

**Nomination of Frank William Volk to the United States District Court for the  
Southern District of West Virginia  
Questions for the Record  
May 29, 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 inappropriate for lower courts to depart from Supreme Court precedent.

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

No.

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

District court decisions do not constitute binding precedent. A district judge's decision to depart from his or her prior opinion on a matter could depend upon a multitude of reasons.

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

I believe a decision of the Supreme Court to overrule or depart from its prior precedent is properly left to the Supreme Court alone.

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"?**

As a district court nominee, all Supreme Court decisions, including *Roe v. Wade*,

are binding precedent that I will follow if confirmed.

**b. Is it settled law?**

Yes. All decisions of the Supreme Court are settled law.

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. All decisions of the Supreme Court are settled law.

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 district court nominee, it would be inappropriate to comment on Supreme Court decisions or dissents. If confirmed I will follow *Heller* fully and faithfully.

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

Please see my response to Question 4(a).

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

Please see my response to Question 4(a).

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?**

As a district court nominee, it would be inappropriate to comment on matters that could come before me as a district judge. If confirmed, I will fully and faithfully follow *Citizens United*.

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

Please see my response to Question 5(a).

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

Please see my response to Question 5(a).

6. 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?**

Not that I recall.

**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"?**

As a district court nominee, it would be inappropriate to comment on issues that might come before me. If confirmed I will follow all binding precedent on the matter.

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

The Supreme Court has authorized judges to consider legislative history when construing the language of an ambiguous statute. *See, e.g., Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 568 (2005). If confirmed I will follow controlling precedent on the matter.

8. 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.

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

I received these questions during the evening of Wednesday, May 29, 2019. I personally drafted the responses after conducting limited legal research and reviewing the responses of prior judicial nominees to the same or similar questions, which are publicly available on the Senate Judiciary Committee website. I submitted a draft of my responses to lawyers within the Department of Justice Office of Legal Policy and reviewed their feedback. The answers to these questions are my own.

**Written Questions for Frank W. Volk**  
**Submitted by Senator Patrick Leahy**  
**May 29, 2019**

1. You have spent over twenty years as a law clerk to multiple federal judges.

**(a) How has that experience prepared you to become a federal judge yourself? What lessons have you learned from the judges for whom you have clerked about how best to conduct yourself and preside over cases as a federal judge?**

The two distinguished United States District Judges for whom I principally worked over the twenty years preceding my own assumption of the federal bench acquainted me with proper docket management, timely disposition of motion practice, the efficient and economical conduct of civil and criminal trials, and the fair and impartial administration of justice. It also provided me an immense amount of experience with federal statutory law and the proper application of the Federal Rules of Evidence and the Federal Rules of Civil Procedure.

2. Prior to your appointment as a Bankruptcy Judge, you had only limited experience directly representing clients as a legal advocate, and no experience serving as counsel in a case that went to trial.

**(a) How important do you believe that the experience of direct legal practice is to the role of a federal district court judge? How do you intend to overcome what will be a steep learning curve as someone who has had no such experience?**

Prior to assuming the bench, I had neither served as counsel in a bankruptcy case nor appeared in bankruptcy court. Additionally, from Day One on the bench, I have been the sole bankruptcy judge in our District. None of these eventualities redounded to the detriment of the bankruptcy bar or the litigants who appeared before me. I think a survey of the bankruptcy bar and the employees in the bankruptcy court would indicate quite to the contrary. Further, my ability to effectively transition is exhibited by the fact that, within a couple of years after becoming a bankruptcy judge, I began teaching colleagues and lawyers through opportunities with the Federal Judicial Center, the National Conference of Bankruptcy Judges and the American Bankruptcy Institute. I am thus well acquainted with the challenges posed by transitioning from chambers administration to the Judiciary.

For two decades as a law clerk, I was steeped in some of the most unusual, complex, challenging, and demanding civil and criminal litigation to be had in multiple districts throughout the Fourth Circuit. I believe this experience will be of inestimable and unparalleled value if I am fortunate enough to be

confirmed. There is nothing that could have prepared me more thoroughly for the tasks that hopefully lie ahead.

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

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

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

Yes.

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

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

I am not completely familiar with the comments made and the circumstances under which they arose. I would surmise, however, that the comments attributed to the President were the subject of considerable discussion in political and related commentary. Accordingly, consistent with Canon 5(C) of the *Code of Conduct for United States Judges*, I believe I am unable to comment on the matter.

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

I am not completely familiar with the comments made and the circumstances under which they arose. I would surmise, however, that the comments attributed to the President were the subject of considerable discussion in political and related commentary. Accordingly, consistent with Canon 5(C) of the *Code of Conduct for United States Judges*, I believe I am unable to comment on the matter.

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

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

I am unaware of any such provision.

6. Many are concerned that the White House’s denouncement of “judicial supremacy” was an attempt to signal that the President can ignore judicial orders.

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

As noted by Justice Stevens and his fellow dissenters in *United States v. Taylor*, 487 U.S. 326 (1988), “Failure to comply with a court order is certainly a serious matter . . . .” *Id.* at 349. Beyond that observation, I believe a response to this question may cause me to offend the terms and spirit of Canon 3(A)(6) of the *Code of Conduct for United States Judges*.

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

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

This is not an area that I have independently researched and analyzed. I am thus unable to comment. If called upon to adjudicate a question of this type, however, I would fully research and analyze the question and faithfully apply binding precedent.

- (b) In a time of war, do you believe that the President has a “Commander-in-Chief” override to authorize violations of laws passed by Congress or to immunize violators from prosecution?**

This is not an area that I have independently researched and analyzed. I am thus unable to comment. If called upon to adjudicate a question of this type, however, I would fully research and analyze the question and faithfully apply binding precedent.

- (c) Is there any circumstance in which the President could ignore a statute passed by Congress and authorize torture or warrantless surveillance?**

This is not an area that I have independently researched and analyzed. I am thus unable to comment. If called upon to adjudicate a question of this type, however, I would fully research and analyze the question and faithfully apply binding precedent.

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

This is not an area that I have independently researched and analyzed. I am thus unable to comment. If called upon to adjudicate a question of this type, however, I would fully

research and analyze the question and faithfully apply binding precedent. An answer would also cause me to tread into those areas of policy and politics which I must avoid pursuant to Canon 5(C) of the *Code of Conduct for United States Judges*.

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

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

Binding Supreme Court precedent teaches that, consistent with the Equal Protection Clause analysis, heightened scrutiny applies when a statute or other law discriminates based on gender. *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440–41 (1985). I would apply this binding precedent, and all others applicable, to cases or controversies assigned to me.

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

As noted by the United States Court of Appeals for the Eleventh Circuit decades ago, “The Voting Rights Act, as well as other federal regulation of the electoral process, has repeatedly withstood constitutional challenges to its validity.” *Delgado v. Smith*, 861 F.2d 1489, 1500 (11th Cir. 1988) (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966); *Buckley v. Valeo*, 424 U.S. 1, 143–44 (1976)). I would thus fully and faithfully apply binding precedent in this area.

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

This is not an area that I have independently researched and analyzed. I am thus unable to comment. If called upon to adjudicate a question of this type, however, I would fully research and analyze the question and faithfully apply binding precedent.

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

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

I cannot presently conceive of a circumstance where such a situation might arise.

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

I am quite familiar with, and have taught for over a decade on, multiple Supreme Court decisions respecting the authority specified, including *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413 (1968) (“We hold that § 1982 bars all racial discrimination, private as well as public, in the sale or rental of property, and that the statute, thus construed, is a valid exercise of the power of Congress to enforce the Thirteenth Amendment.”). I would fully and faithfully apply all binding precedent prescribing the analysis to be followed in this area.

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

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

The decision in *Lawrence* is binding precedent. I would apply *Lawrence* and all other binding precedents.

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

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

Were I fortunate enough to be confirmed by the Senate to the position of United States District Judge, I would have neither the desire nor occasion to tamper with binding precedent; the matter of *stare decisis* arises when an appellate court considers departing from settled law. I am bound by precedent.

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

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

If I understand the question correctly, I would by example recuse myself from any litigation involving a party or parties in which I own stock. Among other examples, I would do likewise if I had the type of relationship with a party that may give rise to an appearance of partiality.

17. It is important for me to try to determine for any judicial nominee whether he or she has a sufficient understanding of the role of the courts and their responsibility to protect the constitutional rights of all individuals. The Supreme Court defined the special role for the courts in stepping in where the political process fails to police itself in the famous footnote 4 in *United States v. Carolene Products*. In that footnote, the Supreme Court held that “legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.”

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

To the extent permitted by statute or rule, I would assure the parties appearing before me enjoyed fair and effective representation.

18. Both Congress and the courts must act as a check on abuses of power. Congressional oversight serves as a check on the Executive, in cases like Iran-Contra or warrantless spying on American citizens. It can also serve as a self-check on abuses of Congressional power. When Congress looks into ethical violations or corruption, including inquiring into the administration's conflicts of interest and the events detailed in the Mueller report, we are fulfilling our constitutional role.

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

I am unfamiliar with the different areas of Congressional oversight. I would suggest that I generally agree with this statement but only to the limits permitted by the separation of powers doctrine as presently or in the future understood with reference to applicable Supreme Court precedent.

- 19. Do you believe there are any discernible limits on a president's pardon power? Can a president pardon himself?**

I believe this area may presently be the subject of considerable discussion in political and related commentary. Accordingly, consistent with Canon 5(C) of the *Code of Conduct for United States Judges*, I believe I am unable to comment on the matter.

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

The Supreme Court has spoken a number of times on this matter, and I would fully and faithfully apply that binding precedent, where applicable, in any case or controversy assigned to me.

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

**(a) What do you believe is the "appropriate weight" that executive factual findings are entitled to on immigration issues? Is there any point at which evidence of unlawful pretext overrides a facially neutral justification of immigration policy?**

Unfortunately, as a nominee for the district court, it would be inappropriate for me to comment on the merits of a Supreme Court decision under these circumstances. *See* Canons 2, 3(A)(6), and 5, *Code of Conduct for United States Judges*. If confirmed as a district court judge, I would faithfully follow Supreme Court precedent.

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

Unfortunately, as a nominee for the district court, it would be inappropriate for me to comment on the merits or meaning of a Supreme Court decision under these circumstances, especially on a matter that may be impending. *See* Canons 2, 3(A)(6), and 5, *Code of Conduct for United States Judges*. If confirmed as a district court judge, I would faithfully follow Supreme Court precedent.

23. Federal courts have used the doctrine of qualified immunity in increasingly broad ways. For example, qualified immunity has been used to protect a social worker who strip searched a four-year-old, a police officer who went to the wrong house, without even a search warrant for the correct house, and killed the homeowner, and many other startling cases.

- (a) **Has the “qualified” aspect of this doctrine ceased to have any practical meaning? Do you believe there can be rights without remedies?**

Unfortunately, as a nominee for the district court, it would be inappropriate for me to comment on the policy considerations underlying the doctrine as presently understood through Supreme Court and other binding precedent, especially on a matter that may be impending. *See* Canons 2, 3(A)(6), and 5, *Code of Conduct for United States Judges*. If confirmed as a district court judge, I would faithfully follow Supreme Court precedent.

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

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

Unfortunately, as a nominee for the district court, it would be inappropriate for me to comment on the policy and other considerations attendant to this rapidly evolving area of the law, especially on a matter that may be impending. *See* Canons 2, 3(A)(6), and 5, *Code of Conduct for United States Judges*. If confirmed as a district court judge, I would faithfully follow Supreme Court and other binding precedent.

25. Earlier this year, President Trump declared a national emergency in order to redirect funding toward the proposed border wall after Congress appropriated less money than requested for that purpose. This raised serious separation-of-powers concerns because Congress, with the power of the purse, rejected the President’s request to provide funding for the wall.

- (b) **With the understanding that you cannot comment on pending cases, are there situations in which you believe a president can lawfully allocate funds for a purpose previously rejected by Congress?**

Unfortunately, as a nominee for the district court, it would be inappropriate for me to comment on this matter, which raises matters of policy and political and legal controversy. *See* Canons 2, 3(A)(6), and 5, *Code of Conduct for United States Judges*. If confirmed as a district court judge, I would faithfully follow Supreme Court and other precedent.

**26. Can you discuss the importance of judges being free from political influence or the appearance thereof?**

It is entirely inappropriate under Canon 5 for a federal judicial officer to yield to political pressure or influence or to allow the appearance of such to arise.

**Nomination of Frank William Volk  
to the United States District Court for the Southern District of West Virginia  
Questions for the Record  
Submitted May 29, 2019**

**QUESTIONS FROM SENATOR WHITEHOUSE**

1. 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.

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

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

I understand the metaphor to mean that one role of a judge is to interpret and apply the law, leaving the formulation of policy to the Executive and Legislative Branches of government. I agree with that formulation.

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

I would not permit political, personal, or other stray influences to affect my ruling in a matter.

3. Federal Rule of Civil Procedure 56 provides that a court “shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact” in a case. Do you agree that determining whether there is a “genuine dispute as to any material fact” in a case requires a trial judge to make a subjective determination?

I agree that a trial judge must exercise judgment in determining whether the standard for summary judgment is satisfied.

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

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

I believe a sense of empathy, so long as restrained and tempered by the Oath, the Canons and governing law, is not an undesirable quality in a judicial officer. But, for example, empathy could lead one to strain for a result at the expense of governing law and precedent. I would consider that inappropriate and inconsistent with the Oath, the Canons and governing law.

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

Please see my response to Question 4(a) above.

- 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?

Please see my response to Question 4(a) above.

5. The Seventh Amendment ensures the right to a jury “in suits at common law.”

- a. What role does the jury play in our constitutional system?

According to the National Constitution Center, James Madison drafted the Seventh Amendment inasmuch as its absence from the Founding Document might result in the necessity of convening a second constitutional convention. It was thus deemed essential at the time of the Founding and remains so.

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

The only concern I would have respecting the Seventh Amendment is to assure that, where applicable, pursuant to controlling precedent, and demanded timely and appropriately under the Federal Rules of Civil Procedure, jury empanelment and submission occurs as intended.

- c. Should an individual’s Seventh Amendment rights be a concern to judges when adjudicating issues surrounding the scope and application of the Federal Arbitration Act?

This policy concern is a matter for Congress to pass on as it deems appropriate. If called upon to do so, I would enforce the provisions of the Federal Arbitration Act, any amendments thereto subsequent, and the considerable controlling precedent interpreting the measure.

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

The Supreme Court has spoken on the subject. *See, e.g., Turner Broadcasting System, Inc. v. F.C.C.*, 520 U.S. 180, 195 (1997) (“We owe Congress’ findings deference in part because the institution ‘is far better equipped than the judiciary to “amass and evaluate the vast amounts of data” bearing upon’ legislative questions.”). I am in complete agreement with this and all other binding precedent on the subject; I would apply the same fully and faithfully.

7. 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.

Before participating in any seminar as a judge, I will ensure that I am complying with all ethical requirements.

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

Please see my response to Question 7(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 7(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 7(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 7(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?

Yes.

8. 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?

I have done so. I was unfamiliar with either Mr. Leo or the article prior to executing this Questionnaire.

- 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.

I have not independently researched the matter.

- 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?

Please see my response above to Question 8(b).

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

No.

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

The views espoused appear to be based upon personal opinion. I would have to independently research the matter myself and consider the subject before stating a personal opinion on the matter.

**Questions for the Record for Frank Volk**  
**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 Frank William Volk**  
**United States District Court for the Southern District of West Virginia**  
**Questions for the Record**  
**Submitted May 29, 2019**

**QUESTIONS FROM SENATOR BOOKER**

1. In 2011, you spoke at a Constitution Day event at the United States District Court for the Southern District of West Virginia and you praised the “Fifth Circuit Four”—referring to four judges of the United States Court of Appeals for the Fifth Circuit who became known for their important decisions that advanced the civil rights of African Americans.<sup>1</sup> You described those judges’ decisions as “one of the greatest illustrations in our Nation’s history about the courage it takes to be a guardian of the Constitution.”<sup>2</sup>
- a. Why do you believe these decisions represent the one of the greatest illustrations in our nation’s history of the courage it takes to be a guardian of the Constitution? Are there any other examples you think exemplify the courage it takes to be a guardian of the Constitution?

Each of the four judicial officers about whom I spoke faced, in varying degrees, significant repercussions for their efforts to faithfully apply and enforce the Supreme Court’s decision in *Brown v. Board of Education of Topeka*, 347 US 483 (1954). Nevertheless, each one scrupulously abided by his oath, without regard to personal consequences. I find that very meaningful and a model for other judges.

- b. If you were to be confirmed as a district judge, what lessons would you take from these four judges that you would try to replicate or draw inspiration from?
- Above all, I would apply controlling precedent without regard to the personal consequences I or my family might suffer as a result.
2. 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.<sup>3</sup> Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.<sup>4</sup> 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.<sup>5</sup> In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.<sup>6</sup>

- 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.

I have visited online sites to research the subject. I believe I was also provided background on this issue at a National Workshop for Bankruptcy Judges. Unfortunately, I cannot now recall the substance or location of either.

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<sup>1</sup> September 16, 2011: Speaker, “The Federal Courts: Guardians of the Constitution,” United States District Court for the Southern District of West Virginia, Constitution Day event, Charleston, West Virginia (SJQ Attachments at pp. 153-168).

<sup>2</sup> *Id.*

<sup>3</sup> 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>. <sup>4</sup>

*Id.*

<sup>5</sup> 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>.

<sup>6</sup> *Id.*

- 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.<sup>7</sup> Why do you think that is the case?

I am unfamiliar with the study.

- 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.<sup>8</sup> Why do you think that is the case?

I am unfamiliar with the study.

- 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?

Implicit bias may affect judicial decision making in this and other areas. If confirmed, I will impose sentences without bias or prejudice and scrupulously follow the several sentencing statutes, the United States Sentencing Guidelines, and all binding precedent.

3. According to a Pew Charitable Trusts fact sheet, in the 10 states with the largest declines in their incarceration rates, crime fell by an average of 14.4 percent.<sup>9</sup> In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.<sup>10</sup>

- 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 reviewed the fact sheet or its underlying data. Consequently, I am unable to reach a conclusion at this time.

- 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.

Please see my response to Question 3(a).

4. 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.

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

I often resist categorizations of this type as I have become more familiar with interpretive theory. If confirmed, I would observe that the original public meaning of a constitutional provision is dispositive when the Supreme Court has decided as much. If the Supreme Court has decided that some other mode of interpretation is appropriate in interpreting a constitutional provision, that decision is dispositive. If confirmed, I would faithfully apply all controlling Supreme Court precedents without respect to my personal and academic views on various interpretive theories.

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

Please see my response to Question 5.

7. 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, in the event that the provision in question is deemed ambiguous. I will follow Supreme Court and circuit precedent respecting the proper framework for statutory construction.

- 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

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<sup>7</sup> 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](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114_Demographics.pdf).

<sup>8</sup> Sonja B. Starr & M. Marit Rehani, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1323 (2014)

<sup>9</sup> 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>.

<sup>10</sup> *Id.*

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?

Please see my response to Question 7(a).

8. 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.

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

Yes.

10. Do you believe that *Plessy v. Ferguson*<sup>12</sup> was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

No. As noted in Justice Harlan's dissent thereto, the majority opinion in *Plessy* runs afoul of our "color-blind" Constitution, which "neither knows nor tolerates classes among citizens." *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

11. 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. The answers I have given here and during my hearing before the Senate Judiciary Committee are my own.

12. 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."<sup>13</sup> Do you agree with President Trump's view that a judge's race or ethnicity can be a basis for recusal or disqualification?

Inasmuch as I am unaware of any legal or ethical basis that would support recusal or disqualification for this reason, my answer is no.

13. 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."<sup>14</sup> Do you believe that immigrants, regardless of status, are entitled to due process and fair adjudication of their claims?

All parties are entitled to fair treatment in our courts. See *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) ("[T]he Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.").

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<sup>11</sup> 347 U.S. 483 (1954).

<sup>12</sup> 163 U.S. 537 (1896).

<sup>13</sup> 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>.

<sup>14</sup> 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**

**Frank Volk, to the U.S. District Court for the Southern District of West Virginia**

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

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

I would undertake a thorough and individualized assessment of the entire factual and legal record. For example, I would review any plea agreement, the presentence report and any objections thereto, any recommendations from the probation officer, any victim impact statements, the letters and other materials submitted by the defendant, if any, and his or her allocution. I would then apply the several sentencing statutes and the United States Sentencing Guidelines to arrive at an appropriate sentence, namely, one that is “sufficient, but not greater than necessary” to achieve a sentence that is consistent with 18 U.S.C § 3553(a). In doing so, I would fully and faithfully follow the process prescribed by the Supreme Court and the United States Court of Appeals for the Fourth Circuit.

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

Please see my response to Question 1(a) above.

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

Mindful of the distinctions between a “departure” from the United States Sentencing Guidelines and a “variance” therefrom based upon the factors found in 18 U.S.C. § 3353(a), I would scrupulously, and in individualized fashion, conduct the necessary analysis for each pursuant to controlling authority and ascertain based upon the law and the totality of the circumstances whether any such deviation is appropriate.

- 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.<sup>1</sup>

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

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

I am unfamiliar with Judge Reeves' views as to mandatory minimum sentences and deterrence.

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

The policy considerations applicable to mandatory minimum sentences have been debated and addressed by Congress. It would be inappropriate for me to comment on the policy considerations attached to those debates and enactments pursuant to Canons 2, 3(A), and 5 of the *Code of Conduct for United States Judges*.

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

If I understand this question correctly, it would necessarily cause me to elaborate upon the policy considerations applicable to mandatory minimum sentences debated and addressed by Congress. It would be inappropriate for me to do so under Canons 2, 3(A), and 5 of the *Code of Conduct for United States Judges*.

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.<sup>2</sup> **If confirmed, and you are required to impose an unjust and disproportionate sentence, would you commit to taking proactive efforts to address the injustice, including:**

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

I am unfamiliar with Judge Gleeson's opinions and analysis. As noted above, mandatory minimum sentences are the subject of considerable policy debate and commentary. If fortunate enough to be confirmed, I would evaluate each case individually as set forth earlier. If facing the situation described herein, I would conduct myself consistent with my ethical obligations and my duty to follow statutory and controlling case law.

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

The charging decision lies exclusively with the Department of Justice, an agency in the Executive Branch. I would thus be

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<sup>2</sup> See, e.g., "Citing Fairness, U.S. Judge Acts to Undo a Sentence He Was Forced to Impose," NY Times, July 28, 2014, <https://www.nytimes.com/2014/07/29/nyregion/brooklyn-judge-acts-to-undo-long-sentence-for-francois-holloway-he-had-to-impose.html>

obliged to respect the separation of powers. I would, however, address any prosecutorial ethical violations consistent with the obligations to do so.

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

This too presents a separation of powers concern. The decision lies exclusively with the Executive Branch. I would thus be obliged to respect the separation of powers.

- 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.

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

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

Unquestionably. It has been a personal polestar during my time in federal service, particularly on the bankruptcy bench.

**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. Sources indicate higher rates of incarceration for African-American men than for white men. I understand there is data as well indicating sentences imposed on the former are longer than those imposed on the latter. If fortunate enough to be confirmed, all parties in all cases will be treated fairly, respectfully, and equally. I will administer justice in accordance with my oath and without bias or prejudice.

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

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

This consideration is of paramount importance to me. First, I note the JRC-JTB Summer Judicial Internship Diversity Project. The goal of the Project "is to provide underrepresented law students summer judicial internships in the chambers of federal and state appellate judges, federal district judges, and federal bankruptcy and magistrate judges." I believe I have sought to participate in this

Project since 2017, but each year they have had difficulty locating an intern willing to come to West Virginia. I also asked my law clerk in February 2018 to inquire about us participating in the ABA's Judicial Intern Opportunity Program but I am unsure of the outcome. Second, in January 2019, I expressed to my colleague bankruptcy judge Tom Catliota my strong interest in participating in the October 2019 Roadways to the Federal Bench program being held in Washington D.C. The description of this effort is as follows:

The Committee on the Administration of the Bankruptcy System of the Judicial Conference is seeking to foster diversity on the bankruptcy bench which, as you know, lags substantially behind all of the other federal courts, and remarkably so. It has determined that one way to address the problem is to encourage diversity in bankruptcy practice, as well as on the bench. The Committee has conducted two diversity sessions, one in DC and one in San Diego. The invitees were law students and practitioners. The sessions lasted about two hours, followed by a reception. There was first a presentation by a Circuit Court judge and others, followed by round table discussions between the invitees and 2 bankruptcy or other judges at each table. Each round table discussion lasted 20 minutes or so, at which time the judges moved to another table to meet and talk to the invitees at that table. The process went on until all invitees had a session with all of the judges in attendance. The round table discussions focused on the practice of bankruptcy law, what are the requirements to become a bankruptcy judge, and the like. The two sessions were very well received. The Committee has decided to greatly expand the program. So, next October 24, the Committee will hold simultaneous sessions in 19 cities around the country. The format will be the same, except that the opening presentation will be broadcast from Washington to the other sites. The round table discussions will then occur at the local level among the attendees and the participating judges. The DC program will be at the Thurgood Marshall Federal Judiciary Building, One Columbus Circle, NE, Washington, DC. The attached flyer gives more information about the sessions, including the locations.

- 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?**

Please see my answer to Question 3(a) above.