Nomination of David Novak to the United States District Court for the Eastern District of Virginia
Questions for the Record
Submitted May 7, 2019

QUESTIONS FROM SENATOR FEINSTEIN

1. Please respond with your views on the proper application of precedent by judges.

   a. When, if ever, is it appropriate for lower courts to depart from Supreme Court precedent?

   It is never appropriate for a lower federal court to deviate from Supreme Court precedent.

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

   No to both questions.

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

   A district court is not bound to follow the decision of another district court. As to overturning its own ruling in a case, the Fourth Circuit has held that an earlier decision of a court becomes the law of the case and should be followed unless "(1) a subsequent trial produces substantially different evidence; (2) controlling authority has since made a contrary decision of law applicable to the issue, or (3) the prior decision was clearly erroneous and would work manifest injustice." *Sejman v. Warner-Lambert Co.*, 845 F.2d 66, 69 (4th Cir. 1988).

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

   As a sitting Magistrate Judge and district court nominee, I believe that it would be inappropriate for me to express a view as to when the Supreme Court should overturn its own precedent. *See* Canons 2 and 3(a)(6), Code of Conduct for United States Judges.

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

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

I have not used the nomenclature of "super-stare decisis" or "superprecedent." However, *Roe v. Wade* constitutes precedent that I am bound to follow and will do so.

b. Is it settled law?

Yes.

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

Yes.

4. In Justice Stevens's dissent in *District of Columbia v. Heller* he wrote: "The Second Amendment was adopted to protect the right of the people of each of the several States to maintain a well-regulated militia. It was a response to concerns raised during the ratification of the Constitution that the power of Congress to disarm the state militias and create a national standing army posed an intolerable threat to the sovereignty of the several States. Neither the text of the Amendment nor the arguments advanced by its proponents evidenced the slightest interest in limiting any legislature's authority to regulate private civilian uses of firearms."

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

As a sitting Magistrate Judge and district court nominee, I believe that it would be inappropriate for me to comment on the merits of a dissenting opinion of the Supreme Court. *See* Canons 2 and 3(a)(6), Code of Conduct for United States Judges.

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

As a sitting Magistrate Judge and district court nominee, I believe that it would be inappropriate for me to express a view regarding gun regulation. *See* Canons 2 and 3(a)(6), Code of Conduct for United States Judges.

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

As a sitting Magistrate Judge and district court nominee, I believe that it would be inappropriate for me to express a view on the analytical merits of the Supreme Court's decision in *Heller*. *See* Canons 2 and 3(a)(6), Code of Conduct for United States Judges.

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

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

    I have not had an occasion to address this issue. If confronted with the issue, I would follow any existing precedent on point. Further, as a sitting Magistrate Judge and district court nominee, I believe that it would be inappropriate for me to express a view beyond committing to follow any existing precedent. *See* Canons 2 and 3(a)(6), Code of Conduct for United States Judges.

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

    I have not had an occasion to address this issue. If confronted with the issue, I would follow any existing precedent on point. Further, as a sitting Magistrate Judge and district court nominee, I believe that it would be inappropriate for me to express a view beyond committing to follow any existing precedent. *See* Canons 2 and 3(a)(6), Code of Conduct for United States Judges.

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

    I have not had an occasion to address this issue. If confronted with the issue, I would follow any existing precedent on point. Further, as a sitting Magistrate Judge and district court nominee, I believe that it would be inappropriate for me to express a view beyond committing to follow any existing precedent. *See* Canons 2 and 3(a)(6), Code of Conduct for United States Judges.

6. According to public reporting, on two separate occasions you have filed libel suits against individuals who complained to the Department of Justice about your conduct as a federal prosecutor. (Houston Attorney Regrets Snitching on Prosecutor, THE BROWNSVILLE HERALD (Apr. 25, 1995))

    a. Why did you decide to bring these lawsuits?

    I filed the two lawsuits in 1994, because I believed that the two defendants made false complaints to the Department of Justice to deter the prosecution of former American Express banker Antonio Giraldi, who I ultimately successfully prosecuted for laundering approximately $33 million for a Mexican drug cartel. Giraldi was sentenced to 10 years imprisonment and his conviction was affirmed by the Fifth Circuit. *See United States v. Giraldi, et al.*, Criminal Case No. B-93-028 (S.D. Tex.) (Vela, J.), *aff'd*, 86 F.3d 1368 (5th Cir. 1996) (Barksdale, DeMoss, Parker, JJ.).

Before filing the lawsuits, I consulted with the First Assistant United States Attorney for the district, who encouraged me to move forward with the lawsuits.

b. Did you ultimately withdraw these lawsuits?

After I filed the lawsuit against Frederick Lintner, he agreed to provide a full retraction of his statements. In a letter dated May 15, 1995, Mr. Lintner wrote to then-Attorney General Reno and then-Assistant Attorney General Harris: "Conditioned on the dismissal with prejudice of the above-captioned action, I hereby retract the statements made by me in that letter concerning actions taken by Assistant United States Attorney David Novak. I have no reason to believe that AUSA Novak did anything improper." After Mr. Lintner retracted his false statements, I dismissed the lawsuit against him.

After filing the lawsuit against attorney Kent Schaeffer, the Department of Justice contacted me about the level of approval that I received before filing the lawsuit. I responded that I had received the approval of the First Assistant U.S. Attorney for the district as previously noted. Although the Department accepted my response and took no action against me, it was clear to me that they believed that I should have received additional approvals. Consequently, I dismissed the lawsuit.

c. If so, why did you decide to withdraw each suit?

See previous answer.

d. During your time as an Assistant U.S. Attorney, did you file any other civil lawsuits in relation to cases you prosecuted?

In the nearly 25 years since I filed the two lawsuits, I have not filed any other lawsuits in relation to a case that I prosecuted.

7. Following your successful prosecution of 9/11 terrorist Zacarias Moussaoui, a complaint was filed against you with the Justice Department's Office of Professional Responsibility (OPR). OPR's investigation into the complaint and its findings had not been finalized at the time of your previous hearing before the Senate Judiciary Committee. (Confirmation Hearings, 110th Cong. (Apr. 3, 2008) (testimony and answers to written questions of David J. Novak))

a. Please specify what was included in the complaint to OPR following the Moussaoui trial.

The complaint was filed by former TSA attorney Carla Martin after I disclosed to the trial court and defense counsel that Ms. Martin had violated a sequestration order entered before trial. The sequestration order was issued by the trial judge during jury selection on February 22, 2006. Because Ms. Martin had signed up for electronic notification, she was emailed a copy of the order that day. Moreover, during a classified hearing on March 3, 2006 (the Friday before trial began), the trial judge discussed the sequestration order. Ms. Martin attended the hearing and a sign-

in sheet conclusively established her presence at the hearing. Moreover, a transcript of the hearing contained a discussion of the sequestration order. Indeed, the trial judge later made findings that Ms. Martin knew of the sequestration order as a result of her attendance during the classified hearing.

Ms. Martin represented two TSA/FAA witnesses who the government intended to call as witnesses, as well as three TSA/FAA witnesses that the defense intended to call as witnesses. Like defense counsel, I believed that Ms. Martin would review the sequestration order with her clients, regardless of whether they were to be called by the government or the defense.

Trial began with opening statements on Monday, March 6, 2006. That night, I was advised by a TSA supervising attorney that TSA had removed Ms. Martin from the case. The next day, Tuesday, March 7, Ms. Martin emailed a copy of the transcript from the first day of trial to the witnesses in direct violation of the sequestration order. I did not learn of Ms. Martin's actions until I met with the two government witnesses during the evening of Friday, March 10. At that time, the witnesses disclosed the emails that they had received from Ms. Martin.

I immediately recognized my ethical duty to report her misconduct to the Court and defense counsel. I alerted my trial partners and our supervisors within the Department of Justice, who all agreed with my view that we had to promptly disclose Ms. Martin's misconduct. I spent the next day investigating the full extent of her misconduct and learned that she had emailed the transcript to the defense witnesses as well. On Sunday, March 12, we sent a letter to the Court and defense counsel, advising them of Ms. Martin's misconduct. The next day, the trial judge ordered Ms. Martin to appear for an evidentiary hearing. During the evidentiary hearing, Ms. Martin invoked her Fifth Amendment rights and never testified, even though she was still employed as a government attorney. The trial judge made extensive findings about Ms. Martin's misconduct and barred the Government from calling the witnesses to testify. The trial judge further complimented my trial partners and me for promptly disclosing Ms. Martin's misconduct. I understand that, after the trial, the Department of Homeland Security (DHS), which is the parent agency of TSA, conducted its own investigation of Ms. Martin and fired her. After initially challenging her firing to the Merit Systems Protection Board, Ms. Martin resigned from the TSA, essentially admitting her misconduct. Thereafter, she filed her complaint.

The thrust of Ms. Martin's complaint was that she did not know about the sequestration order; however, that claim was undermined by her presence during the classified hearing on March 3, 2006, and the email that was sent to her when the order was entered. However, due to the high-profile nature of the case, OPR conducted a full investigation of my conduct during the trial.

b. What were OPR's findings following its investigation?

Ultimately, the Department admonished me to be more careful in the future for asking a question at trial for which an objection was sustained, but did not conclude that the question was improper. The Department also indicated that I should not have relied on Ms. Martin to review the sequestration order with the witnesses. Relatedly, the Department indicated that I should have been more careful with my description of Ms. Martin's role in the discovery process as to the witnesses. However, the Department determined that the criticism did not warrant formal discipline and specifically ordered that the admonishment not be placed in my personnel file. Consequently, no negative personnel action was taken against me. Moreover, it bears noting that I received the Attorney General's Award for Excellence in Furthering Interests of United States National Security (one of DOJ's highest awards), as well as commendation letters from both Attorney General Gonzales and FBI Director Mueller, for my work on the case.

8. On February 22, 2018, when speaking to the Conservative Political Action Conference (CPAC), former White House Counsel Don McGahn told the audience about the Administration's interview process for judicial nominees. He said: "On the judicial piece … one of the things we interview on is their views on administrative law. And what you're seeing is the President nominating a number of people who have some experience, if not expertise, in dealing with the government, particularly the regulatory apparatus. This is different than judicial selection in past years…"

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

During my interview with members of the White House Counsel's Office and DOJ's Office of Legal Policy on December 11, 2017, an interviewer asked if I was familiar with the debate over the *Chevron* decision. I responded that I was unfamiliar with the issue and we had no further discussion about it.

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

No.

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

I simply follow any precedent on issues involving administrative law. I note that, as a sitting Magistrate Judge, I have issued approximately 230 opinions regarding appeals from the denial of Social Security benefits that all implicate administrative law. The citations are included in a chart listing my opinions that I supplied as an

attachment to my Senate Judiciary Questionnaire.

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

   If the plain text of a statute is ambiguous, a canon of statutory construction provides that the legislative history of the statute may be considered when construing a statute.

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

    No.

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

    I carefully reviewed these questions after receiving them from DOJ's Office of Legal Policy (OLP). I reviewed my Senate Judiciary Committee Questionnaire, any materials referenced by these questions, and relevant statutes and caselaw. I prepared draft responses and shared them with OLP staff. Thereafter, I finalized these responses on my own.

Questions for the Record
From Senator Mazie K. Hirono

For David Novak

While you were serving as a U.S. Magistrate Judge, you gave a speech at the University of Richmond in which you made mention of some political current events. You were talking about the importance of being an informed citizen, but it could have been taken as being critical of politicians

Can you talk about the importance of judges being independent from politics?

I believe that the referenced speech was given during the induction of the McNeil Society Scholars at the University of Richmond Law School on November 4, 2016. I intended to convey in the speech the importance of an informed citizenship to our democracy (not to criticize politicians) and the special role that attorneys have in educating our fellow citizens about the responsibilities of citizenship. In the speech, I also discussed the importance of the Rule of Law, which necessarily requires an independent judiciary. Indeed, in my view, an independent judiciary free from politics serves as the bedrock for our democracy.

Nomination of David John Novak
United States District Court for the Eastern District of Virginia Questions for the Record
Submitted May 7, 2019

QUESTIONS FROM SENATOR BOOKER

1. During the committee hearing, Ranking Member Feinstein questioned you about some of the scrutiny you received during the *United States v. Moussaoui* case. Please provide an explanation of the Office of Professional Responsibility (OPR)'s investigation and its resolution.

   The complaint was filed by former TSA attorney Carla Martin after I disclosed to the trial court and defense counsel that Ms. Martin had violated a sequestration order entered before trial. The sequestration order was issued by the trial judge during jury selection on February 22, 2006. Because Ms. Martin had signed up for electronic notification, she was emailed a copy of the order that day. Moreover, during a classified hearing on March 3, 2006 (the Friday before trial began), the trial judge discussed the sequestration order. Ms. Martin attended the hearing and a sign-in sheet conclusively established her presence at the hearing. Moreover, a transcript of the hearing contained a discussion of the sequestration order. Indeed, the trial judge later made findings that Ms. Martin knew of the sequestration order as a result of her attendance during the classified hearing.

   Ms. Martin represented two TSA/FAA witnesses who the government intended to call as witnesses, as well as three TSA/FAA witnesses that the defense intended to call as witnesses. Like defense counsel, I believed that Ms. Martin would review the sequestration order with her clients, regardless of whether they were to be called by the government or the defense.

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   I immediately recognized that I had an ethical duty to report her misconduct to the Court and defense counsel. I alerted my trial partners and our supervisors within the Department of Justice, who all agreed with my view that we had to promptly disclose Ms. Martin's misconduct. I spent the next day investigating the full extent of her misconduct and learned that she had emailed the transcript to the defense witnesses as well. On Sunday, March 12, we sent a letter to the Court and defense counsel, advising them of Ms. Martin's misconduct. The next day, the trial judge ordered Ms. Martin to appear for an evidentiary hearing. During the evidentiary hearing, Ms. Martin invoked her Fifth Amendment rights and never testified, even though she was still employed as a government attorney. The trial judge made extensive findings about Ms. Martin's misconduct and barred the Government from calling the witnesses to testify. The trial judge further complimented my trial partners and me for promptly disclosing Ms. Martin's misconduct. I understand that, after the trial, the Department of Homeland Security (DHS), which is the parent agency of TSA, conducted its own investigation of Ms. Martin and fired her. After initially challenging her firing to the Merit Systems Protection Board, Ms. Martin resigned from the TSA, essentially admitting her misconduct. Thereafter, she filed her complaint.

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however, that claim was undermined by her presence during the classified hearing on March 3, 2006, and the email that was sent to her when the order was entered. However, due to the high-profile nature of the case, OPR conducted a full investigation of my conduct during the trial.

Ultimately, the Department admonished me to be more careful in the future for asking a question at trial for which an objection was sustained, but did not conclude that the question was improper. The Department also indicated that I should not have relied on Ms. Martin to review the sequestration order with the witnesses. Relatedly, the Department indicated that I should have been more careful of my description of Ms. Martin's role in the discovery process as to the witnesses. However, the Department determined that the criticism did not warrant formal discipline and specifically ordered that the admonishment was not to be placed in my personnel file. Consequently, no negative personnel action was taken against me. Moreover, it bears noting that I received the Attorney General's Award for Excellence in Furthering Interests of United States National Security (one of DOJ's highest awards), as well as commendation letters from both Attorney General Gonzales and FBI Director Mueller, for my work on the case.

a. What did you learn about yourself from OPR's investigation and how have you grown from this experience?

No one enjoys being investigated and second-guessed, particularly when they worked around the clock for years on one of the most complicated cases in history. Having said that, the investigation had a profound impact on me. As an introspective person, I believe that I am a better person and certainly a better judge as a result of the investigation. As a judge, defendants routinely appear before me after being investigated and then charged with violating the law. As a career prosecutor before becoming a Magistrate Judge, I lacked the perspective of a defendant. I now know how it feels to be investigated and have your actions questioned. Additionally, I believe that my experience has caused me to be more forgiving to attorneys who make honest mistakes during the heat of litigation.

2. You worked on a case involving Robert Russell Williams, who was charged with murdering someone who had failed to pay a drug debt to Williams. In that case, Williams' attorneys accused the government of seeking the death penalty in his case because he was black.[1] Judge James Spencer called the accusation "frivolous" because there was a failure to establish discriminatory intent. While Judge Spencer may have found this accusation frivolous, the color of a criminal defendant plays a significant role in capital punishment cases. For instance, people of color have accounted for 43 percent of total executions since 1976 and 55 percent of those currently awaiting the death penalty.[2] Additionally, while white victims are one-half of all murder victims, 80 percent of all death penalty cases involve white victims.[3]

a. What is the role of a district court judge in ensuring that the death penalty is not disproportionately applied to minorities?

A district court judge has the responsibility to apply the Equal Protection Clause in a manner consistent with Supreme Court and Circuit precedent when evaluating challenges to the death penalty based upon disproportionate application to minorities.

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[1] Randolph Goode, *Bias Charged In Drug Case Prosecutions; Blacks Not Targeted, U.S. Responds,* Richmond Times-Dispatch (Jan. 15, 1996).

[2] The American Civil Liberties Association, Race and the Death Penalty, https://www.aclu.org/other/race-and-death-penalty (Last visited May 7, 2019).

[3] *Id.*

3. As a magistrate judge, in 2013, you wrote a report and recommendation in *Chennault v. Mitchell*, which recommended the dismissal of a suit filed by the guardian of a woman who attempted suicide while in jail.[4] The guardian alleged that the officers failed to screen the woman for potential suicide risk and did not ask her required triage questions pertaining to her mental and physical health.[5] When the woman attempted to attack one of the officers, another officer sprayed Oleoresin Capsicum spray to incapacitate her.[6] After the incident the officers did not decontaminate her pursuant to the facilities' Use of Force policy.[7] That same day, when responding to the woman's suicide attempt, the officers did not support the woman's head or body when cutting her away from the cell bars.[8] In your report, you said that "a violation of jail policies alone fails to provide a cause of action under 42 U.S.C. § 1983.[9]

    a. Is there any distinction between a single violation of jail policies and repeated violations of jail policies in determining whether there is a cause of action under 42 U.S.C. § 1983?

    Whether a defendant violated a single jail policy or repeated jail policies does not control a court's analysis when determining if a plaintiff has stated a cause of action under § 1983. *See Chennault v. Mitchell*, 923 F. Supp. 2d 765, 781 (E.D. Va. 2013), *report and recommendation adopted*, 923 F. Supp. at 775, ("[A] violation of jail policies alone fails to provide a cause of action under 42 U.S.C. § 1983." (citing *Davis v. Scherer*, 468 U.S. 183, 194 (1984); *Smith v. Tolley*, 960 F. Supp. 977, 997 (E.D. Va. 1997))).

    Rather, when a plaintiff, like Chennault, brings a § 1983 claim based on the theory that the defendant officers acted with deliberate indifference toward a pretrial detainee's serious medical needs in violation of the Fourteenth Amendment, the relevant inquiry is whether the officers "actually know of and disregard an objectively serious condition, medical need, or risk of harm." *Id.* at 779 (quoting *Short v. Smoot,* 436 F.3d 422, 427 (4th Cir. 2006) (following framework established in *Farmer v. Brennan*, 511 U.S. 825, 837 (1994))). The officers "must also have 'recognized that [their] actions were insufficient' to address the risk." *Id.* (quoting *Parrish ex rel. Lee v. Cleveland*, 372 F.3d 294, 303 (4th Cir. 2004)).

    b. In other words, if a plaintiff alleged repeated violations of a jail's policies could that be sufficient for a cause of action pursuant to 42 U.S.C. § 1983?

    If all of the facts and circumstances alleged — including repeated violations of a jail's policies — establish that (1) the defendant officers "actually know of and disregard" a plaintiff's "objectively serious condition, medical need, or risk of harm" and (2) the officers recognized that their actions failed to adequately address the risk, *Chennault*, 923 F. Supp. 2d at 779, then a plaintiff could plausibly allege a cause of action pursuant to § 1983. But "failure to carry out established procedures, without more, does not constitute deliberate indifference for the possibility that [the detainee] would take his own life." *Id.* at 781 (quoting *Belcher v. Oliver*, 898 F.2d 32, 36 (4th Cir. 1990) (additional citation and internal quotations omitted)).

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[4] 923 F. Supp. 2d 765 (E.D. Va. 2013).
[5] *Id.* at 771.
[6] *Id.*
[7] *Id.*
[8] *Id.* at 772.
[9] *Id.* at 781.

i. Why was that not the case here?

Please see *Chennault*, 923 F. Supp. 2d at 780-86, for an explanation as to why I found that the officers' conduct did not amount to deliberate indifference in violation of the detainee's Fourteenth Amendment right to medical care.

4. 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.[10] Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.[11] 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.[12] In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.[13]

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

      Yes.

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

      Yes.

   c. Prior to your nomination, have you ever studied the issue of implicit racial bias in our criminal justice system? Please list what books, articles, or reports you have reviewed on this topic.

      No.

   d. According to a report by the United States Sentencing Commission, black men who commit the same crimes as white men receive federal prison sentences that are an average of 19.1 percent longer.[14] Why do you think that is the case?

      I am unfamiliar with the report, so I cannot provide an informed opinion.

   e. According to an academic study, black men are 75 percent more likely than similarly situated white men are to be charged with federal offenses that carry harsh mandatory minimum sentences.[15] Why do you think that is the case?

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[10] 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.

[11] *Id.*

[12] 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.

[13] *Id.*

[14] 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.

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

I am unfamiliar with the study, so I cannot provide an informed opinion.

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

Federal judges have a duty to ensure that racial bias does not impact the judicial system in any manner, whether during jury selection, trial or sentencing.

5. 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.[16] In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.[17]

a. Do you believe there is a direct link between increases in a state's incarcerated population and decreased crime rates in that state? If you believe there is a direct link, please explain your views.

I have not studied the issue, so I cannot provide an informed opinion. I also believe that this issue should be addressed by the political branches of our government.

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.

I have not studied the issue, so I cannot provide an informed opinion. I also believe that this issue should be addressed by the political branches of our government.

6. Do you believe it is an important goal for there to be demographic diversity in the judicial branch? If not, please explain your views.

Yes.

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

No.

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

Yes, to the extent that the term means that I will follow the plain meaning of the Constitution or the statute at issue and not substitute my personal views when reaching a decision.

9. Legislative history refers to the record Congress produces during the process of passing a bill into law, such as detailed reports by congressional committees about a pending bill or statements by key congressional leaders while a law was being drafted. The basic idea is that by consulting these documents, a judge can get a clearer view about Congress's intent. Most federal judges are willing to consider legislative history in analyzing a statute, and the Supreme Court continues to cite legislative history.

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[16] 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.

[17] *Id.*

a. If you are confirmed to serve on the federal bench, would you be willing to consult and cite legislative history?

   If the plain text of a statute is ambiguous, a canon of statutory construction provides that the legislative history of the statute may be considered when construing that statute. I will employ the canons of statutory construction when it is appropriate to do so.

b. If you are confirmed to serve on the federal bench, your opinions would be subject to review by the Supreme Court. Most Supreme Court Justices are willing to consider legislative history. Isn't it reasonable for you, as a lower-court judge, to evaluate any relevant arguments about legislative history in a case that comes before you?

   See previous answer.

10. Would you honor the request of a plaintiff, defendant, or witness in your courtroom, who is transgender, to be referred in accordance with their gender identity?

    Yes.

11. Do you believe that *Brown v. Board of Education*[18] was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

    The Supreme Court's decision in *Brown* stands as a landmark decision in our Nation's jurisprudence, as it ended the odious existence of segregation and closed a horrible chapter in our Nation's history. Indeed, as the father of two Hispanic daughters, I have directly benefitted from the decision. Had the Supreme Court not overruled *Plessy v. Ferguson* with their decision in *Brown*, it is quite likely that my daughters would have been forced to attend a segregated school. No parent should ever be forced to have their children endure such an injustice. As a sitting Magistrate Judge, I believe that the Code of Conduct for United States Judges prohibits me from critiquing any Supreme Court decision regardless of my personal views, because I serve as a judge on an inferior court. That ethical limitation, however, should not be construed in any manner as a lack of commitment to follow *Brown* as binding precedent.

12. Do you believe that *Plessy v. Ferguson*[19] was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

    Plessy v. Ferguson was not correctly decided and the Supreme Court overruled the decision in *Brown v. Board of Education*.

13. Has any official from the White House or the Department of Justice, or anyone else involved in your nomination or confirmation process, instructed or suggested that you not opine on whether any past Supreme Court decisions were correctly decided?

    No.

14. President Trump has stated on Twitter: "We cannot allow all of these people to invade our Country. When somebody comes in, we must immediately, with no Judges or Court Cases, bring

[18] 347 U.S. 483 (1954).
[19] 163 U.S. 537 (1896).

them back from where they came."[20] Do you believe that immigrants, regardless of status, are entitled to due process and fair adjudication of their claims?

Yes.

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

Questions for the Record from Senator Kamala D. Harris
Submitted May 7, 2019
For the Nomination of

David John Novak, to the U.S. District Court for the Eastern District of Virginia

1. In 2014, you served as one of three co-counsels in *United States v. Moussaoui*, a case against a French citizen of Moroccan descent who was convicted for his role in the September 11, 2001 terrorist attacks. During the trial, 14 victims of the September 11 attacks who were in the country without documentation applied for temporary U-visas, which are available to crime victims. You determined that only three of the 14 victims qualified for a U-visa. Lawyers for the remaining 11 victims argued that you had acted arbitrarily in deciding which immigrants qualified for a U-visa and had "exceeded [your] authority and cherry-picked the witnesses who best suited the prosecution, contrary to the law's intent."[1]

    a. Please explain the basis for your determination that the remaining 11 victims of the September 11 attacks did not qualify for a temporary U-visa.

    Although I cannot remember the specifics of each case, I do recall that I recommended every family member of a September 11 victim for a U-Visa that I believed could plausibly meet the requirements for the visa. (Note: I believe that the date that you are referencing should be 2004.)

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

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

    As a sitting Magistrate Judge, I sentence defendants for misdemeanor violations. In doing so, I follow the provisions of 18 U.S.C. § 3553(a), the Sentencing Guidelines and any applicable precedent. If confirmed, I will follow the same process.

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

    By following the process described in the previous answer.

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

    I have departed in the past when the facts and the law support a departure under the Sentencing Guidelines. If confirmed, I will continue to address departure motions in the same fashion.

[1] https://www nytimes.com/2004/09/16/nyregion/a-visa-case-with-a-twist-911.html

d. Judge Danny Reeves of the Eastern District of Kentucky—who also serves on the U.S. Sentencing Commission—has stated that he believes mandatory minimum sentences are more likely to deter certain types of crime than discretionary or indeterminate sentencing.[2]

i. Do you agree with Judge Reeves?

As a sitting Magistrate Judge, I am statutorily required to impose applicable mandatory minimum sentences for misdemeanors and have done so. If I am confirmed, I will continue to impose any mandatory minimum sentence required by the law, regardless of my personal views.

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

I believe that this question is better answered by the political branches. As previously stated, if I am confirmed, I will impose any mandatory minimum sentence required by law, regardless of my personal views.

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

As a sitting Magistrate Judge, I have sentenced defendants convicted of driving with a suspended driver's license for the third time. The charges resulted from traffic stops or identification checks on federal property (i.e., military base) and, therefore, assimilated Virginia state law that mandated imposition of a 10-day term of imprisonment. During some of the sentencings, I voiced concern that poorer defendants were unjustly facing prison sentences simply due to their inability to pay the fines that would prevent the third conviction. Recently, however, the Virginia law was struck down as unconstitutional by a district court judge and the Virginia legislature made changes to the law, eliminating the mandatory minimum sentence.

iv. Former-Judge John Gleeson has criticized mandatory minimums in various opinions he has authored, and has taken proactive efforts to remedy unjust sentences that result from mandatory minimums.[3] **If confirmed, and you are required to impose an unjust and disproportionate sentence, would you commit to taking proactive efforts to address the injustice, including:**

[2] https://www.judiciary.senate.gov/imo/media/doc/Reeves%20Responses%20to%20QFRs1.pdf

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

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

   I would, as I have done as a Magistrate Judge, discuss the issue with the parties during the sentencing proceeding. Ultimately, however, I would follow the law as written without regard to my personal views.

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

   I would handle the issue as described in the previous answer.

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

   No.

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

Yes. Indeed, as a sitting Magistrate Judge, I have presided over a drug court in Richmond, known as SCORE, that serves as an alternative to incarceration for defendants facing addiction issues who violated the conditions of their supervised release.

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

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

Yes.

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

Yes. For example, Congress has addressed disparities in the mandatory minimum sentences for various drug offenses by lowering the mandatory minimum, providing for sentence reductions under 18 U.S.C. § 3582 and then recently with the passage of the First Step Act.

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

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

Yes.

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

Yes. As a sitting Magistrate Judge, I already work with local law schools to ensure that I receive a pool of qualified, diverse applicants.