

**Nomination of
David Austin Tapp to the U.S. Court of Federal Claims
Questions for the Record
Submitted May 29, 2019**

QUESTIONS FROM SENATOR FEINSTEIN

1. In May 2014, President Obama nominated five individuals to open seats on the Court of Federal Claims—Judge Nancy Firestone, Thomas Halkowski, Patricia McCarthy, Jeri Somers, and Armando Bonilla. All of them received hearings in June and July 2014, and were voice-voted out of Committee between June and August of 2014. Nevertheless, their nominations were blocked by Senator Tom Cotton, who argued that the Court of Federal Claims’ workload did not justify confirming any nominees to those vacancies. Senator Cotton stated, “The reason we should not confirm new judges to the Court of Federal Claims has little to do with these nominees and more to do with the court itself. It doesn’t need new judges. We should keep in mind that the number of active judges authorized for the Court of Federal Claims by statute, 16, isn’t a minimum number, it is a maximum. It is our duty as Senators to determine if the court needs that full contingent and to balance judicial needs in light of our obligation to be good stewards of taxpayer dollars.... [It] makes no sense to spend more taxpayer dollars on judges that the court simply does not need.” (Floor statement, July 14, 2015)

a. What is your understanding of the court’s current caseload and its need for judges?

I am not familiar with Senator Cotton’s comments. Furthermore, as a judicial nominee, it is inappropriate to comment regarding an issue left to the discretion of the President with the advice and consent of the Senate—an assessment of the quantity, quality and complexity of the court’s workload and what role those considerations should play in the political branches of government fulfilling their roles.

b. Do you agree with Senator Cotton that “it makes no sense to spend more taxpayer dollars on judges that the court simply does not need”?

Please see my answer to Question 1(a).

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

a. When, if ever, is it appropriate for the Court of Federal Claims to depart from Supreme Court or relevant circuit court precedent?

Never.

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

The Supreme Court has identified circumstances under which that Court considers it appropriate to overturn its own past precedent. *See, e.g., Franchise Tax Board v. Hyatt*, 139 S. Ct. 1485 (2019). As a nominee to a lower court, I would be bound by all Supreme Court precedent.

3. 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”?**

All Supreme Court precedent is binding upon the trial courts.

- b. **Is it settled law?**

Yes.

4. 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.

5. 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?**

Heller is settled law, as are *Roe* and *Obergefell* noted above. It is inappropriate for a judicial nominee to critique binding higher court decisions. As with any higher court precedent, if confirmed, I will apply *Heller*’s holding regardless of personal view.

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

The Supreme Court determined the right secured by the Second Amendment is not unlimited. *District of Columbia v. Heller*, 554 U.S. 570, 626–27 (2008). Because the constitutionality of various gun regulations is in litigation, Canon 3(A)(6) of the Code of Conduct for United States Judges restricts additional comment.

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

As stated above, *Heller* is settled law. It is inappropriate for a judicial nominee to critique binding higher court decisions. As with any higher court precedent, if confirmed, I will apply *Heller*'s holding regardless of personal view.

6. 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?

Citizen's United determined that the First Amendment applies to corporate speech. As with any other decision by the Supreme Court, *Citizen United* is settled law in the same sense as *Heller*, *Obergefell* and *Roe* discussed above. It is inappropriate for a judicial nominee to critique binding higher court decisions. As with any higher court precedent, if confirmed, I will apply *Citizen United*'s holding regardless of personal view

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

Because the scope of the rights raised in *Citizen's United* remains pending, Canon 3(A)(6) of the Code of Conduct for United States Judges prohibits me from additional comment.

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

The Supreme Court has recognized such a right in the limited context of closely held corporations under the Religious Freedom Restoration Act. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759–2760 (2014). If confirmed, I will apply this precedent in all applicable matters occurring before me. Because the exact scope of this right is in pending litigation, Canon 3(A)(6) of the Code of Conduct for United States Judges prohibits me from commenting further.

7. On your Senate Judiciary Questionnaire, you state that you have been a member of the National Rifle Association (NRA) from 1995 to 2005, from 2010 to 2012, and from 2017 to the present.

a. Are you currently a member of the NRA?

No.

b. If confirmed to the Court of Federal Claims, will you remain a member of the NRA?

I anticipate renewing my membership.

c. Do you commit to recusing yourself from any cases that come before you that present legal issues upon which the NRA has taken a position? If not, why not?

As has been my practice since becoming a judge, I will fully disclose any potential disqualifying circumstance and recuse or voluntarily disqualify myself when required by the applicable Canons.

d. Can you cite any issue areas where you disagree with the NRA's publicly stated positions?

I am not familiar with the entirety of the NRA's publicly stated positions.

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?

No.

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 have no particular views on this broad subject. If confirmed, I am bound by decisions of the Supreme Court and the Federal Circuit on issues relating to the interpretation and application of administrative regulations. I am generally aware of the legal debate regarding the degree of deference owed to agency interpretations of its’ own regulations.

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

If confirmed, I will apply all relevant precedent from the Supreme Court and the Federal Circuit when construing a statute and review legislative history when the meaning of the statute is ambiguous. I am aware that not all legislative history carries the same degree of probative value but understand that where ambiguity exists, it can be an informative aid to construction.

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 received these questions on Wednesday, May 29, 2019. I immediately reviewed each Senator’s questions, discussed them briefly with my family, conducted initial legal research including a review of the Code of Conduct for United States Judges, reviewed responses submitted by prior nominees to similar questions, and began drafting responses. On Friday, May 31, 2019, I continued my research, then drafted and submitted preliminary responses to the Office of Legal Policy. I reviewed their feedback and independently finalized my responses for submission.

**Nomination of David Austin Tapp
to the United States Court of Federal Claims
Questions for the Record
Submitted May 29, 2019**

QUESTIONS FROM SENATOR WHITEHOUSE

1. Have you ever litigated a case before the Court of Federal Claims?

No.

2. In connection with your nomination to the Court of Federal Claims, you submitted a Questionnaire that we received on March 5, 2019. In response to Question 11, you indicated that you are currently a member of the National Rifle Association.

- a. If confirmed to the federal bench, do you plan to remain a member of the National Rifle Association?

Yes. I anticipate renewing my expired membership.

- b. Do you commit to recuse yourself from any cases that present legal issues on which the National Rifle Association has taken a position? Why or why not?

As has been my practice since becoming a judge, if confirmed to the U.S. Court of Federal Claims, I will fully disclose any potential disqualifying circumstance and recuse or voluntarily disqualify myself when required by the applicable Canons.

3. In your view, is it ever appropriate for a judge to ignore, disregard, refuse to implement, or issue an order that is contrary to an order from a superior court?

No.

4. During his confirmation hearing, Chief Justice Roberts likened the judicial role to that of a baseball umpire, saying “[m]y job is to call balls and strikes and not to pitch or bat.”

- a. Do you agree with Justice Roberts’ metaphor? Why or why not?

I agree that the metaphor explains the essential neutrality of judges. Judges are to be impartial arbiters of fact and law.

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

Judges do not exist in a vacuum, nor should they. Judges should be aware of the practical consequences of a decision and consider those consequences if it is appropriate to do so as authorized by statute, regulation or precedent. Regardless

of the practical consequences, a judge must apply the law fairly and impartially, even despite personal misgivings.

5. During Justice Sotomayor's confirmation proceedings, President Obama expressed his view that a judge benefits from having a sense of empathy, for instance "to recognize what it's like to be a young teenage mom, the empathy to understand what it's like to be poor or African-American or gay or disabled or old."

- a. What role, if any, should empathy play in a judge's decision-making process?

Empathy is an essential quality for effective judges. Depending on context, empathy facilitates communication and comports with fundamental notions of fairness and due process. Empathy cannot, in non-discretionary matters, obviate a judge's constitutional and ethical obligations to comply with the law. When a court is permitted discretion as is increasingly common within problem solving treatment courts, empathy plays a vital role in the social process.

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

Real life experiences and disappointments, positive and negative, shape individual humanity and permit judges in many instances to connect with litigants and to provide context for legal and factual issues. These experiences cannot, however, interfere with the faithful administration of a judge's constitutional and ethical obligations.

- c. Do you believe you can empathize with "a young teenage mom," or understand what it is like to be "poor or African-American or gay or disabled or old"? If so, which life experiences lead you to that sense of empathy? Will you bring those life experiences to bear in exercising your judicial role?

Yes. My current responsibilities involve a tremendous diversity of individuals confronting overwhelmingly difficult circumstances. I have presided in over 20,000 civil and criminal cases. I currently preside over a nationally recognized drug court, a separate specialty court focused on high risk offenders who would otherwise be incarcerated and implemented Kentucky's first judicial Medication Assisted Treatment program for Opioid Use Disorder. My drug court alone can account for 19 drug free babies, and dozens more within my other dockets. I have worked hard to ensure that substance abuse and mental health treatment are available to all justice involved individuals within my geographical area. I have aided countless families within my community obtain treatment for non-justice involved individuals and promoted the distribution of rescue drugs within the community. I voluntarily serve in a variety of capacities to aid our nation's children, those with Substance Abuse Disorders, and those who have been victimized by domestic violence. I have voluntarily served to aid impoverished people within and without the United States, and as a surviving spouse to promote

cancer awareness and research. My court is known for its commitment to accountability and empathy. My life experiences are what define me, and I bring those with me if confirmed to the U.S. Court of Federal Claims.

6. The Federal Judiciary’s Committee on the Codes of Conduct recently issued “Advisory Opinion 116: Participation in Educational Seminars Sponsored by Research Institutes, Think Tanks, Associations, Public Interest Groups, or Other Organizations Engaged in Public Policy Debates.” I request that before you complete these questions you review that Advisory Opinion.

a. Have you read Advisory Opinion #116?

Yes.

b. Prior to participating in any educational seminars covered by that opinion will you commit to doing the following?

i. Determining whether the seminar or conference specifically targets judges or judicial employees.

I commit to doing everything necessary to ensure that my attendance at any educational seminar comports with all ethical requirements.

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

Please see my response to Question 6(b)(i).

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

Please see my response to Question 6(b)(i).

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

Please see my response to Question 6(b)(i).

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

Please see my response to Question 6(b)(i).

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

I commit that when a reasonable question exists regarding the propriety of participating in an education program exists, I will utilize the same tools and resources which existed prior to the adoption of Advisory Opinion #116 which consolidated prior related opinions.

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

- a. Have you read the Washington Post story and listened to the associated recordings of Mr. Leo?

Yes.

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

It was only upon the request made above that I became aware of the facts and opinions expressed in the Washington Post article and accompanying material. I have formulated no opinion from my brief exposure to this material.

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

The process of judicial selection at the federal level is reserved for Legislative and Executive Branches. As such, it is inappropriate for a judicial nominee to opine regarding potential legislative action to impose financial disclosures related to judicial nominations.

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

No. As indicated above, until the request made above, I was unfamiliar with Leonard Leo. In addition, I have no knowledge of any organization or group advocating for or against my nomination.

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

As noted above, I had no familiarity with Leonard Leo until the request that I read the Washington Post and listen to the accompanying materials. I have formulated no opinion following this brief exposure to the material discussed in the story or the video file.

Questions for the Record for David Tapp
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?

No.

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

No.

**Nomination of David Austin Tapp
United States Court of Federal
Claims Questions for the Record
Submitted May 29, 2019**

QUESTIONS FROM SENATOR BOOKER

1. After you were nominated to the United States Court of Federal Claims, you said you “[weren’t] completely sure why [you were] selected for the federal claims court [sic].”¹ You also said the United States Court of Federal Claims is “obviously a very different type of court” than you are accustomed to.²

a. Why do you think you were nominated to sit on the United States Court of Federal Claims?

I do not know. If confirmed, the position of Judge of the U.S. Court of Federal Claims would present an opportunity to pursue some of the professional goals which I had articulated in the last few years. These include the opportunity to focus on complex litigation and “core’ judicial functions as compared to the important, but frequently routine, grist of the state court mill and my many ancillary duties.

b. Did you at all resist being nominated given it is a different type of court than you are used to practicing in?

No.

c. Given that you have never practiced before the United States Court of Federal Claims, what do you think prepares you to sit on that court?

I have presided over approximately 20,000 civil and criminal cases during my tenure as a state court judge. Many of those cases presented complex issues arising in contract, eminent domain, medical and legal malpractice, property rights, and product liability. I have conducted hundreds of jury and bench trials, many of which involve large corporate or governmental entities. My docket is well organized and pending matters are resolved expeditiously.

I have been entrusted on countless occasions by other courts of the Commonwealth, as well as the executive and legislative branches, to provide guidance and counsel on a variety of justice related issues. My commitment to address deficiencies and improve the Commonwealth’s courts resulted in Kentucky’s first judicial Medication Treatment Program. That program served as a model for Kentucky’s Department of Correction’s MAT program to aid those diagnosed with an Opioid Use Disorder and facing imminent release from state or county incarceration, as well as a model for other courts throughout the nation. I volunteer as a Drug Court judge which has twice

received national acclaim. I implemented Kentucky's first high risk/high need probation supervision program based a model first developed in Hawaii. Evaluations of this program have established that it reduces recidivism, decreases costs, and reduces illicit drug use.

I have been chosen by my colleagues to oversee the education of new members of the judiciary and the continuing education of all 147 general jurisdiction and family court judges within the Commonwealth. Upon request, I instruct lower court judges and the appellate judges of the Commonwealth. I have lectured extensively on issues within and without Kentucky related to Electronically Stored Information (ESI), bail reform, court culture, the use of validated risk assessment tools, evidence, and civil and criminal procedure.

In addition to fulfilling my core judicial functions I am privileged to serve as a member of the United State Coordinating Council for Juvenile Justice and Delinquency Prevention in conjunction with the U.S. Department of Justice. I am also the only judge selected to serve as a member of the Advisory Board for the RX Drug and Heroin Abuse Summit, the nation's largest conference focusing on the opioid crisis. I have served on countless formal and informal commissions, boards, working groups, and counsels involving a variety of justice related issues.

While a portion of my professional experience has involved criminal justice issues, that is largely because those were the issues confronting Kentucky at the time. No one has questioned my work ethic, my readiness, or my commitment to fulfill Constitutional and ethical obligations.

2. You support fixing our broken criminal justice system and you have spoken and/or written about the topic on numerous occasions. You once wrote that treatment programs are "primarily directed at individuals following their conviction instead of being 'front-loaded' so that we are better suited to address significant criminogenic needs like substance abuse at the outset of a person's interaction with the justice system"³
 - a. What efforts could you take on as a district judge to help people with substance abuse disorders access treatment earlier and avoid getting trapped in our broken criminal justice system?

I have been nominated for a position as a Judge of the United States Court of Federal Claims rather than as a District Judge.

3. 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.⁴ Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.⁵ 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.⁶ In my home state of New Jersey, the

disparity between blacks and whites in the state prison systems is greater than 10 to 1.⁷ You once wrote about risk assessment tools and said that “racial bias remains implicit in the system until we eliminate it as a factor in every stage of the criminal justice process.”⁸

- 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.

¹ Christopher Harris and Jeff Neal, *Tapp: ‘The High Point of My Career,’* COMMONWEALTH JOURNAL (Mar. 3, 2019); SJQ attachment 12(e) at p. 2003.

² *Id.*

³ David Tapp, Letter to Jessie Halladay, Senior Policy Advisor, Kentucky Justice & Public Policy Cabinet (Nov. 22, 2016) (SJQ Attachment 12(c) at p. 1047).

⁴ 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>.

⁵ *Id.*

⁶ 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>.

- 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.

I do not recall specific books, articles or reports that I have reviewed. I have attended implicit bias training and arranged for such training to be provided to the Commonwealth’s general jurisdiction and family court judges. Most recently, that training, consisting of a two-hour block, was offered October 22, 2018. The program was entitled “Starting the Conversation: Understanding the Impact of Implicit Bias.” I have also utilized Karen Newirth, a senior staff-attorney from the Innocence Project, regarding issues of cross-racial identifications and the reliability of eye-witness testimony which involves implicit bias. That training occurred on October 23, 2017. I reviewed and approved the materials used at each presentation. Other training programs have discussed various implicit bias issues including courses I’ve attended at the National Judicial College.

- 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.⁹ Why do you think that is the case?

I am not familiar with the specific research referenced in the question.

- 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.¹⁰ Why do you think that is the case?

I am not familiar with the specific research referenced in the question.

- 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?

Judges have a unique ability to control the actors within their courts—counsel, clerks, security, witnesses, probation officers. Educated and aware judges can focus not only on their own actions and words, but those of their staff and within their courtrooms. Judges lead by example and must immediately and effectively react to displays of intolerance. In addition, judges can promote implicit bias training within local bar associations and by ensuring that courtroom staff are adequately trained.

- 4. 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.¹¹ In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.¹²

- 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.

Assuming I understand the question, I do not believe there is a correlation between high prison populations and lower crime rates.

- 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 am not sufficiently familiar with the research to draw a conclusion on that point.

⁷ *Id.*

⁸ David Tapp, Memorandum to Laurie K. Dudgeon, Director, Administrative Office of Courts (Feb. 27, 2018) (SJQ Attachment 12(c) at p. 1045).

⁹ 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.

¹⁰ Sonja B. Starr & M. Marit Rehani, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1323 (2014)

¹¹ 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>.

¹² *Id.*

5. 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.

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

The meaning attributed to the words used within the United States Constitution at the time of adoption are a relevant factor in discerning intent.

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

The words selected by the legislature are the best manifestation of legislative intent.

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

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

Yes. I would be willing to consult legislative history as appropriate.

- 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?

This is sometimes appropriate. If a higher court has addressed the issue argued in my court, it is my obligation to comply with that precedent regardless of my own reading of the statute or its history. In addition, where legislative intent can be discerned from the words utilized by the legislature there may be no need to consult legislative history. Even when appropriate, different types of legislative history have varying probative value.

9. 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.

10. Do you believe that *Brown v. Board of Education*¹³ was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

Yes.

11. Do you believe that *Plessy v. Ferguson*¹⁴ was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

No.

12. 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.

13. As a candidate in 2016, President Trump said that U.S. District Judge Gonzalo Curiel, who was born in Indiana to parents who had immigrated from Mexico, had “an absolute conflict” in presiding over civil fraud lawsuits against Trump University because he was “of Mexican heritage.”¹⁵ Do you agree with President Trump’s view that a judge’s race or ethnicity can be a basis for recusal or disqualification?

It would be inappropriate for me to offer an opinion regarding expressions of opinion or fact by the Executive Branch. I believe, however, that a judge’s race or ethnicity is not a basis for recusal or disqualification.

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 them back from where they came.”¹⁶ Do you believe that immigrants, regardless of status, are entitled to due process and fair adjudication of their claims?

All litigants, regardless of status, are fully entitled to due process and equal justice.

¹³ 347 U.S. 483 (1954).

¹⁴ 163 U.S. 537 (1896).

¹⁵ Brent Kendall, *Trump Says Judge’s Mexican Heritage Presents ‘Absolute Conflict,’* WALL ST. J. (June 3, 2016), <https://www.wsj.com/articles/donald-trump-keeps-up-attacks-on-judge-gonzalo-curiel-1464911442>.

¹⁶ 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 29, 2019
For the Nomination of
David Austin Tapp, to the U.S. Court of Federal Claims

1. 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. As the individual charged with the continuing education of all general jurisdiction and family court judges within the Commonwealth of Kentucky, I have addressed inequity within the Commonwealth's courts by promoting implicit bias training, enhancing translation services to reduce language and cultural barriers, and promoting techniques to reduce inequity in discovery and mediation processes in cases involving asymmetrical litigation.

2. If confirmed, 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?**

In my tenure as a state judge, I have consistently employed the best qualified candidate regardless of minority status or gender. Adherence to this long-standing practice has resulted in a diverse group of employees within my chambers since first assuming office nearly 15 years ago. I commit to maintaining this practice and I acknowledge the value of diverse cultural experiences and perspective.