

**Nomination of Virgil Madden
Commissioner of the United States Parole Commission
Questions for the
Record Submitted:
March 12, 2019**

QUESTIONS FROM SENATOR FEINSTEIN

1. The majority of offenders who come before the U.S. Parole Commission have been convicted for violating the District of Columbia Code. The Parole Commission maintains jurisdiction over all District of Columbia Code offenders and has decision-making authority for both grants of parole and revocations of parole and supervised released for those prisoners. For each of the cases under its jurisdiction, the Parole Commission is responsible for making determinations for initial conditions of supervision; managing an offender's risk in the community; modifying supervised release conditions; making early discharges from supervision; issuing warrants or summonses for violations of supervised release conditions; and issuing revocations of release for any offenders released on parole or mandatory release supervision.
 - a. You have spent your entire career in the state of Indiana, and your correctional experience is at the state level. How are you planning to use that experience as you consider parole decisions for offenders in the District of Columbia?

RESPONSE: My experience at the state level has provided me with an understanding of the criminal justice system's structure and an understanding of how parole and supervising officials play a vital role in that system. Although there are some differences in the statutory language, the equities and considerations that factor into parole decisions and release revocations are based on the same principles. The determination to grant an offender the opportunity for reformation stems from their promise to follow the rules, but ultimately must be based on the facts and reports provided from the hearing officers and other reporting entities. If confirmed, I am confident that I will be able to make the appropriate and necessary determinations based on the facts and circumstances of each individual case under the Commission's jurisdiction.

- b. Do you believe that having localized experience is necessary for a Commissioner on the Parole Commission?

RESPONSE: I do not believe having localized experience is a necessary prerequisite for serving as a Commissioner on the U.S. Parole Commission. I believe that the outcome of every case under the Commission's jurisdiction should be based solely on the underlying facts and circumstances, and the applicable law. Parole is defined as a temporary release of a prisoner, who agrees and promises to certain conditions, prior to the completion of the offender's maximum sentence. Thus, geography is not relevant in determining parole or release revocation recommendations or decisions.

- c. Please speak to your federal corrections experience, specifically any professional experience you have interacting with the Federal Bureau of Prisons.

RESPONSE: As indicated on my disclosure forms, all of my experience is at the county and state levels. This experience provides me with the foundation to quickly adapt to the structural processes of the federal system and the USPC manual.

- 2. The National Capital Revitalization and Self-Government Improvement Act of 1997 (D.C. Revitalization Act) transferred control of the District of Columbia's criminal law enforcement system to the federal government. Among other changes, the D.C. Revitalization Act abolished the D.C. Parole Board and transferred its duties to the Parole Commission. The District of Columbia is unique in that the federal government provides a local function when it determines the parole and supervised release outcomes for D.C. residents.

- a. If confirmed, do you see a role for District of Columbia government to play in the parole and supervised release decisions impacting its citizens?

RESPONSE: If confirmed, I will work with the Court Services and Offender Supervision Agency (CSOSA) and the District of Columbia government in parole and supervised release decisions as appropriate. For example, for offenders sentenced under the District of Columbia (D.C.) Code, forfeiture of all "street time" is mandatory, regardless of the basis of revocation (See *Notes and Procedures in the USPC Manual*, 2.52-01). In such cases, I would coordinate with local law enforcement, local D.C. government, and CSOSA to ensure compliance with the regulations.

- b. In some instances, you will encounter offenders who were sentenced when the D.C. Parole Board was still in existence. Do you believe that factor should be weighed in your final determination? Why or why not?

RESPONSE: It is my understanding that the Parole Commission follows different guidelines depending on when the underlying offense was committed (See *Parole Practice Manual for the District of Columbia 2018*, page 10). Accordingly, offenders who were sentenced when the D.C. Parole Board was still in existence, prior to August 5, 1998, follow different guidelines than offenses committed after this date. I will commit to following the appropriate guidelines and court rulings, while making every determination based on the underlying facts and individual circumstances.

- 3. Commissioners on the Parole Commission exercise a great deal of discretion. A hearing examiner, who attends the actual hearing, provides the commission with a recommendation based on the facts of each case. A commissioner may choose to go against the recommendation of the hearing examiner.

- a. Would you ever overturn a determination made by a hearing examiner without seeing the witness firsthand or talking with the offender whose liberty interest is at stake?

RESPONSE: Your question raises a hypothetical that would entirely depend on the underlying facts and circumstances surrounding the determination. Additionally, my decision would depend on the circumstances of the parolee / releasee and the determination of his or her mental competency made by either the hearing examiner, hearing panel, or other official, such as a U.S. Probation Officer, designated by the Regional Commissioner.

- b. It is possible for offenders to have their parole or supervised release revoked based on a charge that is ultimately dismissed or a charge for which the offender is acquitted. If confirmed, would you pursue a revocation in cases where there is a dismissal or acquittal? Why or why not?

RESPONSE: Pursuant to Section 2.98 of Title 28 of the Code of Federal Regulations, a parolee or releasee may be requested to appear for a probable cause or local revocation hearing if the parolee or releasee is alleged to have violated the conditions of his or her release. The conduct that is the basis of the revocation may or may not result in a criminal conviction. If confirmed, I would weigh all of the relevant facts in determining whether revocation is appropriate under the circumstances, including whether the alleged violating conduct resulted in a criminal conviction. Additionally, I would consider the severity of the offense and the characteristics of the parolee, as with any parole assessment.

- 4. As you know, the Parole Commission is comprised of up to five commissioners. The Parole Commission, however, has proposed lowering the number of commissioners from five to three. In addition, last year, the reauthorization for Parole Commission was only extended for two years. What is your vision for the future of the Parole Commission?

RESPONSE: The United States Parole Commission's mission is "to promote public safety and strive for justice and fairness in the exercise of its authority to release and supervise offenders under its jurisdiction." Further, the vision of the U.S. Parole Commission is to "build an organization that balances justice through fair and equal treatment with dignity and respect for offenders, staff, and the community we serve."

My vision is to follow the laws as enacted by Congress, and work to achieve the mission and vision of the Commission by promoting public safety, reformation, and adherence to blind justice.

- 5. What improvements, if any, would you bring to the Parole Commission as a commissioner?

RESPONSE: As I have not served on the Commission, I cannot speak to what improvements could be made. However, I would be honored to bring my experience in both judicial and correctional administration to the Parole Commission. If confirmed, I will be committed to rendering decisions that are fair and made only after taking in and studying all of the facts presented. If I am fortunate enough to be

confirmed and serve on the Commission, I will absolutely suggest ideas for improvement when warranted.

QUESTIONS FOR THE RECORD FROM
SENATOR MAZIE K. HIRONO

1. As part of my responsibility as a member of the Senate Judiciary Committee and to ensure the fitness of nominees, I am asking nominees to answer the following two questions:
 - a. Since you became a legal adult, have you ever made unwanted requests for sexual favors, or committed any verbal or physical harassment or assault of a sexual nature?

RESPONSE: No. As disclosed in my response to Question 4 of the Confidential Portion of my Senate Judiciary Questionnaire, I was accused of verbal sexual harassment in the mid-1990s. The allegations were investigated and the Presiding Judge found no merit to the complaint.

- b. Have you ever faced discipline, or entered into a settlement related to this kind of conduct?

RESPONSE: As disclosed in my response to Question 4 of the Confidential Portion of my Senate Judiciary Questionnaire, I was instructed to attend a sensitivity and sexual harassment training class in connection with the above-described accusations. I completed the course as instructed.

QUESTIONS FOR THE RECORD
FROM SENATOR BOOKER

1. 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.¹ Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.² 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.³ In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.⁴

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

RESPONSE: I am not familiar with the Brookings Institution study you cite; however, I believe that the statistics cited demonstrate that people of color are disproportionately represented in jails and prisons.

- b. 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.

RESPONSE: As I have spent the majority of my career in Court Administration, Corrections, and Parole, I am personally aware of the disparity between different races in the criminal justice system. However, I have not studied the specific issue of implicit racial bias. If confirmed, I will base every decision on the facts, underlying circumstances, and the law.

2. According to a report by the United States Sentencing Commission, black men who commit the same crimes as white men receive federal prison sentences that are an average of 19.1 percent longer.⁵ Why do you think that is the case?
 - a. 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

¹ 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>.

² *Id.*

³ 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>.

⁴ *Id.*

⁵ 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.

minimum sentences.⁶ Why do you think that is the case?

RESPONSE: I have not reviewed the United States Sentencing Commission report, thus, it would be inappropriate to speculate. However, I do believe that understanding societal factors is imperative to serve the criminal justice system constructively. Our society must treat individuals as such, and each sentencing and parole decision should be made without regard for the color of the person's skin.

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

RESPONSE: I have not studied this matter in detail and thus, it would be inappropriate for me to comment on the role of judges concerning this issue. However, I do believe that each federal appeals judge should examine the facts and take into consideration any racial bias that might have occurred to ensure any such bias does not negatively influence their decisions.

3. 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.⁷ In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.⁸

- 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.

RESPONSE: I have not studied this issue and do not know if there is a direct link between changes in a state's incarcerated population and crime rates. Therefore, I have no basis on which to reach a conclusion.

- 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.

RESPONSE: Please see my response to Question 3a.

4. As Commissioner of the United States Parole Commission, what would you do to ensure

⁶ Sonja B. Starr & M. Marit Rehaavi, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1323 (2014)

⁷ 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>.

⁸ *Id.*

that implicit racial bias does not play a role in our criminal justice system?

RESPONSE: If confirmed as Commissioner, I will review the merits of each case under the Commission's jurisdiction, the underlying facts, and endeavor to ensure that no decision is improperly based upon race, gender, or any other bias.

QUESTIONS FOR THE RECORD FROM
SENATOR KAMALA D. HARRIS

1. The U.S. Parole Commission may grant parole to people within its jurisdiction, in cases where (a) the person has substantially observed the rules of the institution; (b) release would not depreciate the seriousness of the offense or promote disrespect for the law; and (c) release would not jeopardize the public welfare.
 - a. What factors will you consider to determine whether release would “depreciate the seriousness of the offense” or “promote disrespect for the law”?

RESPONSE: If confirmed, as with every parole assessment, I will assess each individual and the underlying crime independently and in adherence with the governing regulations and guidance. Pursuant to the guidelines, this includes a comprehensive assessment based upon the severity of the offense or offenses, as well as of the offender’s characteristics and incarceration experience. Additionally, I will consider any mitigating or aggravating circumstances in each particular case. Only after evaluation and consideration of all relevant facts and circumstances would I be able to determine whether release would “depreciate the seriousness of the offense,” or “promote disrespect for the law.”

- b. What factors will you consider to determine whether release would “jeopardize the public welfare”?

RESPONSE: Determining which factors are appropriate to consider can only occur concurrently with a comprehensive evaluation of the underlying facts and circumstances of the offense and the offender’s characteristics. I can say that, if confirmed, I would look to the severity of the underlying offense and the offender’s record of rehabilitation in order to determine whether release would “jeopardize the public welfare.”

- c. Will you commit to considering evidence of a parole applicant’s rehabilitation?

RESPONSE: If confirmed, I will consider evidence of rehabilitation when doing so would provide a more comprehensive understanding of the level of risk that parole or supervised release would pose to the public. As with any parole assessment, I will consider all of the relevant factors, which includes, amongst other considerations, evidence of an offender’s rehabilitation.

- i. If yes, please explain how you will analyze whether an applicant has been sufficiently rehabilitated to justify release.

RESPONSE: If confirmed, I will consider the parolee’s individual circumstances prior to justifying release. These considerations include their record of superior program achievement while in prison. I will adhere to the Parole Commission’s guidance regarding parole decisions that depart from the recommendation

generated by the Total Guideline Range, which requires a clinical judgment to override the salient factor score.

2. In *Graham v. Florida* (2010), the U.S. Supreme Court held that juvenile offenders could not be sentenced to life without parole for non-homicide offenses. Writing for the majority, Justice Kennedy noted that juveniles are characteristically distinct from adults because they have less maturity, a less developed sense of responsibility, and less formed character. Accordingly, Justice Kennedy concluded that “because juveniles have lessened culpability they are less deserving of the most severe punishments.”

- a. Do you agree with Justice Kennedy’s description of the characteristics of juveniles?

RESPONSE: Most juveniles are less mature than adults are, and in certain situations, juveniles may not fully understand the consequences of their actions. However, I believe that each case must be examined independently and all decisions regarding their sentencing and parole should be based on the underlying facts, circumstances, and pursuant to the law and regulations.

- b. If yes, how will this affect your parole assessment for people who committed crimes as juveniles?

RESPONSE: If confirmed, I will dedicate myself to assessing each individual for parole on the basis of the underlying facts and circumstances, consistent with the relevant law and parole guidelines. Pursuant to the current governing regulations, “youthfulness shall, in itself, be considered as a mitigating factor,” see U.S. Parole Commission Manual § 2.20(h). If confirmed, I will follow the regulations and consider such youthfulness as a mitigating factor when assessing an offender who was under 18 years of age at the time of the current offense.