Senator Chuck Grassley, Ranking Member
Questions for the Record
Michael Nachmanoff
Judicial Nominee to the U.S. District Court for the Eastern District of Virginia

1. **During your hearing you seemed to say that you think the best criminal defense lawyers have prosecutorial experience and vice versa. Please tell me more about why a diversity of legal experiences can make someone a better lawyer.**

   Response: Many of the attorneys I most admire served as both prosecutors and defense attorneys. They served in government and worked in private practice, and most had extensive experience as civil litigators. This diversity of experience helped them develop their skills as trial lawyers and provided them with insight into how to prepare for trial, investigate cases, and communicate effectively with clients, law enforcement agents, and opposing counsel. I learned an extraordinary amount from these attorneys, and I modeled my own career on their experience.

2. **In the context of federal case law, what is super precedent? Which cases, if any, count as super precedent?**

   Response: I am not familiar with the term "super precedent." If confirmed as a District Judge, I would be bound by all precedents of the United States Supreme Court and the Fourth Circuit.

3. **Should law firms undertake the pro bono prosecution of crimes?**

   Response: Throughout my legal career in private practice, as a federal defender, and as a Magistrate Judge, I have never been involved in a case in which a law firm participated in the prosecution of a criminal matter on a pro bono basis. During my tenure in private practice, I prosecuted cases on behalf of the Town of Herndon on a retained basis.

4. **Do you agree with Judge Ketanji Brown Jackson when she said in 2013 that she did not believe in a "living constitution"?**

   Response: I am not aware of this quote or the context in which it was made. I believe that the United States Constitution is an enduring document that has protected our liberties since its founding and that it provides the bedrock principles upon which our government is based. If I am fortunate enough to be confirmed as a District Judge, I will faithfully interpret the Constitution as directed by the binding precedents of the Supreme Court and Fourth Circuit.

5. **Should a judge yield to social pressure when deciding the outcome of cases?**

   Response: No. A judge must decide every case based on the faithful application of the law to the specific facts of the case without regard to the outcome.

6. **Is it possible for private parties—like law firms, retired prosecutors, or retired judges—to prosecute federal criminals in the absence of charges being actively pursued by federal authorities?**

   Response: I have not encountered this issue in private practice, as a federal defender, or as a Magistrate Judge. I do not have an opinion regarding when, if ever, private parties could prosecute federal criminal cases.

7. **The Federalist Society is an organization of conservatives and libertarians dedicated to the rule of law and legal reform. Would you hire a member of the Federalist Society to serve in your chambers as a law clerk?**

   Response: During the six years I have served as a United States Magistrate Judge, I have hired judicial law clerks based upon their intellect, judgment, and character. I consider many factors when evaluating candidates, including their academic accomplishments, recommendations, and writing samples. Membership in an organization is not a factor that would lead me to hire or not hire an otherwise qualified candidate. If confirmed, I would continue to follow the same hiring practices I have used as a Magistrate Judge.

8. **Absent a traditional conflict of interest, should paying clients of a law firm be able to prevent other paying clients from engaging the firm?**

   Response: I have not encountered this issue in private practice, as a federal defender, or as a Magistrate Judge. I do not have an opinion regarding how law firms should address potential conflicts between clients.

9. **Should paying clients be able to influence which pro bono clients engage a law firm?**

   Response: I have not encountered this issue in private practice, as a federal defender, or as a Magistrate Judge. I do not have an opinion regarding how law firms should address efforts by paying clients to influence their decisions regarding pro bono representation of other clients.

10. **As a matter of legal ethics do you agree with the proposition that some civil clients don't deserve representation on account of their identity?**

    Response: No.

11. **Should judicial decisions take into consideration principles of social "equity"?**

    Response: Judicial decisions must be based solely on the specific facts and applicable law of the case or controversy to be resolved. As a Magistrate Judge for the past six years, I have endeavored to faithfully provide equal justice under law in every case over which I preside consistent with my obligations under the Constitution.

12. **Is climate change real?**

Response: Issues related to climate change are the subject of considerable discussion and litigation. As a sitting Magistrate Judge and nominee, it would be inappropriate for me to comment on issues that are being actively litigated or could come before me. *See* Code of Conduct for United States Judges, Canon 3(A)(6) ("A judge should not make public comment on the merits of a matter pending or impending in any court."). If fortunate enough to be confirmed as a District Judge, and the issue of climate change came before me, I would faithfully apply the law to the facts of the specific case and follow all binding Supreme Court and Fourth Circuit precedent.

13. **As a matter of legal ethics do you agree with the proposition that some civil clients don't deserve representation on account of their identity?**

    Response: Please see my response to Question No. 10.

14. **Do you agree with the proposition that some clients do not deserve representation on account of their:**

    a. **Heinous crimes?**
    b. **Political beliefs?**
    c. **Religious beliefs?**

    Response: No.

15. **Should judicial decisions take into consideration principles of social "equity"?**

    Response: Please see my response to Question No. 11.

16. **Do you believe that we should defund police departments? Please explain.**

    Response: The separation of powers requires judges to interpret the law in the context of specific cases or controversies that come before the courts. Policy decisions regarding funding government programs or institutions, whether they involve police departments or other government services, are the responsibility of the legislative branch. Accordingly, it would not be appropriate for me as a sitting Magistrate Judge and nominee to opine on such policy issues. If fortunate enough to be confirmed as a District Judge, I would carefully review the specific facts of any case involving governmental funding decisions and faithfully apply the law following the binding precedents of the Supreme Court and the Fourth Circuit.

17. **Do you believe that local governments should reallocate funds away from police departments to other support services? Please explain.**

    Response: Please see my response to Question No. 16.

18. **Do you believe that the federal government should reallocate funds away from the Department of Justice, specifically, U.S. Attorney's Offices, to provide greater support to the Federal Public Defenders?**

    Response: Please see my response to Question No. 16.

19. **Is a social worker qualified to respond to a domestic violence call where there is an allegation that the aggressor is armed?**

    Response: The separation of powers requires judges to interpret the law in the context of specific cases or controversies that come before the courts. Policy decisions regarding how the government should respond to domestic violence calls are the responsibility of the legislative branch. Accordingly, it would not be appropriate for me as a sitting Magistrate Judge and nominee to opine on such policy issues. If fortunate enough to be confirmed as a District Judge, I would carefully review the specific facts of any case involving the response to a domestic violence call and faithfully apply the law following the binding precedents of the Supreme Court and the Fourth Circuit.

20. **Do you believe legal gun purchases have caused the violent crime spike?**

    Response: I am not familiar with any research or studies on this topic. If fortunate enough to be confirmed as a District Judge, I would carefully review the specific facts of any case involving gun purchases and crimes rates and faithfully apply the law following the binding precedents of the Supreme Court and the Fourth Circuit.

21. **Do rogue gun dealers constitute a substantial factor in the amount of crimes committed with firearms?**

    Response: I am not familiar with any research or studies on this topic. If fortunate enough to be confirmed as a District Judge, I would carefully review the specific facts of any case involving gun dealers and faithfully apply the law following the binding precedents of the Supreme Court and the Fourth Circuit.

22. **Is threatening Supreme Court Justices right or wrong?**

    Response: Threatening a Supreme Court Justice or any judicial official is wrong. It undermines the rule of law and interferes with the fair and impartial administration of justice.

23. **How do you distinguish between "attacks" on a sitting judge and mere criticism of an opinion he or she has issued?**

    Response: There is substantial case law that addresses when speech crosses the line from "mere criticism" to an "attack," which would constitute the criminal offense of threats. Such a determination would depend on the specific language used and the context in which the views were expressed and transmitted.

24. **Do you think the Supreme Court should be expanded?**

Response: As a sitting Magistrate Judge and nominee, it would be improper for me to comment on whether the Supreme Court should be expanded, which is a policy question for the legislative branch of government. This topic is currently the subject of extensive debate and discussion, and it would be inappropriate for me to opine on it.

25. **Should a defendant's personal characteristics influence the punishment he or she receives?**

Response: The factors set forth in 18 U.S.C. § 3553(a) provide the guidance courts must follow in imposing sentences. The "nature and circumstances of the offense and the history and characteristics of the defendant" are among the factors to be considered in determining an appropriate sentence. *See* 18 U.S.C. § 3553(a)(1). However, a defendant's race, sex, national origin, creed, religion, and socio-economic status "are not relevant in the determination of a sentence." U.S. Sent'g Guidelines Manual § 5H1.10 (policy statement) (2018).

26. **Is the federal judicial system systemically racist? Please explain.**

    a. **If you answered yes, if confirmed how will you feel comfortable working in a systemically racist system?**

    Response: As a sitting Magistrate Judge, I have not been asked to determine whether the federal judicial system as a whole is "systemically racist." I decide matters on a case-by-case basis, including cases involving allegations of discrimination by specific individuals. For the past six years, I have endeavored to treat every litigant who appears before me fairly and provide equal justice under law to all. If fortunate enough to be confirmed as a District Judge, I would continue to do the same.

27. **Is the federal judiciary affected by implicit bias?**

Response: I am generally familiar with the term "implicit bias," but I have not seen that term applied to the federal judiciary as a whole. As I understand it, implicit bias refers to the concept that all people have subconscious views or attitudes about others of which they may be unaware. As a sitting Magistrate Judge, I have endeavored to treat every litigant fairly and impartially. If fortunate enough to be confirmed as a District Judge, I would continue to do the same.

28. **Is the Eastern District of Virginia impacted by implicit bias?**

Response: Please see my response to Question No. 27.

29. **What is more important during the COVID-19 pandemic: ensuring the safety of the community by keeping violent, gun re-offenders incarcerated or releasing violent, gun-offenders to the community?**

Response: The Bail Reform Act sets forth the factors to be considered in granting bail. *See* 18 U.S.C. § 3142(g). Those factors include, but are not limited to, the nature and characteristics of the offense charged and the history and characteristics of the defendant.

30. **If the Justice Department determines that a prosecution of an individual is meritless and dismisses the case, is it appropriate for a District Judge to question the Department's motivations and appoint an amicus to continue the prosecution? Please explain why or why not.**

Response: It is my understanding that the circumstances under which a District Judge can appoint an amicus to continue the prosecution of a matter the government has sought to dismiss is currently being litigated. Accordingly, as a sitting Magistrate Judge and nominee, it would be inappropriate for me to comment on this issue. *See* Code of Conduct for United States Judges, Canon 3(A)(6) ("A judge should not make public comment on the merits of a matter pending or impending in any court.").

31. **What legal standard would you apply in evaluating whether or not a regulation or proposed legislation infringes on Second Amendment rights?**

Response: The standard to be applied in evaluating Second Amendment challenges is either strict scrutiny or intermediate scrutiny. *See Rogers v. Grewal*, 140 S. Ct. 1865, 1868 (2020) (Thomas, J., dissenting) (noting variety of approaches used by Circuit Courts after *District of Columbia v. Heller*, 554 U.S. 570 (2008)). The Fourth Circuit has addressed this issue in *United States v. Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2010) ("[A]s has been the experience under the First Amendment, we might expect that courts will employ different types of scrutiny in assessing burdens on Second Amendment rights, depending on the character of the Second Amendment question presented. Under such an approach, we would take into account the nature of a person's Second Amendment interest, the extent to which those interests are burdened by government regulation, and the strength of the government's justifications for the regulation."). *See also United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010). If fortunate enough to be confirmed as a District Judge, I would apply applicable Supreme Court and Fourth Circuit precedents to determine the proper level of scrutiny in any Second Amendment case.

32. **What is implicit bias?**

Response: Please see my response to Question No. 27.

33. **Do you have any implicit biases? If so, what are they?**

Response: Please see my response to Question No. 27.

34. **In your career as a public defender, did you ever encounter a defendant who sought to withdraw his guilty plea? Please provide an approximation of the number.**

    a. **In your career, did you ever personally encounter a situation where the judge refused to accept a motion to dismiss with prejudice, filed by the government? If yes, please explain the circumstances and provide the citation.**

    Response: I cannot recall any specific instances in which one of my clients sought to withdraw his guilty plea, but I represented hundreds of clients so it is possible that a small number may have attempted to do so. I am unaware of any cases in which a judge refused to accept a motion to dismiss with prejudice filed by the government.

35. **What is the legal basis for a nationwide injunction? What considerations would you consider as a district judge when deciding whether to grant one?**

    Response: The scope of injunctive relief remains an open question under federal law. As a general matter, injunctive relief must be narrowly tailored to provide relief to the specific parties before the court. Because this question is presently pending before the courts, it would be inappropriate for me, as a sitting Magistrate Judge and nominee, to comment further on this issue. *See* Code of Conduct for United States Judges, Canon 3(A)(6) ("A judge should not make public comment on the merits of a matter pending or impending in any court."). If fortunate enough to be confirmed as a District Judge, I would faithfully apply all binding Supreme Court and Fourth Circuit precedents with regard to the scope of injunctive relief.

36. **In an interview for The Rocket Docket News in March 2015 shortly after you took the bench as a magistrate judge, you stated that the "advice that is resonating most with me right now is to always be mindful that judges are no longer advocates. That means that, a lot of the time, they should be quiet and let the lawyers talk."**

    a. **Do you believe this advice still holds true for District Judges?**

    Response: Yes.

    b. **Do you intend to follow this advice, if confirmed, as a District Judge?**

    Response: Yes.

37. **In a speech delivered in February 2018 to Rotary Club members, you stated that: one of the most comforting aspects of my job has been the knowledge that whatever errors I may make (and I have definitely made a couple here and there), there are at least three levels of appellate review available to the parties –**

district judges, circuit court judges and the Supreme Court Justices – to review my decision and fix my mistakes, if necessary. I suppose that could be a source of anxiety for some – after all no one likes to be judged, much less told they were wrong (and I will let you in on a little secret – judges are no different – they don't like to be reversed) – but for me, I view it as a safety net: a way to help avoid a potential injustice.

a. **If confirmed, will you still take "comfort" that the Fourth Circuit exists as a "safety net"?**

Response: If I am fortunate enough to be confirmed as a District Judge, I will faithfully apply the applicable law to the facts in every case that comes before me in an effort to reach the correct decision as required by the binding precedents of the Supreme Court and the Fourth Circuit.

38. **In a speech delivered at a Naturalization Ceremony, you noted that it was your "view that one of the greatest strengths of our nation is its ability to welcome hard working people from all over the world who want to contribute to our communities and make better lives for themselves and their families." Do you believe that immigrants who cross the border illegally should receive citizenship benefits before those who apply and follow the immigration and citizenship process as set forth by law?**

Response: It has been one of the greatest privileges of my service as a Magistrate Judge to preside over naturalization ceremonies. As the grandson of immigrants, I am a beneficiary of this country's long history of welcoming new citizens, and I will be forever grateful that my grandparents were given that opportunity. Immigration policy is the responsibility of the legislative and executive branches of government. If fortunate enough to be confirmed as a District Judge, I will apply all federal statutes, including statutes related to immigration, as written by Congress, and follow all binding Supreme Court and Fourth Circuit precedents.

39. **Do you believe the Armed Career Criminal Act (ACCA) should be abolished?**

Response: If fortunate enough to be confirmed as a District Judge, I will apply all federal statutes, including the Armed Career Criminal Act ("ACCA"), as written by Congress, and follow all binding Supreme Court and Fourth Circuit precedents. Whether any statute should be abolished or modified is a policy question that falls squarely within the purview of the legislative branch.

40. **If you do not believe ACCA should be abolished, do you believe that ACCA should be altered? If so, what specifically would you like to see changed?**

Response: Please see my response to Question No. 39.

41. **Do you believe mandatory minimums should be abolished? Why or why not?**

Response: If fortunate enough to be confirmed as a District Judge, I will apply all federal statutes, including mandatory minimums, as written by Congress, and follow all binding Supreme Court and Fourth Circuit precedent. Whether any statute or category of statutes should be abolished or modified is a policy question that falls squarely within the purview of the legislative branch. As a Magistrate Judge for the past six years, I have faithfully applied the sentencing statute, 18 U.S.C. § 3553(a), the Sentencing Guidelines, and mandatory minimums in Assimilated Crimes Act cases as required by the law. If confirmed, I will continue to impose sentences consistent with all applicable mandatory minimums and the sentencing statute.

42. **If confirmed to the District Court, will you enforce sentences of mandatory minimums for defendants who qualify for ACCA?**

Response: Yes.

43. **You have noted the "negative racial impact of mandatory minimums" in public testimony before the U.S. Sentencing Commission. Given that, if confirmed, how will you feel comfortable sentencing defendants who qualify for mandatory minimum sentences?**

Response: If fortunate enough to be confirmed as a District Judge, I will apply all federal statutes, including mandatory minimums, as written by Congress, and follow all binding Supreme Court and Fourth Circuit precedents. As a Magistrate Judge for the past six years, I have faithfully applied the sentencing statute, 18 U.S.C. § 3553(a), the Sentencing Guidelines, and mandatory minimums in Assimilated Crimes Act cases as required by the law. If confirmed, I will continue to impose sentences consistent with all applicable mandatory minimums and the sentencing statute.

44. **Do you believe that the federal government should abolish mandatory minimums for all drug crimes?**

Response: If fortunate enough to be confirmed as a District Judge, I will apply all federal statutes, including mandatory minimums for drug crimes, as written by Congress, and follow all binding Supreme Court and Fourth Circuit precedents. Whether any statute or category of statutes should be abolished or modified is a policy question that falls squarely within the purview of the legislative branch. As a Magistrate Judge for the past six years, I have faithfully applied the sentencing statute, 18 U.S.C. § 3553(a), the Sentencing Guidelines, and mandatory minimums in Assimilated Crimes Act cases as required by the law. If confirmed, I will continue to impose sentences consistent with all applicable mandatory minimums and the sentencing statute.

45. **Do you believe that the federal government should decriminalize possession of all drugs?**

Response: If fortunate enough to be confirmed as a District Judge, I will apply all federal statutes, including all drug offenses, as written by Congress, and follow all binding Supreme Court and Fourth Circuit precedents. Whether possession of drugs should be decriminalized is a policy question that falls squarely within the purview of the legislative branch.

46. **Do you believe the federal government should expand the use of the safety valve? What alterations do you believe should be adopted?**

Response: If fortunate enough to be confirmed as a District Judge, I will apply all federal statutes, including the safety valve, as written by Congress, and implemented by the United States Sentencing Commission, and I will follow all binding Supreme Court and Fourth Circuit precedents. Whether the safety valve should be expanded or altered is a policy question that falls squarely within the purview of the legislative branch. As a Magistrate Judge for the past six years, I have faithfully applied the sentencing statute, 18 U.S.C. § 3553(a), the Sentencing Guidelines, and mandatory minimums in Assimilated Crimes Act cases as required by the law. If confirmed, I will continue to impose sentences consistent with all applicable mandatory minimums and the sentencing statute.

47. **What legal standard would you apply in evaluating whether or not a regulation or proposed legislation infringes on Second Amendment rights?**

Response: Please see my response to Question No. 31.

48. **In your view, is a personal philosophical or religious objection to the death penalty on the part of the President a valid justification to abandon the defense of a death sentence on direct appeal?**

Response: The decision whether to pursue or abandon a particular prosecution or seek a specific punishment in a case is a decision solely for the executive branch.

49. **In your view, is a personal philosophical or religious objection to the death penalty on the part of a District Judge a valid justification not to impose a death sentence?**

Response: No. A judge must apply the law as written without regard to personal views.

50. **Do you believe potential voter fraud or other election abnormalities are concerns that the Justice Department should take seriously?**

Response: The executive branch is responsible for setting its investigatory and prosecutorial priorities. As a sitting Magistrate Judge and nominee, it would not be appropriate for me to opine as to the weight the Department of Justice should give to any specific enforcement priority, including voter fraud or election abnormalities. If fortunate enough to be confirmed as a District Judge, I will apply all federal statutes, including those related to election law and voter fraud, as written by Congress, and follow all binding Supreme Court and Fourth Circuit precedents.

51. **Do Blaine Amendments violate the Constitution?**

Response: The Supreme Court ruled in *Espinoza v. Montana*, 140 S. Ct. 2246 (2020), that if a state decides to subsidize private education, it cannot disqualify some private schools solely because they are religious. As a Magistrate Judge and nominee, it would not be appropriate for me to comment on issues which could possibly come before the court. If I am fortunate enough to be confirmed, I would be bound by all applicable Supreme Court and Fourth Circuit precedents regarding limits on the government's ability to restrict funding of religious institutions.

52. **Do parents have a constitutional right to direct the education of their children?**

Response: Yes. The Supreme Court has recognized a parent's right to direct the education and upbringing of one's children. *See Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

53. **Please describe the selection process that led to your nomination to be a United States District Judge, from beginning to end (including the circumstances that led to your nomination and the interviews in which you participated).**

Response: On December 18, 2020, I submitted an application to Senators Mark Warner and Tim Kaine for the open District Judge position in the Alexandria Division of the United States District Court for the Eastern District of Virginia. I also submitted an application to the Virginia State Bar. The Virginia State Bar and several other bar associations then conducted evaluations of all judicial candidates and provided their ratings to the Senators. On March 18, 2021, I interviewed with the Senators' Committee. Based upon the Committee's recommendation, I was interviewed by Senators Warner and Kaine on April 12, 2021. On April 30, 2021, I interviewed with attorneys from the White House Counsel's Office. On June 30, 2021, the President announced his intention to nominate me.

54. **During your selection process did you talk with any officials from or anyone directly associated with the organization Demand Justice? If so, what was the nature of those discussions?**

    a. **Did anyone do so on your behalf?**

    Response: I spoke with Chris Kang on two occasions after I submitted my application for the District Judge position in the Eastern District of Virginia**.** He provided me with information on the nominations process based on his past experience in the White House.

55. **During your selection process did you talk with any officials from or anyone directly associated with the American Constitution Society? If so, what was the nature of those discussions?**

a. **Did anyone do so on your behalf?**

Response: No.

56. **During your selection process, did you talk with any officials from or anyone directly associated with Arabella Advisors? If so, what was the nature of those discussions? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, or any other such Arabella dark-money fund that is still shrouded.**

a. **Did anyone do so on your behalf?**

Response: No.

57. **During your selection process did you talk with any officials from or anyone directly associated with the Open Society Foundation. If so, what was the nature of those discussions?**

a. **Did anyone do so on your behalf?**

Response: No.

58. **List the dates of all interviews or communications you had with the White House staff or the Justice Department regarding your nomination.**

Response: I interviewed with the White House Counsel's Office on April 30, 2021. Since that time, I have had periodic communications with White House Counsel's Office and the Office of Legal Policy at the Department of Justice in connection with my nomination.

59. **Please explain, with particularity, the process whereby you answered these questions.**

Response: On August 4, 2021, I received a copy of these questions from the Office of Legal Policy at the Department of Justice. I reviewed the questions, conducted legal research, and drafted responses, which I shared with the Office of Legal Policy. After reviewing feedback from the Office of Legal Policy, I submitted these responses to the Senate Judiciary Committee.

Senator Marsha Blackburn
Questions for the Record
Senate Judiciary Committee
Michael Nachmanoff, Nominee to be U.S. District Judge for the Eastern District of Virginia

1. **In 2009, you co-authored an article in which you argued that the policy of imposing mandatory minimums "[i]nevitably results in disproportionately harsh punishments and unwarranted disparity." One of the reasons you gave was that mandatory minimums transfer the sentencing function from neutral judges to prosecutors. Can you explain what you mean?**

   Response: In 2009, as an advocate and then-Chair of the Legislative Committee for the federal defender community, I made arguments on behalf of specific clients and the federal defender community as a whole with respect to mandatory minimum sentences. The points I made at the time were simply that mandatory minimums place additional responsibility in the hands of prosecutors who determine which crimes to charge defendants with, including crimes that carry mandatory minimum sentences. Judges are then bound to apply those mandatory minimums if defendants are convicted or plead guilty. However, as a Magistrate Judge for the past six years, I have faithfully applied the sentencing statute, 18 U.S.C. § 3553(a), the Sentencing Guidelines, and mandatory minimums in Assimilated Crimes Act cases as required by the law. If fortunate enough to be confirmed as a District Judge, I would continue to impose sentences consistent with all applicable mandatory minimums and the sentencing statute.

2. **In 2012 when you testified before the U.S. Sentencing Commission, you criticized advisory sentencing guidelines because "district judges now have absolute sentencing power." Could you elaborate on your criticism?**

   Response: Upon review of the transcript of the U.S. Sentencing Commission's Public Hearing (February 16, 2012), it appears that the quote above was made by Professor Frank Bowman but mistakenly attributed to me. I cannot elaborate further on why he made that statement.

SENATOR TED CRUZ
U.S. Senate Committee on the Judiciary

Questions for the Record for Michael Stefan Nachmanoff, nominee to theUnited States District Court for the Eastern District of Virginia

I. Directions

Please provide a wholly contained answer to each question. A question's answer should not cross-reference answers provided in other questions. Because a previous nominee declined to provide any response to discrete subparts of previous questions, they are listed here separately, even when one continues or expands upon the topic in the immediately previous question or relies on facts or context previouslyprovided.

If a question asks for a yes or no answer, please provide a yes or no answer first and then provide subsequent explanation. If the answer to a yes or no question is sometimes yes and sometimes no, please state such first and then describe the circumstances giving rise to each answer.

If a question asks for a choice between two options, please begin by stating which option applies, or both, or neither, followed by any subsequent explanation.

If you disagree with the premise of a question, please answer the question as-written and then articulate both the premise about which you disagree and the basis for thatdisagreement.

If you lack a basis for knowing the answer to a question, please first describe what efforts you have taken to ascertain an answer to the question and then provide your tentative answer as a consequence of its reasonable investigation. If even a tentative answer is impossible at this time, please state why such an answer is impossible and what efforts you, if confirmed, or the administration or the Department, intend to take to provide an answer in the future. Please further give an estimate as to when the Committee will receive that answer.

To the extent that an answer depends on an ambiguity in the question asked, please state the ambiguity you perceive in the question, and provide multiple answers which articulate each possible reasonable interpretation of the question in light of the ambiguity.

II. Questions

1. **In December 2009, you authored an article with Amy Baron-Evans titled "Booker Five Years out: Mandatory Minimum Sentences and Department of Justice Charging Policies Continue to Distort Federal Sentencing Process," where you argued that the mandatory minimums "in both principle andpractice, inevitably results in disproportionately harsh punishments and unwarranted disparity." You have also argued that mandatory minimums have an adverse impact on racial minorities, that their use correlates with race, and that they directly and indirectly cause prison overcrowding. Are mandatory minimums part of systemic racism?**

   Response: In 2009, as an advocate and then-Chair of the Legislative Committee for the federal defender community, I made arguments on behalf of specific clients and the federal defender community as a whole with respect to mandatory minimum sentences. However, as a Magistrate Judge for the past six years, I have faithfully applied the sentencing statute, 18 U.S.C. § 3553(a), the Sentencing Guidelines, and mandatory minimums in Assimilated Crimes Act cases as required by the law. If fortunate enough to be confirmed as a District Judge, I would continue to impose sentences consistent with all applicable mandatory minimums and the sentencing statute.

2. **Is the ability to own a firearm a personal civil right?**

   Response: Yes. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court held that the Second Amendment guarantees the right of individuals to keep and bear arms.

3. **Does the right to own a firearm receive less protection than the other individual rights specifically enumerated in the Constitution?**

   Response: No.

Questions for the Record for Michael Nachmanoff
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.

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

   Response: No.

Senator Mike Lee Questions
for the Record
Michael Nachmanoff, E.D. Va.

1. **How would you describe your judicial philosophy?**

Response: I currently serve as a United States Magistrate Judge in the United States District Court for the Eastern District of Virginia, and if fortunate enough to be confirmed, I will continue serve in the Eastern District as a United States District Judge. For the past six years, I have endeavored to be fair and impartial in every case that comes before me and to treat all litigants with respect. I work hard to be well prepared, listen carefully to the arguments presented, and keep an open mind as I faithfully apply the law to the facts of each case. Finally, I render opinions and rulings from the bench and in writing promptly in language that is clear and accessible to the parties and to the public.

2. **What sources would you consult when deciding a case that turned on the interpretation of a federal statute?**

Response: I would start with the text of the statute. If the text of the statute is clear and unambiguous, no further interpretation is needed. If the text is ambiguous, I would consider Supreme Court and Fourth Circuit precedents interpreting the statute. If no binding precedent directly on point is available, I would consult related or analogous precedents from the Supreme Court or Fourth Circuit or persuasive precedent from other Circuits. In the rare circumstance where the text and relevant case law do not provide sufficient guidance, I would look to other reliable and accepted sources authorized by the Supreme Court and the Fourth Circuit for interpretation of the statute. If I am fortunate enough to be confirmed as a District Judge, I would be obliged to follow the precedents of the Supreme Court and Fourth Circuit and the methods of analysis set forth therein with regard to the interpretation of any federal statute.

3. **What sources would you consult when deciding a case that turned on the interpretation of a constitutional provision?**

Response: I would start with the text of the constitutional provision. If the text is clear and unambiguous, no further interpretation is needed. If the text is ambiguous, I would consider Supreme Court and Fourth Circuit precedents interpreting the provision. If no binding precedent directly on point is available, I would consult related or analogous precedents from the Supreme Court or Fourth Circuit or persuasive precedent from other Circuits. In the rare circumstance where the text and relevant case law do not provide sufficient guidance, I would look to other reliable and accepted sources authorized by the Supreme Court and the Fourth Circuit for interpretation of the provision. If I am fortunate enough to be confirmed as a District Judge, I would be obliged to follow the precedents of the Supreme Court and Fourth Circuit and the methods of analysis set forth therein with regard to any constitutional provision.

4. **What role do the text and original meaning of a constitutional provision play**

when interpreting the Constitution?

Response: The text controls when interpreting the Constitution. In some cases, the Supreme Court has relied on the original public meaning of a particular constitutional provision. If confirmed, I would consider whether the Supreme Court and Fourth Circuit precedents relied on the original public meaning with regard to the specific provision to be interpreted and follow applicable Supreme Court and Fourth Circuit precedent.

5. **How would you describe your approach to reading statutes? Specifically, how much weight do you give to the plain meaning of the text?**

Response: Please see my response to Question No. 2.

a. **Does the "plain meaning" of a statute or constitutional provision refer to the public understanding of the relevant language at the time of enactment, or does the meaning change as social norms and linguistic conventions evolve?**

Response: I understand "plain meaning" to be the meaning of the statute or constitutional provision at the time it was enacted.

6. **What are the constitutional requirements for standing?**

Response: The Supreme Court has set forth the constitutional requirements for standing in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), and *California v. Texas,* 141 S. Ct. 2104 (2021). Plaintiff must be able to establish (1) an injury in fact that is not conjectural or hypothetical, (2) that is traceable to the conduct of the defendant, and (3) is likely to be redressed by a favorable judicial decision. *Lujan*, 504 U.S. at 560-61.

7. **Do you believe Congress has implied powers beyond those enumerated in the Constitution? If so, what are those implied powers?**

Response: The Supreme Court recognized, in *McCulloch v. Maryland*, 17 U.S. 316 (1819), that Congress has certain implied powers beyond those expressly enumerated in the Constitution through the Necessary and Proper Clause. In *McCulloch*, the Supreme Court found that Congress had the power to establish a national bank although it was not specifically enumerated in the text of the Constitution.

8. **Where Congress enacts a law without reference to a specific Constitutional enumerated power, how would you evaluate the constitutionality of that law?**

Response: In any case involving constitutional issues, I would apply Supreme Court and Fourth Circuit precedents to determine the constitutionality of the law. To the extent Congress relied on an unenumerated power, I would evaluate whether it has been recognized by the Supreme Court to determine its validity.

9. **Does the Constitution protect rights that are not expressly enumerated in the Constitution? Which rights?**

Response: In *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997), the Supreme Court set forth a list of cases in which the Court found substantive due process rights which are not expressly enumerated in the Constitution, including: the right to marry, *Loving v. Virginia*, 388 U.S. 1 (1967); to have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); to direct the education and upbringing of one's children, *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); to marital privacy and use of contraception, *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); to bodily integrity, *Rochin v. California*, 342 U.S. 165 (1952), and to abortion, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). *Id*. at 720; *see also Saenz v. Roe*, 526 U.S. 489 (1999) (recognizing a right to travel); *Obergefell v. Hodges*, 576 U.S. 644 (2015) (recognizing a right of same-sex couples to marry). The Supreme Court has also "assumed, and strongly suggested" that there is a "right to refuse unwanted lifesaving medical treatment." *Glucksberg*, 521 U.S. at 720.

10. **What rights are protected under substantive due process?**

Response: Please see my response to Question No. 9.

11. **If you believe substantive due process protects some personal rights such as a right to abortion, but not economic rights such as those at stake in *Lochner v. New York*, on what basis do you distinguish these types of rights for constitutional purposes?**

Response: The rights set forth in *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) do not reflect any personal beliefs on my part but rather the binding precedent of the Supreme Court. To the extent economic rights are not protected by "substantive due process" that is a decision that rests with the Supreme Court. If I am fortunate enough to be confirmed as a District judge, I will follow all binding precedents of the Supreme Court and the Fourth Circuit in evaluating what rights are protected under "substantive due process."

12. **What are the limits on Congress's power under the Commerce Clause?**

Response: Congress may regulate the use of the channels of interstate commerce, the instrumentalities of interstate commerce, and activity that substantially affects interstate commerce. *See United States v. Lopez*, 514 U.S. 549, 558-59 (1995).

13. **What qualifies a particular group as a "suspect class," such that laws affecting that group must survive strict scrutiny?**

Response: The application of strict scrutiny review for a particular group as a "suspect class" is triggered by classifications based on race, religion, national origin, or alienage. *See, e.g.*, *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976); *Graham v. Richardson*, 403 U.S. 365, 372 (1971).

14. **How would you describe the role that checks and balances and separation of powers play in the Constitution's structure?**

Response: The separation of powers is one of the most important features of our constitutional framework. The role of the judicial branch is limited to interpreting the law when faced with a specific case or controversy. Congress is charged with making the law, and the executive branch is responsible for enforcing it. This system of checks and balances prevents power from accumulating in one branch and allows the three separate branches of government to serve as a vital check on the power of the others. The elegance and enduring power of this structure is reflected in its longevity and resilience.

15. **How would you go about deciding a case in which one branch assumed an authority not granted it by the text of the Constitution?**

Response: I would start with the text of the Constitution to determine the parameters of the authority assumed by the branch of government at issue. I would then apply applicable Supreme Court and Fourth Circuit precedents regarding the scope of the claimed executive or legislative power to resolve the specific issue in controversy.

16. **What role should empathy play in a judge's consideration of a case?**

Response: Judges must decide cases based solely upon the facts and the applicable law. In determining the appropriate resolution and making sure that litigants have an opportunity to be heard, it is essential that judges be respectful and open minded. This requires preparation, patience, humility, and thoughtfulness. As a Magistrate Judge, I have endeavored to make decisions by applying the law to the facts of the case before me, and then rendering my decisions promptly in language that is easily accessible to the parties and to the public.

17. **What's worse: Invalidating a law that is, in fact, constitutional, or upholding a law that is, in fact, unconstitutional?**

Response: Both errors undermine confidence in our judicial system.

18. **From 1789 to 1857, the Supreme Court exercised its power of judicial review to strike down federal statutes as unconstitutional only twice. Since then, the invalidation of federal statutes by the Supreme Court has become significantly more common. What do you believe accounts for this change? What are the downsides to the aggressive exercise of judicial review? What are the downsides to judicial passivity?**

Response: I am not familiar with the changes in the frequency with which the Supreme Court invalidates federal statutes and do not have an opinion as to why the frequency has changed since the founding of our country.

19. **How would you explain the difference between judicial review and judicial**

supremacy?

Response: It is my understanding that judicial review refers to the authority of the judicial branch to determine the constitutionality of actions taken by the legislative and executive branches. Judicial supremacy refers to the concept that the Supreme Court is the final arbiter of the meaning of the Constitution.

20. **Abraham Lincoln explained his refusal to honor the Dred Scott decision by asserting that "If the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court . . . the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal." How do you think elected officials should balance their independentobligation to follow the Constitution with the need to respect duly rendered judicial decisions?**

Response: I cannot comment on how elected officials from an independent branch of government should resolve conflicts that arise in the discharge of their constitutional duties. As a judge, I am obligated to faithfully apply the law, follow binding precedent, and uphold the Constitution.

21. **In Federalist 78, Hamilton says that the courts are the least dangerous branch because they have neither force nor will, but only judgment. Explain why that's important to keep in mind when judging.**

Response: It is vitally important for judges to recognize the essential, but limited, role they play in our constitutional framework. Judges must decide cases based on the relevant facts and the applicable law. The legislature makes the law, and the executive enforces it. The separation of powers requires judges to follow precedent and decide only the case or controversy brought before them.

22. **As a district court judge, you would be bound by both Supreme Court precedent and prior circuit court precedent. What is the duty of a lower court judge when confronted with a case where the precedent in question does not seem to be rooted in constitutional text, history, or tradition and also does not appear to speak directly to the issue at hand? In applying a precedent that has questionable constitutional underpinnings, should a lower court judge extend the precedent to cover new cases, or limit its application where appropriate and reasonably possible?**

Response: The obligation of a district judge is to faithfully apply all relevant Supreme Court and Circuit Court precedent. To the extent a particular case raises legal issues that require the extension of precedent, the district judge must rule based on the specific facts and applicable law using recognized canons of construction.

23. **When sentencing an individual defendant in a criminal case, what role, if any, should the defendant's group identity(ies) (e.g., race, gender, nationality, sexual orientation or gender identity) play in the judges' sentencing analysis?**

Response: None. The factors to be considered at sentencing are set forth in 18 U.S.C. § 3553(a). The United States Sentencing Guidelines state that race, sex, national origin, creed, religion, and socio-economic status "are not relevant in the determination of a sentence." U.S.S.G. § 5H1.10 (policy statement) (2018). As a Magistrate Judge, I have sentenced hundreds of defendants and faithfully applied the sentencing factors set forth in 18 U.S.C. § 3553(a) fairly and impartially without regard to the defendant's group identity or identities.

24. **The Biden Administration has defined "equity" as: "the consistent and systematic fair, just, and impartial treatment of all individuals, including individuals who belong to underserved communities that have been denied such treatment, such as Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color; members of religious minorities; lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons; persons with disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality." Do you agree with that definition? If not, how would you defineequity?**

Response: I am not familiar with the context of the Biden Administration's definition of equity referenced above.

25. **Is there a difference between "equity" and "equality?" If so, what is it?**

Response: Dictionary definitions of "equity" and "equality" explain that equality addresses treatment whereas equity addresses outcomes. In other words, equality requires fairness, but equity suggests that to achieve equal outcomes different resources or treatment may be needed by different people.

26. **Does the 14th Amendment's equal protection clause guarantee "equity" as defined by the Biden Administration (listed above in question 24)?**

Response: The Fourteenth Amendment provides "equal protection of the laws."

27. **How do you define "systemic racism?"**

Response: I do not have a specific definition of "systemic racism." I understand the term to mean racism that affects an entire society, organization or institution rather than specific acts of racism perpetrated by an individual.

28. **How do you define "critical race theory?"**

Response: I do not have a specific definition of "critical race theory." It is my understanding that it is a term used in academic scholarship that involves the study of race and its relationship to legal and political institutions.

29. **Do you distinguish "critical race theory" from "systemic racism," and if so, how?**

Response: I do not purport to be knowledgeable with respect to these terms, but I would consider “critical race theory” to be an academic theory used in scholarly analysis, and I would consider “systemic racism” to be a term used to describe the discriminatory history of institutions or organizations.

Senator Ben Sasse
Questions for the Record
U.S. Senate Committee on the Judiciary
Hearing: "Nominations"
July 28, 2021

For all nominees:

1. **Since becoming a legal adult, have you participated in any events at which you or other participants called into question the legitimacy of the United States Constitution?**

   Response: No.

2. **Since becoming a legal adult, have you participated in any rallies, demonstrations, or other events at which you or other participants have willfully damaged public or private property?**

   Response: No.

For all judicial nominees:

1. **How would you describe your judicial philosophy?**

   Response: I currently serve as a United States Magistrate Judge in the United States District Court for the Eastern District of Virginia, and if fortunate enough to be confirmed, I will continue serve in the Eastern District as a United States District Judge. For the past six years, I have endeavored to be fair and impartial in every case that comes before me and to treat all litigants with respect. I work hard to be well prepared, to listen carefully to the arguments presented, and to keep an open mind as I faithfully apply the law to the facts of each case. Finally, I try my best to render opinions and rulings from the bench and in writing promptly in language that is clear and accessible to the parties and to the public.

2. **Would you describe yourself as an originalist?**

   Response: Please see my response to Question No. 1.

3. **Would you describe yourself as a textualist?**

   Response: Please see my response to Question No. 1.

4. **Do you believe the Constitution is a "living" document? Why or why not?**

   Response: I believe that the United States Constitution is an enduring document that has protected our liberties since its founding and that it provides the bedrock principles upon

which our government is based. If I am fortunate enough to be confirmed as a District Judge, I will faithfully interpret the Constitution as directed by the binding precedents of the Supreme Court and Fourth Circuit.

5. Please name the Supreme Court Justice or Justices appointed since January 20, 1953 whose jurisprudence you admire the most and explain why.

Response: I have deep respect and admiration for the Supreme Court as an institution and for the members of the Supreme Court. It is difficult for me to single out specific justices for praise as I have always focused primarily on the reasoning in their holdings rather than their judicial philosophies.

6. Was Marbury v. Madison correctly decided?

Response: It is generally inappropriate for me to comment on whether any binding Supreme Court precedent was correctly decided. As a sitting Magistrate Judge and nominee, I am bound to apply all such precedent. However, there are certain Supreme Court decisions that are so widely accepted and unlikely to come before any court that they present an exception to this rule. Consistent with the responses of other nominees, I believe *Marbury v. Madison* was correctly decided.

7. Was Lochner v. New York correctly decided?

Response: As a sitting Magistrate Judge, I apply binding Supreme Court precedent without reservation, and if I am fortunate enough to be confirmed as a District Judge, I would continue to do so. As a Magistrate Judge and nominee, it is generally inappropriate for me to comment on whether any binding Supreme Court precedent was correctly decided.

8. Was Brown v. Board of Education correctly decided?

Response: It is generally inappropriate for me to comment on whether any binding Supreme Court precedent was correctly decided. As a sitting Magistrate Judge and nominee, I am bound to apply all such precedent. However, there are certain Supreme Court decisions that are so widely accepted and unlikely to come before any court that they present an exception to this rule. Consistent with the responses of other nominees, I believe *Brown v. Board of Education* was correctly decided.

9. Was Bolling v. Sharpe correctly decided?

Response: It is generally inappropriate for me to comment on whether any binding Supreme Court precedent was correctly decided. As a sitting Magistrate Judge and nominee, I am bound to apply all such precedent. However, there are certain Supreme Court decisions that are so widely accepted and unlikely to come before any court that they present an exception to this rule. Consistent with my response to Question No. 8 regarding *Brown v. Board of Education*, I believe *Bolling v. Sharpe* was correctly decided.

10. Was Cooper v. Aaron correctly decided?

Response: Please see my response to Question No. 7.

11. Was Mapp v. Ohio correctly decided?

Response: Please see my response to Question No. 7.

12. Was Gideon v. Wainwright correctly decided?

Response: Please see my response to Question No. 7.

13. Was Griswold v. Connecticut correctly decided?

Response: Please see my response to Question No. 7.

14. Was South Carolina v. Katzenbach correctly decided?

Response: Please see my response to Question No. 7.

15. Was Miranda v. Arizona correctly decided?

Response: Please see my response to Question No. 7.

16. Was Katzenbach v. Morgan correctly decided?

Response: Please see my response to Question No. 7.

17. Was Loving v. Virginia correctly decided?

Response: It is generally inappropriate for me to comment on whether any binding Supreme Court precedent was correctly decided. As a sitting Magistrate Judge and nominee, I am bound to apply all such precedent. However, there are certain Supreme Court decisions that are so widely accepted and unlikely to come before any court that they present an exception to this rule. Consistent with the responses of other nominees, I believe *Loving v. Virginia* was correctly decided.

18. Was Katz v. United States correctly decided?

Response: Please see my response to Question No. 7.

19. Was Roe v. Wade correctly decided?

Response: Please see my response to Question No. 7.

20. Was Romer v. Evans correctly decided?

Response: Please see my response to Question No. 7.

21. Was United States v. Virginia correctly decided?

Response: Please see my response to Question No. 7.

22. Was Bush v. Gore correctly decided?

Response: Please see my response to Question No. 7.

23. Was District of Columbia v. Heller correctly decided?

Response: Please see my response to Question No. 7.

24. Was Crawford v. Marion County Election Bord correctly decided?

Response: Please see my response to Question No. 7.

25. Was Boumediene v. Bush correctly decided?

Response: Please see my response to Question No. 7.

26. Was Citizens United v. Federal Election Commission correctly decided?

Response: Please see my response to Question No. 7.

27. Was Shelby County v. Holder correctly decided?

Response: Please see my response to Question No. 7.

28. Was United States v. Windsor correctly decided?

Response: Please see my response to Question No. 7.

29. Was Obergefell v. Hodges correctly decided?

Response: Please see my response to Question No. 7.

30. In the absence of controlling Supreme Court precedent, what substantive factors determine whether it is appropriate for appellate court to reaffirm its own precedent that conflicts with the original public meaning of the Constitution?

Response: An appellate court can overturn its own precedent in rare circumstances through en banc proceedings. Federal Rule of Appellate Procedure 35 sets forth the circumstances under which en banc hearings can be held. If I am fortunate enough to be confirmed as a District Judge, I would not be in a position to consider whether Fourth

Circuit precedent should be reaffirmed or overturned but would be obliged to follow all binding precedents of the Supreme Court and Fourth Circuit.

31. In the absence of controlling Supreme Court precedent, what substantive factors determine whether it is appropriate for an appellate court to reaffirm its own precedent that conflicts with the original public meaning of the text of a statute?

Response: Please see my response to Question No. 30.

32. If defendants of a particular minority group receive on average longer sentences for a particular crime than do defendants of other racial or ethnic groups, should that disparity factor into the sentencing of an individual defendant? If so, how so?

Response: The factors set forth in 18 U.S.C. § 3553(a) provide the guidance courts must follow in imposing sentences. Ordinarily, a defendant's race or ethnicity should play no role in sentencing a defendant. As the Sentencing Guidelines state, race, sex, national origin, creed, religion, and socio-economic status "are not relevant in the determination of a sentence." U.S. Sent'g Guidelines Manual § 5H1.10 (policy statement) (2018).

Questions from Senator Thom Tillis
for Michael Stefan Nachmanoff
Nominee to be United States District Judge for the Eastern District of Virginia

1. **Do you believe that a judge's personal views are irrelevant when it comes to interpreting and applying the law?**

   Response: Yes. A judge's personal views are irrelevant when it comes to interpreting and applying the law.

2. **What is judicial activism? Do you consider judicial activism appropriate?**

   Response: I understand judicial activism to be judicial decision-making that is based on the judge's personal views rather than the applicable law and facts of the case. Judges should never inject their personal views into the decision-making process. As a Magistrate Judge, I make decisions based solely on the applicable law and the facts of the case before me. If I am fortunate enough to be confirmed as a District Judge, I would continue to do the same.

3. **Do you believe impartiality is an aspiration or an expectation for a judge?**

   Response: Impartiality is more than an "expectation" for a judge. Impartiality is one of the cornerstones of judicial independence and essential to the fair administration of justice.

4. **Should a judge second-guess policy decisions by Congress or state legislative bodies to reach a desired outcome?**

   Response: No. A judge should never make any decision to reach a desired outcome, which would include second-guessing decisions by Congress or state legislative bodies. As a sitting Magistrate Judge, I have applied the applicable law to the facts in hundreds of cases without regard to the outcome. If fortunate enough to be confirmed as a District Judge, I would continue to do the same.

5. **Does faithfully interpreting the law sometimes result in an undesirable outcome? How, as a judge, do you reconcile that?**

   Response: As a Magistrate Judge, I have faithfully applied the applicable law to the facts in hundreds of cases without regard to the outcome. A judge's personal view of the desirability of a particular outcome is irrelevant to the decision-making process.

6. **Should a judge interject his or her own politics or policy preferences when interpreting and applying the law?**

   Response: No.

7. **What will you do if you are confirmed to ensure that Americans feel confident that their Second Amendment rights are protected?**

Response: If confirmed, I will faithfully apply the Supreme Court's precedents interpreting the Second Amendment, including *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago*, 561 U.S. 742 (2010). These decisions reflect that the individual right to possess firearms is protected by the Second Amendment, and that the right to keep and bear arms is fundamental.

8. How would you evaluate a lawsuit challenging a Sheriff's policy of not processing handgun purchase permits? Should local officials be able to use a crisis, such as COVID-19 to limit someone's constitutional rights? In other words, does a pandemic limit someone's constitutional rights?

Response: I would evaluate any case involving firearms or COVID-19 restrictions in accordance with the binding precedents of the Supreme Court and the Fourth Circuit, including *District of Columbia v. Heller*, 554 U.S. 570 (2008), *McDonald v. City of Chicago*, 561 U.S. 742 (2010), *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020), and *Tandon v. Newsom*, 141 S. Ct. 1294 (2021). Because issues involving the constitutionality of firearms and religious-liberty restrictions are currently being litigated before the courts, it would be inappropriate for me to opine as to how such issues will ultimately be resolved. *See* Code of Conduct for United States Judges, Canon 3(A)(6) ("A judge should not make public comment on the merits of a matter pending or impending in any court.").

9. What process do you follow when considering qualified immunity cases, and under the law, when must the court grant qualified immunity to law enforcement personnel and departments?

Response: Under Supreme Court precedent, I would be required to consider the following: (1) "whether the facts that a plaintiff has alleged or shown make out a violation of a constitutional right," and (2) "whether the right at issue was 'clearly established' at the time of defendant's alleged misconduct." *Pearson v. Callahan*, 555 U.S. 223, 232 (2009) (internal citations omitted); *see also Hicks v. Ferreyra*, 965 F.3d 302, 307 (4th Cir. 2020). Qualified immunity applies "when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *City of Escondido, Cal. v. Emmons*, 139 S. Ct. 500, 503 (2019); *see Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (holding that "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known").

10. Do you believe that qualified immunity jurisprudence provides sufficient protection for law enforcement officers who must make split-second decisions when protecting public safety?

Response: It is the role of the legislative and executive branches of government to determine whether qualified immunity provides sufficient protection for law enforcement officers. As

a sitting Magistrate Judge, I am obligated to follow the binding precedents of the Supreme Court and Fourth Circuit. If I am fortunate enough to be confirmed as District Judge, I would apply those same precedents to any cases involving claims of qualified immunity.

11. What do you believe should be the proper scope of qualified immunity protections for law enforcement?

Response: It is the role of the legislative and executive branches of government to determine the proper scope of qualified immunity protections for law enforcement. Moreover, issues involving the scope of qualified immunity protections remain an open question before the courts, and it would be inappropriate for me to opine as to how such issues will ultimately be resolved. *See* Code of Conduct for United States Judges, Canon 3(A)(6) ("A judge should not make public comment on the merits of a matter pending or impending in any court."). As a sitting Magistrate Judge, I am obligated to follow the binding precedents of the Supreme Court and Fourth Circuit. If I am fortunate enough to be confirmed as District Judge, I will be bound those same precedents in any cases involving claims of qualified immunity.

12. Throughout the past decade, the Supreme Court has repeatedly waded into the area of patent eligibility, producing a series of opinions in cases that have only muddled the standards for what is patent eligible. The current state of eligibility jurisprudence is in abysmal shambles. What are your thoughts on the Supreme Court's patent eligibility jurisprudence?

Response: I have ruled on pretrial matters and mediated settlements in several complex patent cases as a Magistrate Judge, but I have not been required to rule on eligibility issues. *See, e.g., Plastipak Packaging, Inc. v. Niagara Bottling, LLC*, No. 1:17-cv-1463-AJT-MSN (E.D. Va.)(Patent infringement action involving multiple motions to compel, to strike expert testimony, and for issuance of letters rogatory). The Supreme Court set forth the test for patent eligibility in *Alice Corp. v. CLS Bank Int'l*, 573 U.S. 208 (2014). If fortunate enough to be confirmed as a District Judge, I would faithfully apply binding precedents from the Supreme Court and the Federal Circuit to evaluate the eligibility of patent claims.

13. How would you apply current patent eligibility jurisprudence to the following hypotheticals. Please avoid giving non-answers and actually analyze these hypotheticals.

a. *ABC Pharmaceutical Company* develops a method of optimizing dosages of a substance that has beneficial effects on preventing, treating or curing a disease or condition for individual patients, using conventional technology but a newly-discovered correlation between administered medicinal agents and bodily chemicals or metabolites. Should this invention be patent eligible?

Response: As a sitting Magistrate Judge and nominee, I cannot offer an advisory opinion indicating how I would rule in such a hypothetical case. Because the Eastern District of Virginia has a substantial patent docket, it would be inappropriate for me

to comment on this issue. If fortunate enough to be confirmed, I would faithfully apply all relevant Supreme Court and Federal Circuit precedent to evaluate the eligibility of patent claims. As I stated in response to Question No. 12, I have ruled on pretrial matters and mediated settlements in several complex patent cases as a Magistrate Judge, and I have followed all relevant Supreme Court and Federal Circuit precedent in those matters.

b. ***FinServCo*** **develops a valuable proprietary trading strategy that demonstrably increases their profits derived from trading commodities. The strategy involves a new application of statistical methods, combined with predictions about how trading markets behave that are derived from insights into human psychology. Should** ***FinServCo's*** **business method standing alone be eligible? What about the business method as practically applied on a computer?**

Response: Please see my response to Question No. 13.a.

c. ***HumanGenetics*** **Company wants to patent a human gene or human gene fragment as it exists in the human body. Should that be patent eligible? What if** ***HumanGenetics*** **Company wants to patent a human gene or fragment that contains sequence alterations provided by an engineering process initiated by humans that do not otherwise exist in nature? What if the engineered alterations were only at the end of the human gene or fragment and merely removed one or more contiguous elements?**

Response: Please see my response to Question No. 13.a.

d. ***BetterThanTesla ElectricCo*** **develops a system for billing customers for charging electric cars. The system employs conventional charging technology and conventional computing technology, but there was no previous system combining computerized billing with electric car charging. Should** ***BetterThanTesla's*** **billing system for charging be patent eligible standing alone? What about when it explicitly claims charging hardware?**

Response: Please see my response to Question No. 13.a.

e. ***Natural Laws and Substances, Inc.*** **specializes in isolating natural substances and providing them as products to consumers. Should the isolation of a naturally occurring substance other than a human gene be patent eligible? What about if the substance is purified or combined with other substances to produce an effect that none of the constituents provide alone or in lesser combinations?**

Response: Please see my response to Question No. 13.a.

f. **A business methods company,** ***FinancialServices Troll,*** **specializes in taking conventional legal transaction methods or systems and implementing them**

through a computer process or artificial intelligence. Should such implementations be patent eligible? What if the implemented method actually improves the expected result by, for example, making the methods faster, but doesn't improve the functioning of the computer itself? If the computer or artificial intelligence implemented system does actually improve the expected result, what if it doesn't have any other meaningful limitations?

Response: Please see my response to Question No. 13.a.

g. ***BioTechCo*** **discovers a previously unknown relationship between a genetic mutation and a disease state. No suggestion of such a relationship existed in the prior art. Should** ***BioTechCo*** **be able to patent the gene sequence corresponding to the mutation? What about the correlation between the mutation and the disease state standing alone? But, what if** ***BioTech Co*** **invents a new, novel, and nonobvious method of diagnosing the disease state by means of testing for the gene sequence and the method requires at least one step that involves the manipulation and transformation of physical subject matter using techniques and equipment? Should that be patent eligible?**

Response: Please see my response to Question No. 13.a.

h. Assuming ***BioTechCo's*** **diagnostic test is patent eligible, should there exist provisions in law that prohibit an assertion of infringement against patients receiving the diagnostic test? In other words, should there be a testing exemption for the patient health and benefit? If there is such an exemption, what are its limits?**

Response: Please see my response to Question No. 13.a.

i. ***Hantson Pharmaceuticals*** **develops a new chemical entity as a composition of matter that proves effective in treating TrulyTerribleDisease. Should this new chemical entity be patent eligible?**

Response: Please see my response to Question No. 13.a.

j. ***Stoll Laboratories*** **discovers that superconducting materials superconduct at much higher temperatures when in microgravity. The materials are standard superconducting materials that superconduct at lower temperatures at surface gravity. Should** ***Stoll Labs*** **be able to patent the natural law that superconductive materials in space have higher superconductive temperatures? What about the space applications of superconductivity that benefit from this effect?**

Response: Please see my response to Question No. 13.a.

14. Based on the previous hypotheticals, do you believe the current jurisprudence provides the clarity and consistency needed to incentivize innovation? How would you apply the Supreme Court's ineligibility tests—laws of nature, natural phenomena, and abstract ideas—to cases before you?

Response: I have ruled on pretrial matters and mediated settlements in several complex patent cases as a Magistrate Judge, but I have not been required to rule on eligibility issues. *See, e.g.*, *Plastipak Packaging, Inc. v. Niagara Bottling, LLC*, No. 1:17-cv-1463-AJT-MSN (E.D. Va.) (Patent infringement action involving multiple motions to compel, to strike expert testimony, and for issuance of letters rogatory). Accordingly, I have not formed an opinion regarding the current state of patent eligibility jurisprudence. If fortunate enough to be confirmed as a District Judge, I would faithfully apply binding precedents from the Supreme Court and the Federal Circuit to evaluate the eligibility of patent claims.