not to create law or dictate a result based on his or her personal views or preferences. In this sense, I agree with his analogy.

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

Judges should endeavor to gain a complete understanding of the facts and circumstances of the cases brought before them so that they also understand the impact or consequences of their decisions.

3. 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?

A judge must use his discretion and discernment in adjudicating summary judgment motions. I would apply the precedent established in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986) ("[T]he judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented.").

4. 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 is important for a judge to fully understand the motivations and circumstances of litigants. This can be relevant to criminal defendants as well as to the parties in a civil litigation. However, empathy cannot supersede a judge's obligation to follow the law.

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

A judge's knowledge, education, training, and ability to treat all persons with respect and dignity are vital to proper performance of his or her duties. However, a judge's personal preferences should not impact his or her decision-making process. A judge must always faithfully apply the law.

5. 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?

No.

6. 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?

The right to jury trial is a bedrock principle in the American judicial system. The Declaration of Independence listed denial of the right to jury trial as one of the grievances against England that justified separation, and the Constitution enshrines the right to jury trial in both criminal and civil cases. U.S. Const. Amend. V, VI, VII. The role of the jury is to decide the facts of the case and, in so doing, serve as a check on the power of government.

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

Preservation of the right to jury as provided under the Constitution should always be a concern for the courts. *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 501 (1959) ("Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury should be scrutinized with the utmost care."). I will apply Supreme Court and Fifth Circuit precedent regarding the scope of the Seventh Amendment right to a jury if confirmed.

- 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?

See response to Question 6(b).

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

The Supreme Court has addressed this issue in *Whole Woman's Health v. Hellerstedt* and other cases. In *Whole Woman's Health*, the Court held that courts "must review legislative 'factfinding under a deferential standard'" but not give them "dispositive weight." 136 S. Ct. 2292, 2310 (2016). I will apply this and all other Supreme Court and Fifth Circuit

precedent addressing this issue if confirmed.

8. 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.
- ii. Determining whether the seminar is supported by private or otherwise anonymous sources.
- iii. Determining whether any of the funding sources for the seminar are engaged in litigation or political advocacy.
- iv. Determining whether the seminar targets a narrow audience of incoming or current judicial employees or judges.
- v. 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.

If confirmed, I commit to comply with the Code of Judicial Conduct, including the obligation to avoid impropriety or the appearance of impropriety. I will evaluate my participation in any activity to ensure compliance with my ethical and legal obligations. If I have any question about whether an activity complies with the Code of Judicial Conduct I will consult with the ethics attorneys at the Administrative Office of the U.S. Courts.

- 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?

See response to Question 8(b).

**Nomination of David Cleveland Joseph, to be United States District Court Judge
for the Western District of Louisiana
Questions for the Record
Submitted January 15, 2020**

QUESTIONS FROM SENATOR COONS

1. With respect to substantive due process, what factors do you look to when a case requires you to determine whether a right is fundamental and protected under the Fourteenth Amendment?

I would look to the Supreme Court and the Fifth Circuit for the applicable framework. See, e.g., *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

- a. Would you consider whether the right is expressly enumerated in the Constitution?

Yes, the Supreme Court has considered that factor.

- b. Would you consider whether the right is deeply rooted in this nation's history and tradition? If so, what types of sources would you consult to determine whether a right is deeply rooted in this nation's history and tradition?

Yes. Please see my response to Question 1.

- c. Would you consider whether the right has previously been recognized by Supreme Court or circuit precedent? What about the precedent of any court of appeals?

Yes I would consider whether the right has previously been recognized by the Supreme Court or circuit courts. As to the second question, as a district court judge, I would follow all binding Supreme Court and Fifth Circuit precedent, and in the absence of any controlling precedent, I would look to the precedent of other circuit courts for guidance.

- d. Would you consider whether a similar right has previously been recognized by Supreme Court or circuit precedent? What about whether a similar right has been recognized by any court of appeals?

Yes.

- e. Would you consider whether the right is central to "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life"? See *Planned Parenthood v. Casey*, 505 U.S. 833, 581 (1992); *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (quoting *Casey*).

As a district court judge, I would follow all binding Supreme Court and Fifth Circuit precedent, including *Lawrence* and *Casey*.

f. What other factors would you consider?

Please refer to my response to Question 1.

2. Does the Fourteenth Amendment's promise of "equal protection" guarantee equality across race and gender, or does it only require racial equality?

The Supreme Court has applied the Equal Protection Clause to race-based classifications and to gender-based classifications. *See, e.g., United States v. Virginia*, 518 U.S. 515 (1996) (gender-based classification); *Palmore v. Sidoti*, 466 U.S. 429 (1984) (race-based classification); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (gender-based classification).

a. If you conclude that it does require gender equality under the law, how do you respond to the argument that the Fourteenth Amendment was passed to address certain forms of racial inequality during Reconstruction, and thus was not intended to create a new protection against gender discrimination?

The Supreme Court has addressed the proper means for interpreting and applying the Fourteenth Amendment. As a district court judge, I would follow all binding Supreme Court and Fifth Circuit precedent regarding the Equal Protection Clause.

b. If you conclude that the Fourteenth Amendment has always required equal treatment of men and women, as some originalists contend, why was it not until 1996, in *United States v. Virginia*, 518 U.S. 515 (1996), that states were required to provide the same educational opportunities to men and women?

The Supreme Court has recognized that the Equal Protection Clause applies to gender-based classifications. *See United States v. Virginia; Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982).

c. Does the Fourteenth Amendment require that states treat gay and lesbian couples the same as heterosexual couples? Why or why not?

In *Obergefell v. Hodges*, the Supreme Court held that same-sex couples be afforded the right to marry "on the same terms as accorded to couples of the opposite sex." 135 S. Ct. 2584, 2607 (2015). As a district court judge, I would follow all binding Supreme Court and Fifth Circuit precedent regarding the Fourteenth Amendment.

d. Does the Fourteenth Amendment require that states treat transgender people the same as those who are not transgender? Why or why not?

Because there may be litigation pertaining to this issue, I must refrain from further responding to this question pursuant to Canon 3(A)(6) of the Code of Conduct for United States Judges, which directs that "[a] judge should not make public comment on the merits of a matter pending or impending in any court." See also Canons 2 and

5, Code of Conduct for United States Judges.

3. Do you agree that there is a constitutional right to privacy that protects a woman's right to use contraceptives?

The Supreme Court found a right for married couples to use contraceptives in *Griswold v. Connecticut*, 381 U.S. 479 (1965). Subsequently, in *Eisenstadt v. Baird*, 405 U.S. 438 (1972), the Supreme Court overturned a conviction under a law banning the distribution of contraceptives, without regard to marital status. As a district court judge, I would follow all binding Supreme Court and Fifth Circuit precedent in this area.

- a. Do you agree that there is a constitutional right to privacy that protects a woman's right to obtain an abortion?

The Supreme Court has recognized such a right. *See, e.g., Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016); *Casey v. Planned Parenthood of Southeastern Pennsylvania*, 505 U.S. 833 (1992); *Roe v. Wade*, 410 U.S. 113 (1973). As a district court judge, I would follow all binding Supreme Court and Fifth Circuit precedent in this area.

- b. Do you agree that there is a constitutional right to privacy that protects intimate relations between two consenting adults, regardless of their sexes or genders?

In *Lawrence v. Texas*, 539 U.S. 558 (2003), the Supreme Court struck down a state criminal law based on the liberty interest protected by the Due Process Clause for "two adults who, with full and mutual consent from each other engaged in sexual practices. . . ." *Id.* at 578. As a district court judge, I would follow all binding Supreme Court and Fifth Circuit precedent in this area.

- c. If you do not agree with any of the above, please explain whether these rights are protected or not and which constitutional rights or provisions encompass them.

Please see my responses to Questions 3, 3(a), and 3(b).

4. In *United States v. Virginia*, 518 U.S. 515, 536 (1996), the Court explained that in 1839, when the Virginia Military Institute was established, "[h]igher education at the time was considered dangerous for women," a view widely rejected today. In *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600-01 (2015), the Court reasoned, "As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. . . . Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser." This conclusion rejects arguments made by campaigns to prohibit same-sex marriage based on the purported negative impact of such marriages on children.

- a. When is it appropriate to consider evidence that sheds light on our changing understanding of society?

As a district court judge, I would perform my duty to apply all binding Supreme Court and Fifth Circuit precedent. I would consider such evidence when precedent dictates.

- b. What is the role of sociology, scientific evidence, and data in judicial analysis?

Under Rule 702 of the Federal Rules of Evidence, as well as applicable precedent pertaining to the qualifications of expert witnesses, expert opinions from these disciplines may be admissible into evidence.

5. In the Supreme Court's *Obergefell* opinion, Justice Kennedy explained, "If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied. This Court has rejected that approach, both with respect to the right to marry and the rights of gays and lesbians."

- a. Do you agree that after *Obergefell*, history and tradition should not limit the rights afforded to LGBT individuals?

Because there may be litigation implicating this issue, I should not respond to this question pursuant to Canon 3(A)(6) of the Code of Conduct for United States Judges, which directs that "[a] judge should not make public comment on the merits of a matter pending or impending in any court." *See also* Canons 2 and 5, Code of Conduct for United States Judges.

- b. When is it appropriate to apply Justice Kennedy's formulation of substantive due process?

I would look to the Supreme Court and the Fifth Circuit for the applicable framework. *See, e.g., Washington v. Glucksberg*, 521 U.S. 702 (1997); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

6. In his opinion for the unanimous Court in *Brown v. Board of Education*, 347 U.S. 483 (1954), Chief Justice Warren wrote that although the "circumstances surrounding the adoption of the Fourteenth Amendment in 1868 . . . cast some light" on the amendment's original meaning, "it is not enough to resolve the problem with which we are faced. At best, they are inconclusive We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws." 347 U.S. at 489, 490-93.

- a. Do you consider *Brown* to be consistent with originalism even though the Court in *Brown* explicitly rejected the notion that the original meaning of the Fourteenth Amendment was dispositive or even conclusively supportive?

This is a topic of academic debate among legal scholars. As a district court judge, I would follow all binding Supreme Court and Fifth Circuit precedent regarding *Brown* and its progeny.

- b. How do you respond to the criticism of originalism that terms like “‘the freedom of speech,’ or ‘equal protection,’ or ‘due process of law’ are not precise or self-defining”? Robert Post & Reva Siegel, *Democratic Constitutionalism*, National Constitution Center, <https://constitutioncenter.org/interactive-constitution/white-papers/democratic-constitutionalism> (last visited Jan 13, 2020).

Please see my response to Question 6.a.

- c. Should the public’s understanding of a constitutional provision’s meaning at the time of its adoption ever be dispositive when interpreting that constitutional provision today?

I believe the original public meaning of a provision is a valid consideration. However, I will fulfill my duty to observe and apply all binding Supreme Court and Fifth Circuit precedent regardless of whether that precedent is based on the original public meaning of a constitutional provision.

- d. Does the public’s original understanding of the scope of a constitutional provision constrain its application decades later?

Please see my response to Question 6.c.

- e. What sources would you employ to discern the contours of a constitutional provision?

I would observe and apply all relevant Supreme Court and Fifth Circuit precedent that identifies the appropriate sources to use to discern the contours of a constitutional provision.

7. In a speech that you gave in August 2019, you praised the conditions at an Immigration and Customs Enforcement detention facility. However, the Department of Homeland Security Inspector General had criticized the conditions at that same facility only a couple of months earlier, in June 2019.

- a. Were you aware of the Inspector General’s report when you praised the facility?

I do not recall being aware of the referenced report.

- b. How do you reconcile your assessment with the Inspector General’s report?

I visited the ICE detention facility in Jena, Louisiana in my role as United States Attorney for the Western District of Louisiana, wherein this and other ICE detention facilities are located. My purpose in visiting the facility was to gain a better understanding of its operations and to ensure that the detainees were being treated in a humane manner

consistent with the law. My office regularly prosecutes civil rights cases arising from abuse of inmates by correctional officers.

8. In October 2018, you announced an election fraud prevention program. You reportedly stated, "It is imperative that those who have specific information about discrimination or election fraud make that information available immediately to my office, the FBI or the Department's Civil Rights Division."

a. Did your office receive any complaints about discrimination? If so, what measures did your office take in response?

No, my office did not receive any reports of discrimination or other issues pertaining to voter access.

b. Did your office receive any complaints about election fraud? If so, what measures did your office take in response?

No, my office did not receive any reports of election fraud.

c. A 2014 report in the *Washington Post* found that since 2000, there were only 31 credible allegations of voter impersonation, during a period in which there were one billion ballots cast. In your experience as a U.S. Attorney and as an Assistant U.S. Attorney, have you ever encountered any significant examples of voter fraud or impersonation?

Although I am aware that my office has handled such matters in the past, I have not handled or otherwise encountered any significant cases of voter fraud or impersonation during my time at the Department of Justice.

**Questions for the Record for David C. Joseph
From Senator Mazie Hirono**

1. Prior nominees before the Committee have spoken about the importance of training to help judges identify their implicit biases.

- a. **Do you agree that training on implicit bias is important for judges to have?**

Judges are required to preside over and decide cases without regard to bias, prejudice, or preference. Training to help judges understand and fulfill this obligation is important.

- b. **Have you ever taken such training?**

No, I have not taken training specific to implicit bias, but have read studies and articles pertaining to this issue.

- c. **If confirmed, do you commit to taking training on implicit bias?**

If confirmed, I look forward to participating in training opportunities that will assist me in performing my job to the best of my ability. I believe implicit bias training would be beneficial.

2. In a speech to the Shreveport Lions Club, you identified immigration enforcement as one of your priorities as U.S. Attorney. You argued that “[i]f we allow those who immigrate to our shores to ignore our laws as their first act, we are doing great damage to our country. Those seeking entry into the United States must pledge fidelity to the law, not break them. If they do, they will face criminal prosecution by our office.”

- a. **Is it your view that those who are seeking asylum in the United States and crossing the U.S. border without first obtaining documentation is “ignoring our laws as their first act”? If so, do you believe these asylum seekers should be criminally prosecuted?**

My office has focused its resources in this area on the prosecution of unlawful immigrants with substantial criminal histories, multiple prior deportations, or both. Because there may be litigation implicating this issue as it pertains to asylum, I should not further respond to this question pursuant to Canon 3(A)(6) of the Code of Conduct for United States Judges, which directs that “[a] judge should not make public comment on the merits of a matter pending or impending in any court.” *See also* Canons 2 and 5, Code of Conduct for United States Judges.

- b. **Please explain what you meant by the “great damage” that is being done to our country by not criminally prosecuting every immigrant who crosses the border without authorization.**

Immediately prior to the quoted remarks, I stated that “[t]he promise of the American

Dream has brought immigrants from across the globe seeking life, liberty, and the pursuit of happiness. Those immigrants have contributed greatly to our country and have made it what it is today. But the foundation of the success of America, and what allows our democracy to flourish, is our shared commitment to the rule of law.” I believe that supremacy of the Rule of Law is a bedrock principle in our country and that we all must endeavor to follow the law. In the area of immigration, my office focuses its resources on the prosecution of unlawful immigrants with substantial criminal histories, multiple prior deportations, or who engage in identity theft. My office also prosecutes those who profit from the smuggling, trafficking, and harboring of unlawful immigrants.

Nomination of David Cleveland Joseph
United States District Court for the Western District of Louisiana
Questions for the Record
Submitted January 15, 2020

QUESTIONS FROM SENATOR BOOKER

1. In a radio interview, you responded to a question about political resistance to ‘harsh, unfair imprisonment.’ You stated that, “It’s [the criminal justice system] a pendulum, it goes back and forth. We saw in the Seventies the same thing happen that some people, some political types, thought that we needed to lighten up prison sentences and focus more on rehabilitation of the inmates.”¹

- a. Where do you believe the “pendulum” of the criminal justice system should be on a spectrum from “harsh, unfair imprisonment” to one that emphasizes “rehabilitation of the inmates”?

I believe that all of the factors listed in 18 U.S.C. 3553(a) are valid considerations in crafting an appropriate sentence. Certainly, I do not believe that a criminal sentence should ever be harsher than necessary.

- b. Please describe the role you believe rehabilitation should play in federal sentencing policy and that will influence your role as a federal judge in criminal cases.

18 U.S.C. 3553(a) provides that in considering an appropriate sentence, a judge should take into account a defendant’s need for educational or vocational training, medical care, or other correctional treatment in the most effective manner.

2. In a 2019 speech, you spoke about the prevalence of civilian held firearms. In your remarks, you stated, “we need to get better at determining ways to identify armed offenders. . . . My strategy in reducing violent crime is simple and effective: I want to take guns out of the hands of convicted felons and take armed drug dealers out of our neighborhoods and into federal prison. . . .”² As U.S. Attorney for the Western District of Louisiana, what strategies have you employed to ensure that firearms do not fall into the wrong hands?

As United States Attorney, one of my primary goals is to reduce the prevalence of firearm violence in neighborhoods and communities across Louisiana. We have focused on identifying and prosecuting felons and other prohibited persons that we deem to be most likely to commit violence based on historical data. We have also worked with state and local law enforcement to identify and federally prosecute criminal gangs and organizations that employ violence to further their criminal enterprise. Likewise, we have increased our prosecution of prohibited persons that attempt to illicitly obtain firearms, either through lying on an ATF Form 4473 in order to purchase a firearm or using a “straw purchaser” to

¹ *Is Feds Crime Reduction Program Working in Shreveport?*, KEEL 101.7FM & 710AM (July 18, 2018), <https://www.youtube.com/watch?v=J19cpktwdQI&feature=youtu.be>.

² Joseph Speech, Welcoming Remarks, PSN Training, U.S. Department of Justice (Shreveport, LA) (Aug. 5, 2019) (SJQ Attachment 12(d) at pp. 44-49).

purchase the firearm on their behalf. Finally, we have engaged in public relations efforts to, among other things, inform the public that felons with firearms will be prosecuted federally and to ask the public to be more conscious about leaving firearms in places where they can easily be stolen.

3. During your time as U.S. Attorney, you stated on multiple occasions that one of your top priorities is the enforcement of immigration laws. Specifically, you said, “We must enforce our immigration laws so we can deport dangerous aliens and ensure everybody working here is paying into the system by paying employment income taxes, which is a top priority of this office. . . . Failure to enforce the laws in the past has put our nation at risk of crime, violence and even terrorism.”³

- a. To what extent do you believe immigrants continue to put our nation at risk of crime, violence, and even terrorism?

As I stated in the referenced speech, “[t]he promise of the American Dream has brought immigrants from across the globe seeking life, liberty, and the pursuit of happiness. Those immigrants have contributed greatly to our country and have made it what it is today. But the foundation of the success of America, and what allows our democracy to flourish, is our shared commitment to the rule of law.” I believe that supremacy of the Rule of Law is a bedrock principle in our country and that we all must endeavor to follow the law. In the area of immigration, my office focuses its resources on the prosecution of unlawful immigrants with substantial criminal histories, multiple prior deportations, or who engage in identity theft. My office also prosecutes those who profit from the smuggling, trafficking, and harboring of unlawful immigrants.

- b. Do you believe there is a nexus between immigration and crime? If so, please explain your answer.

I do not know of a nexus between immigration and crime.

- c. Do you believe that undocumented immigrants are prone to committing crimes?

I believe the majority of immigrants, including unlawful immigrants, come to the United States to find a better life for themselves and their families. I do not have reason to believe that immigrants are more prone to commit crimes than other segments of our population.

- d. According to an analysis done by the Cato Institute—a libertarian think tank—immigrants are less crime prone than native-born Americans.⁴ Were you aware of this analysis or research when you made the statement referenced above? If not, are you willing to revise your statement in light of this research?

³ Joseph Speech, North Shreveport Lions Club (Shreveport, LA) (Aug. 15, 2019) (SJQ Attachment 12(d) at pp. 28, 32-33).

⁴ Alex Nowrasteh, *Immigration and Crime – What the Research Says*, CATO INST. (July 14, 2015), <https://www.cato.org/blog/immigration-crime-what-research-says>.

I have not conducted research on this issue, but would generally refer you to Questions 3 (a) – (c).

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

As a district court judge, my first and foremost obligation would be not to any specific interpretative method, but to binding precedent. Beyond that, the Supreme Court has indicated that looking to the original public meaning of the terms in the Constitution is a valid method of analysis in some cases.

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

As stated above, as a district court judge, my first and foremost obligation would be not to any interpretive method, but to binding precedent on the meaning of a given statutory term. Beyond that, the Supreme Court has indicated that looking to the text and structure of a statute is a valid method of analysis in some cases.

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 made clear that when a statute is ambiguous, it is permissible for a court to consider legislative history, among other factors, in interpreting the statute.

- 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, I would do so consistent with my response to Question 6.a.

7. Do you believe that judicial restraint is an important value for a district judge to consider in deciding a case? If so, what do you understand judicial restraint to mean?

I view judicial restraint as deciding a case in a manner that resolves the case among the litigants, but does not otherwise resolve issues not squarely before the court. I believe that judicial restraint is an important value for all judges to possess.

- a. The Supreme Court's decision in *District of Columbia v. Heller* dramatically changed the Court's longstanding interpretation of the Second Amendment.⁵ Was that decision

⁵ 554 U.S. 570 (2008).

guided by the principle of judicial restraint?

Heller is binding Supreme Court precedent, and, if confirmed as a district court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Fifth Circuit precedent. As a district court nominee, it is, as a general rule, inappropriate for me to opine on the correctness of Supreme Court decisions.

- b. The Supreme Court’s decision in *Citizens United v. FEC* opened the floodgates to big money in politics.⁶ Was that decision guided by the principle of judicial restraint?

Citizens United is binding Supreme Court precedent, and, if confirmed as a district court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Fifth Circuit precedent. As a district court nominee, it is, as a general rule, inappropriate for me to opine on the correctness of Supreme Court decisions, and for that reason, I respectfully refrain from further responding to this question.

- c. The Supreme Court’s decision in *Shelby County v. Holder* gutted Section 5 of the Voting Rights Act.⁷ Was that decision guided by the principle of judicial restraint?

Shelby County is binding Supreme Court precedent, and as a district court judge, I would fulfill my duty to observe and apply all binding Supreme Court and Fifth Circuit precedent. As a district court judge, it is, as a general rule, inappropriate for me to opine on the correctness of Supreme Court decisions.

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.⁸ 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.⁹

- a. As U.S. Attorney for the Western District of Louisiana, you announced an “election fraud” prevention program leading up to the 2018 election.¹⁰ Prior to the election, you said, “Louisiana hasn’t seen huge numbers of election fraud allegations, but with today’s political climate, voters need to be aware.”¹¹ How many instances of voter

⁶ 558 U.S. 310 (2010).

⁷ 570 U.S. 529 (2013).

⁸ *Debunking the Voter Fraud Myth*, BRENNAN CTR. FOR JUSTICE (Jan. 31, 2017), <https://www.brennancenter.org/analysis/debunking-voter-fraud-myth>.

⁹ *Id.*

¹⁰ *U.S. Attorney David Joseph implements Election Day program to prevent fraud, protect voting rights*, KALB (Oct. 30, 2018), <https://www.kalb.com/content/news/US-Attorney-David-Joseph-implements-Election-Day-program-to-prevent-fraud-protect-voting-rights-499020941.html>.

¹¹ *Voters warned of election fraud before heading to the polls on November 6th*, KLFY NEWS 10 (Oct. 30, 2018), <https://www.klfy.com/news/voters-warned-of-election-fraud-before-heading-to-the-polls-on-november-6th/>.

fraud did your office prosecute following the 2018 election?

My office has not prosecuted any cases of voter fraud in relation to the 2018 federal election. The election monitoring done by my office and other components of the Department of Justice was focused primarily on ensuring access to the polls for voters and encouraging citizens to report any irregularities.

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

I have not studied this issue in depth. Because there may be litigation implicating this issue, as a sitting judge, I respectfully refrain from further responding pursuant to Canon 3(A)(6) of the Code of Conduct for United States Judges, which directs that “[a] judge should not make public comment on the merits of a matter pending or impending in any court.” See also Canons 2 and 5, Code of Conduct for United States Judges.

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

Please see my response to Question 8.b.

- d. 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.

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.¹² Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.¹³ 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.¹⁴ In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.¹⁵

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

I believe that implicit bias can have an effect on the criminal justice system.

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

¹² 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>.

¹³ *Id.*

¹⁴ 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>.

¹⁵ *Id.*

Yes, I believe that certain racial and ethnic groups are disproportionately represented in prison.

- 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.

No, I have not taken training specific to implicit bias, but have read studies and articles pertaining to this issue.

- 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 longer¹⁶. Why do you think that is the case?

Those disparities concern me. I look forward to studying this issue in greater depth and to taking every step necessary to ensure that defendants are treated fairly by everybody in the criminal justice system, without regard to such defendants' racial or ethnic background.

- 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.¹⁷ Why do you think that is the case?

Those disparities concern me, and I look forward to studying this issue in greater depth and to taking every step necessary to ensure that defendants are treated fairly by everybody in the criminal justice system, without regard to such defendants' racial or ethnic background.

- f. What role do you think federal judges, who review difficult, complex criminal cases, can play in addressing implicit racial bias in our criminal justice system?

In addition to ensuring the correctness of the sentencing guidelines range and the rulings on any departures, appellate judges can review the record to ensure a meaningful evaluation of statutory factors, *see* 18 U.S.C. § 3553(a), that consider the individual circumstances of the defendant to ensure that the sentence is "sufficient, but not greater than necessary."

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.¹⁸ In the 10 states that

¹⁶ 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.

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

¹⁸ 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>.

saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.¹⁹

- 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 depth.

- 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.

See my response to Question 11.a.

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*²⁰ was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

Yes, I believe that *Brown v. Board of Education* was correctly decided. Do you believe that *Plessy v. Ferguson*²¹ was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

Plessy v. Ferguson institutionalized segregation and racism, which are abhorrent to the Constitution and to my concept of the equality of everybody under the law. In *Brown v. Board of Education*, the Supreme Court correctly ruled in a unanimous decision that *Plessy* was not correctly decided.

14. 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.

15. 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"

¹⁹ *Id.*

²⁰ 347 U.S. 483 (1954).

²¹ 163 U.S. 537 (1896).

in presiding over civil fraud lawsuits against Trump University because he was “of Mexican heritage.”²² Do you agree with President Trump’s view that a judge’s race or ethnicity can be a basis for recusal or disqualification?

The decision to recuse or disqualify is primarily one for the presiding judge to make himself or herself, *see* 28 U.S.C. § 455. In my experience, I am not aware of an instance in which a judge was recused or disqualified based on his or her race or ethnicity.

16. 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.”²³ 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 explained that “once an alien enters the country, the legal circumstance changes, for 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. As a district court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Fifth Circuit precedent, including *Zadvydas*.

²² 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>.

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

Questions for the Record from Senator Kamala D. Harris
Submitted January 15, 2020
For the Nomination of:

David Cleveland Joseph, 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?**

A district court judge must make an individualized assessment with regard to sentencing based on the facts of each case. Generally, a sentence should be sufficient, but not greater than necessary, to comply with the purposes set forth in 18 U.S.C. § 3553(a). As such, I would take into consideration any relevant materials, including the recommendation of the United States Probation Office, the sentencing memoranda and evidence submitted by the parties, letters submitted on behalf of the defendant, any victim impact statements, and any allocution of the defendant. I would also give substantial weight to the United States Sentencing Guidelines (USSG) and consider the statutory factors in 18 U.S.C. § 3553(a).

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

I would follow the steps outlined in my response to Question 1(a). I would also rely upon the experience gained through participation as counsel in numerous sentencing hearings, both as a prosecutor and defense attorney. In addition, I would review available sentencing data for similarly situated defendants.

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

The Sentencing Guidelines are discretionary; however, a district court judge should carefully consider the advisory guideline calculation in every case. A district judge may determine that a departure from the guidelines is warranted based on the facts and circumstances presented in a particular case, such as based on a defendant's criminal history or an aggravating or mitigating factor not adequately taken into consideration by the USSG.

- 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.¹

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

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

Congress has established certain mandatory minimum sentencing requirements for certain crimes, and if confirmed, I would follow the law established by Congress, regardless of my personal views. As a judicial nominee, I must respectfully refrain from responding to this question which is asking for my personal views on a matter of policy reserved for Congress.

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

See my response to Question 1(d)(i).

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

See my response to Question 1(d)(i).

iv. Former-Judge John Gleeson has criticized mandatory minimums in various opinions he has authored, and has taken proactive efforts to remedy unjust sentences that result from mandatory minimums.² **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 do not believe it is appropriate for me to commit to doing so at this time.

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

Charging decisions are entrusted to the Department of Justice. To the extent applicable case law and ethical rules permit me to discuss charging policies with members of the Department of Justice, I would consider doing so where I believe the policy being implemented undermines confidence in the criminal justice system.

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

See my response to Question 1(d)(iv)(2).

² 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>

- 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?**

If confirmed, I would consider all sentencing options permitted by statute and in accord with the USSG, including alternatives to incarceration in the appropriate situations.

- 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.

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

Yes, I am aware of the statistics from many sources, including from the United States Sentencing Commission, indicating that the rate of incarceration is higher for black men than for white men and that sentences imposed on black men are longer than sentences imposed on white men. If confirmed, I will do everything in my power to guard against racial disparities in cases that come before me. I commit that all persons that come into my courtroom will be treated fairly, respectfully, and equally.

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

- a. **Do you believe 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?**

As I do now in my position as U.S. Attorney, I intend to make staffing decisions on a case-by-case basis. In doing so, I will continue to look for opportunities to hire and promote qualified minorities and women.