

**Nomination of Raul M. Arias-Marxuach to the
United States District Court
For the District of Puerto Rico
Questions for the Record
Submitted June 27, 2018**

QUESTIONS FROM SENATOR WHITEHOUSE

1. 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?

Yes, I agree with Chief Justice Roberts’ metaphor. Like an umpire, a judge is called upon to apply rules to decide specific cases and controversies. *See* Federalist No. 78 (“[t]o avoid an arbitrary discretion in the courts, it is indispensable that they should be bound by strict rules and precedent which serve to define and point out their duty in every particular case that comes before them...”).

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

As a district court judge, I will be guided by the applicable law, regardless of practical consequences. Of course, in some circumstances, a judge is bound to consider practical consequences, and, in those areas, I would do so. For example, the canons of statutory construction caution that statutes should be interpreted to avoid absurd results. *See, e.g., General Motors Corp. v. Darling’s*, 444 F.3d 98 (1st Cir. 2006) (stating absurd results are to be avoided). Another example arises in the preliminary injunction context, where a judge must consider both the harm to the movant if injunctive relief is denied and the competing harm, if any, to the non-movant if injunctive relief is granted. *See, e.g., Charlesbank Equity Fund II v. Blinds to Go, Inc.*, 370 F.3d 151, 162 (1st Cir. 2004) (listing four-part standard for preliminary injunctions). A judge also should keep in mind the consequences of case management and scheduling decisions. *See* Fed. R. Civ. P. 1 & 2.

2. 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 can play a role in the decision-making process, but adherence to the law is paramount. For example, it is my understanding that a judge may exercise empathy for defendants or victims when determining an appropriate criminal sentence. And a judge is often called upon to exercise empathy for litigants and lawyers in the way he conducts a trial.

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

decision-making process?

A judge's personal life experiences should not play a role in the decision-making process. Cases must be decided according to the law and the facts before the Court. A judge should take pains to insulate the decision-making process from any preconceived notions formed by personal life experiences.

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?

It is not appropriate for a judge to ignore, disregard, refuse to implement, or issue an order that is contrary to an order from a superior court.

4. What assurance can you provide this committee and the American people that you would, as a federal judge, equally uphold the interests of the "little guy," specifically litigants who do not have the same kind of resources to spend on their legal representation as large corporations?

If confirmed, I will faithfully comply with the oath of office which requires a judge to "administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties [of the office]." *See* 28 U.S.C. § 453.

- a. In civil litigation, well-resourced parties commonly employ "paper blizzard" tactics to overwhelm their adversaries or force settlements through burdensome discovery demands, pretrial motions, and the like. Do you believe these tactics are acceptable? Or are they problematic? If they are problematic, what can and should a judge do to prevent them?

Burdensome and unnecessary discovery demands and motion practice are problematic tactics. Rule 1 of the Federal Rules of Civil Procedure requires that the Rules be "construed, administered and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." In keeping with this mandate, a judge should use the tools and discretion provided by Fed R. Civ. P. 26 & 37 to ensure discovery is proportional to the needs of the case and to encourage the parties to resolve discovery disputes in good faith, so as to avoid unnecessary discovery motion practice. In appropriate cases, Rule 11 provides a judge with tools to discourage unnecessary motion practice beyond the discovery arena.

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QUESTIONS FROM SENATOR BOOKER

1. According to a Brookings Institute study, African Americans and whites use drugs at similar rates, yet blacks are 3.6 times more likely to be arrested for selling drugs and 2.5 times more likely to be arrested for possessing drugs than their white peers.¹ Notably, the same study found that whites are actually *more likely* to sell drugs than blacks.² These shocking statistics are reflected in our nation's prisons and jails. Blacks are five times more likely than whites to be incarcerated in state prisons.³ In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.⁴

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

Yes.

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

Yes.

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

No.

2. According to a Pew Charitable Trusts fact sheet, in the 10 states with the largest declines in their incarceration rates, crime fell an average of 14.4 percent.⁵ In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an 8.1 percent average.⁶

¹ JONATHAN ROTHWELL, HOW THE WAR ON DRUGS DAMAGES BLACK SOCIAL MOBILITY, BROOKINGS INSTITUTE (Sept. 30, 2014), available at <https://www.brookings.edu/blog/social-mobility-memos/2014/09/30/how-the-war-on-drugs-damages-black-social-mobility/>.

² *Id.*

³ ASHLEY NELLIS, PH.D., THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS, THE SENTENCING PROJECT 14 (June 14, 2016), available at <http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/>.

⁴ *Id.* at 8.

⁵ THE PEW CHARITABLE TRUSTS, NATIONAL IMPRISONMENT AND CRIME RATES CONTINUE TO FALL 1 (Dec. 2016), available at http://www.pewtrusts.org/~media/assets/2016/12/national_imprisonment_and_crime_rates_continue_to_fall_web.pdf.

⁶ *Id.*

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

I have not studied this issue. As it involves an issue of political dispute and one that may come before me if I am so fortunate as to be confirmed, it would be inappropriate for me as a judicial nominee to express a view.

- b. Do you believe there is a direct link between decreases of 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 answer to Question 2.a. above.

3. 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.

4. Since *Shelby County, Alabama v. Holder*, states across the country have adopted restrictive voting laws that make it harder, not easier for people to vote. From strict voter ID laws to the elimination of early voting, these laws almost always have a disproportionate impact on poor minority communities. These laws are often passed under the guise of widespread voter fraud. However, study after study has demonstrated that widespread voter fraud is a myth. In fact, an American is more likely to be struck by lightning than to impersonate someone voter at the polls.⁷ One study that examined over one billion ballots cast between 2000 and 2014, found only 31 credible instances of voter fraud.⁸ Despite this, President Trump, citing no information, alleged that widespread voter fraud occurred in the 2016 presidential election. At one point he even claimed—again without evidence—that millions of people voted illegally in the 2016 election.

- a. As a general matter, do you think there is widespread voter fraud? If so, what studies are you referring to support that conclusion?

I have not studied this issue. As it involves an issue of political dispute and one that may come before me if I am so fortunate as to be confirmed, it would be inappropriate for me as a judicial nominee to express a view.

⁷ JUSTIN LEVITT, THE TRUTH ABOUT VOTER FRAUD, BRENNAN CENTER FOR JUSTICE 6 (2007), available at <http://www.brennancenter.org/sites/default/files/legacy/The%20Truth%20About%20Voter%20Fraud.pdf>.

⁸ Justin Levitt, *A comprehensive investigation of voter impersonation finds 31 credible incidents out of one billion ballots cast*, THE WASHINGTON POST, Aug. 6, 2014, available at https://www.washingtonpost.com/news/wonk/wp/2014/08/06/a-comprehensive-investigation-of-voter-impersonation-finds-31-credible-incidents-out-of-one-billion-ballots-cast/?utm_term=.4da3c22d7dca.

- b. Do you agree with President Trump that there was widespread voter fraud in the 2016 presidential election?

Please see my answer to question 4.a. above.

- c. Do you believe that restrictive voter ID laws suppress the vote in poor and minority communities?

Please see my answer to question 4.a. above.

5. The color of a criminal defendant plays a significant role in capital punishment cases. For instance, people of color have accounted for 43 percent of total executions since 1976 and 55 percent of those currently awaiting the death penalty.⁹

- a. Do those statistics alarm you?

It would be improper for me to state my personal views because doing so would mistakenly suggest that I might decide a case based on something other than the relevant law and facts. If I am so fortunate as to be confirmed as a district judge, I will treat defendants in such cases fairly and respectfully, regardless of race.

- b. Do you believe it is cruel and unusual to disproportionately apply the death penalty on people of color in compared to whites? Why not?

I have not studied this issue. As it involves an issue that may come before me if I am so fortunate as to be confirmed, it would be inappropriate for me as a judicial nominee to express a view. I commit to faithfully complying with the oath of office by striving to provide equal justice to all regardless of race, gender, ethnicity, religious beliefs or socio-economic status.

- c. The color of the victim also plays an important role in determining whether the death penalty applies in a particular case. White victims account for about half of all murder victims, but 80 percent of all death penalty cases involve white victims. If you were a judge, and those statistics were playing out in your courtroom, what would you do?

Answer: I have not studied this issue and believe it would be inappropriate for a judicial nominee to express a view other than a commitment to faithfully comply with the oath of office by striving to provide equal justice to all regardless of race, gender, ethnicity, religious beliefs or socio-economic status.

⁹ The American Civil Liberties Association, Race and the Death Penalty, <https://www.aclu.org/other/race-and-death-penalty> (Last visited June 13, 2018).

Questions for the Record from Senator Kamala D. Harris
Submitted June 27, 2018
For the Nominations of

Raul M. Arias-Marxuach, to be United States District Judge for the District of Puerto Rico

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?

If confirmed, I will follow all federal sentencing laws and the applicable precedent from the Supreme Court of the United States and the United States Court of Appeals for the First Circuit. In broad terms, they require considering the Pre-Sentence Report, calculating the sentence range under the advisory Sentencing Guidelines, and considering whether upward or downward departures from the Sentencing Guidelines are appropriate. The Sentencing Guidelines are the starting point and initial benchmark of sentencing proceedings, and after giving the parties the opportunity to argue for the sentence they deem appropriate, a judge should consider all statutory factors to determine whether they support the sentence requested by a party. *See Gall v. United States*, 552 U.S. 38, 50–51 (2007). A judge cannot presume that the guidelines range is reasonable and instead must make an individualized assessment based on the facts presented. *Id.* A decision to depart from the guidelines must be based on a justification sufficiently compelling to justify the degree of the variance. *Id.*

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?

Both 18 U.S.C. § 3553 and the Sentencing Guidelines list factors that may support a variance, and I will apply them when the facts so warrant. I will also consult relevant Supreme Court and First Circuit precedent.

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

I have not studied the issue. I would also note that the efficacy of mandatory minimum sentences is a political question that is reserved to the political branches. It would thus be inappropriate for me to state whether I agree or disagree. Moreover, cases may come before me in the future involving such statutes, and thus I am precluded from publicly

commenting on them. If confirmed, I will faithfully follow the applicable statutes and precedent regarding sentencing.

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

Please see my answer to Question 1.c.i. above.

iii. Former-Judge John Gleeson has previously criticized mandatory minimums in various opinions he has authored, and has taken proactive efforts to remedy unjust sentences that result from mandatory minimums.¹ 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?**
- 2. Reaching out to the U.S. Attorney and other federal prosecutors to discuss their charging policies?**
- 3. Reaching out to the U.S. Attorney and other federal prosecutors to discuss considerations of clemency?**

I have not previously studied the issue. However, if faced with an injustice, I will take such measures as are consistent with governing law and ethical canons.

d. 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?

Yes, that role is mandated by the oath of office which requires that the judge “administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform

¹ 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>

all the duties [of the office].” 28 U.S.C. § 453.

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

I am aware of statistics reporting a higher rate of incarceration in state jails for people of color, which suggest that such a racial disparity exists. If I am fortunate enough to be confirmed, I will treat everyone equally, fairly, and respectfully in my courtroom, and demand the same of anyone appearing, in any capacity, before me.

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

- a. Do you believe that 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?**

If confirmed, I will give serious consideration to all qualified applicants regardless of their race, gender, ethnicity, religious beliefs or socio-economic status.