

**Nomination of Holly Brady to the U.S. District Court for the Northern District of
Indiana Questions for the Record
June 13, 2018**

QUESTIONS FROM SENATOR FEINSTEIN

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

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

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

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

If I am fortunate enough to be confirmed as a District Court Judge, I will be obligated to and will faithfully apply and follow all United States Supreme Court and Seventh Circuit precedent. In a rare case, it might be appropriate for a lower court judge to point out an issue that might benefit from further attention by the Supreme Court.

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

The existence of precedent is an important part of the American judicial system. Precedent provides stability and certainty, allowing individuals to evaluate the anticipated risks associated with their conduct. A district court therefore should be extremely cautious about overturning its own precedent. In rare cases, a court may reconsider its own precedent when the grounds for a previous decision no longer exist, or the reasoning has been determined to be flawed.

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

As a district court nominee, it would be inappropriate for me to comment upon when it would be appropriate for the Supreme Court to overturn its own precedent.

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 precedent is binding, and I will apply it, including *Roe* and its progeny, fully and faithfully.

- b. Is it settled law?

Roe v. Wade is binding Supreme Court precedent. If confirmed, I will follow it and all other applicable United States Supreme Court and Seventh Circuit precedent.

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?

Obergefell v. Hodges is binding United States Supreme Court precedent. If confirmed, I will follow it and all other applicable United States Supreme Court and Seventh Circuit precedent.

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?

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 facts and law. Should I be so fortunate to be confirmed, I will faithfully apply Supreme Court and Seventh Circuit precedent in this area.

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

In *Heller*, the Supreme Court made it clear that, “like most rights, the right secured by the Second Amendment is not unlimited.” *District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008). The Court also noted that nothing in its opinion was intended to “cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing

conditions and qualifications on the commercial sale of arms.” *Id.* If I am fortunate enough to be confirmed, I will apply the United States Supreme Court precedent established in *Heller* and all other applicable precedent.

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

The various opinions in *Heller* debated the scope and applicability of previous Supreme Court precedent in this area. Beyond that observation, it would be inappropriate for me to state my personal opinion as to whether or not the holding in *Heller* departed from previous Supreme Court precedent. If I am fortunate enough to be confirmed, I will apply the United States Supreme Court precedent established in *Heller* and all other applicable precedent.

5. In March 2015, you were interviewed by a local Indiana news channel about the potential impact of the Indiana Religious Freedom Restoration Act. According to video from that interview, you described concerns about the impact of the bill as “a lot of hoopla.” You also said the following: “I don’t think that this is going to open the door to new discrimination. Are there some bad apples who will try to use this as some sort of a sword? Perhaps. But I don’t see it having any dramatic change whatsoever. I think that quite frankly this law was passed because, in recent times, people are feeling more and more like their religious beliefs are under attack.” The article that includes video of your interview also quotes you as saying that “[t]he people of Indiana will continue to apply their own values to how they operate their businesses.”

The article also cites an example you gave of people feeling that their religious beliefs were under attack. Although not a direct quote from you, the article states that you “referenced the Affordable Care Act’s attempt to require the Catholic Church to provide medical services contrary to their religious beliefs.” (Adam Widener, *Horrible or hoopla? Attorneys weigh in on religious freedom law*, WANE.COM (Mar. 26, 2015))

- a. On what basis did you conclude that the Indiana Religious Freedom Restoration Act would not have “any dramatic change whatsoever”?

During the interview, I was asked, as an employment attorney who regularly represents employers, to comment upon what impact the Indiana Religious Freedom Restoration Act might have on employers. Based on my personal experience in this area, I did not think that this law would cause employers to change the manner in which they treated their employees.

- b. On what basis did you conclude that concern about the impact of the Indiana Religious Freedom Restoration Act was “a lot of hoopla”?

Please see my answer to Question 5.a.

- c. Do you believe it is acceptable for businesses to discriminate against individuals

on the basis of their sexual orientation?

This is a factual question that is currently being litigated and which may come before me if I am confirmed as a district judge. Canon 3(A)(6) of the Code of Conduct for United States Judges prohibits me from “mak[ing] public comments on the merits of a matter pending or impending in any court.” I will fully and faithfully apply all United States Supreme Court and Seventh Circuit precedent governing this area.

- d. At the time you gave this interview, what evidence did you have that people felt “more and more like their religious beliefs are under attack”?

My comments in this article related to the potential effect of the Indiana religious freedom bill on the practices of Indiana employers. This comment reflected my understanding – based on press reports – of the legislature’s reasons for passing the religious freedom bill.

- e. Did you cite the Affordable Care Act’s “attempt to require the Catholic Church to provide medical services contrary to their religious beliefs” as an example of how religious beliefs were under attack? If so, what was the basis for that statement?

Please see my answer to Question 5.d. My reference to the Catholic Church and ACA was an attempt to give a more concrete illustration of tensions between religious beliefs and government enactments. If I am confirmed, I will follow all Supreme Court and Seventh Circuit precedent in this area.

6. On February 22, 2018, when speaking to the Conservative Political Action Conference (CPAC), 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”?

It would be improper for me to state my personal views about administrative law because doing so would mistakenly suggest that I might decide a case based on something other than the relevant facts and law. Should I be so fortunate to be confirmed, I will faithfully apply Supreme Court and Seventh Circuit precedent in this area.

7. 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.

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

I reviewed and researched each of the questions, and personally drafted answers to each. I then solicited feedback from the Office of Legal Policy at the Department of Justice. After receiving suggestions from the Office of Legal Policy, I edited the responses in a manner that I considered appropriate. I then authorized the Office of Legal Policy to submit my answers.

**Nomination of Holly A. Brady
United States District Court
For the Northern District of Indiana
Questions for the Record
Submitted June 13, 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?

As a former umpire, I appreciate Chief Justice Roberts’ analogy. An umpire is obligated to call balls and strikes consistent with the strike zone established by the applicable rules regardless of which team might be at bat. Similarly, a judge is obligated to apply the laws to the facts presented to the court in a fair and impartial manner.

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

In general, the “practical consequences” of a judge’s ruling should not play a role in her decision. A judge is obligated to apply the law, including binding precedent, regardless of the practical consequences. In certain circumstances, a legal analysis requires the judge to consider the practical consequences of her ruling, such as in the context of a preliminary injunction. I will fully and faithfully apply all precedent establishing whether and when to take practical consequences into account, if I am so fortunate as to be confirmed.

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?

28 U.S.C. § 453, which sets forth the oath for the federal judiciary, states that a judge is to “administer justice without respect to persons, and do equal right to the poor and to the rich, and that [the judge] will faithfully and impartially discharge and perform all the duties incumbent upon [the judge] . . .” While a judge must faithfully and impartially apply precedent, this does not preclude the exercise of the judge’s own empathy when presiding over a trial. Likewise, a judge may be called upon to show empathy for victims, or the defendant, when making sentencing decisions.

- 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 may assist a judge in understanding the facts and circumstances of a particular case. However, a judge is obligated to apply binding precedent, regardless of the judge's personal background or beliefs. If I am fortunate enough to be confirmed, I will fully and faithfully apply all binding precedent.

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. 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?

During my nearly 25 years of experience in general civil litigation, I have represented individuals with very limited resources and large corporations with significant resources. If I am fortunate enough to be confirmed, I can appreciate the position of all parties and will ensure that all litigants, regardless of stature or resources, will be treated equally and fairly.

- 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?

Such tactics are, at the least, problematic. I am aware that recent amendments to the Federal Rules of Civil Procedure have strengthened the district judge's ability to police such tactics and address abuses. I will actively do so, if I am fortunate enough to be confirmed.

5. Do you believe that discrimination (in voting access, housing, employment, etc.) against minorities—including racial, religious, and LGBT minorities—exists today? If so, what role would its existence play in your job as a federal judge?

Our society is not free of discrimination. If I am fortunate enough to be confirmed, I will ensure that discrimination has no place in my courtroom. If a lawsuit involving discrimination comes before me, I will fully and fairly apply all relevant statutory provisions, as well as binding Supreme Court and Seventh Circuit precedent, when presiding over the case.

6. In reference to then-Governor Pence's "religious freedom bill" that had important implications for discrimination against the LGBT community, you noted that "this law passed because in recent times, people are feeling more and more like their religious beliefs are under attack."

My comment that your personal view? What in your personal experience informs your understanding of this issue? You also noted that “there are some bad apples that will try to use this as some sort of sword, perhaps.” If confirmed, what would be your role in protecting the rights of the LGBT community from those seeking to use legislation as a “sword” against these rights?

My comments in this article related to the potential effect of the Indiana religious freedom bill on the practices of Indiana employers. My comment regarding the passage of the bill was not intended to represent my personal view about the merits of that bill, but merely set forth my understanding – based on press reports – of the legislature’s reasons for passing it. If I am so fortunate as to be confirmed, I will fully and faithfully apply the United States Supreme Court and Seventh Circuit precedent regarding the rights of the LGBT community.

**Nomination of Holly A. Brady, to be United States District Court Judge for the
Northern District of Indiana
Questions for the Record
Submitted June 13, 2018**

QUESTIONS FROM SENATOR COONS

1. With respect to substantive due process, what factors do you look to when a case requires you to determine whether a right is fundamental and protected under the Fourteenth Amendment?

If I am fortunate enough to be confirmed, I will consider the factors that have been articulated by the United States Supreme Court and the Seventh Circuit and apply the applicable precedent where determining if a right is fundamental and protected under the Fourteenth Amendment. *See, e.g., Washington v. Glucksberg*, 521 U.S. 702 (1997). My decision in a particular case would be determined by precedent, law, the particular facts, and arguments presented.

- a. Would you consider whether the right is expressly enumerated in the Constitution?

Yes. I would follow United States Supreme Court and Seventh Circuit precedent in considering the significance of express enumeration in a particular case.

- b. Would you consider whether the right is deeply rooted in this nation's history and tradition? If so, what types of sources would you consult to determine whether a right is deeply rooted in this nation's history and tradition?

Yes. Under *Glucksberg*, the inquiry focuses on sources including historical practice under the common law, practice in the American colonies, history of state statutes and judicial decisions, and long-established traditions. In undertaking such analysis, I would follow United States Supreme Court and Seventh Circuit precedent.

- c. Would you consider whether the right has previously been recognized by Supreme Court or circuit precedent? What about the precedent of a court of appeals outside your circuit?

Yes. If a right has been previously recognized by the United States Supreme Court or the Seventh Circuit, I would follow the precedent established. I would look to precedent outside the circuit for its persuasive value if there is no binding precedent from the United States Supreme Court or the Seventh Circuit.

- d. Would you consider whether a similar right has previously been recognized by Supreme Court or circuit precedent? What about whether a similar right had been recognized by Supreme Court or circuit precedent?

Yes.

- e. Would you consider whether the right is central to “the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life”? See *Planned Parenthood v. Casey*, 505 U.S. 833, 581 (1992); *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (quoting *Casey*).

Yes. If I am fortunate enough to be confirmed, I would follow all Supreme Court precedent, including *Casey* and *Lawrence*.

- f. What other factors would you consider?

I would consider any other factors identified by the United States Supreme Court or the Seventh Circuit in binding precedent.

2. Does the Fourteenth Amendment’s promise of “equal protection” guarantee equality across race and gender, or does it only require racial equality?

Answer: The United States Supreme Court has made it clear that the Fourteenth Amendment’s promise of “equal protection” applies equally to race and gender. See *United States v. Virginia*, 518 U.S. 515 (1996).

- a. If you conclude that it does require gender equality under the law, how do you respond to the argument that the Fourteenth Amendment was passed to address certain forms of racial inequality during Reconstruction, and thus was not intended to create a new protection against gender discrimination?

As a district court judge, I would be bound by the rulings of the Supreme Court and Seventh Circuit in this area, regardless of arguments made to the contrary.

- b. If you conclude that the Fourteenth Amendment has always required equal treatment of men and women, as some originalists contend, why was it not until 1996, in *United States v. Virginia*, 518 U.S. 515 (1996), that states were required to provide the same educational opportunities to men and women?

As a district court judge, I would follow *United States v. Virginia* and any other precedent of the United States Supreme Court and the Seventh Circuit in this area. I do not have any information why this issue arose and was adjudicated when it did.

- c. Does the Fourteenth Amendment require that states treat gay and lesbian couples the same as heterosexual couples? Why or why not?

The Fourteenth Amendment requires that same-sex couples be afforded the right to marry “on the same terms accorded to couple of the opposite sex.” *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015). If I am confirmed, I will fully and faithfully

apply United States Supreme Court and Seventh Circuit precedent on this and all other issues.

- d. Does the Fourteenth Amendment require that states treat transgender people the same as those who are not transgender? Why or why not?

This question encompasses cases and controversies that might come before me if I were confirmed as a district court judge. Were the question to arise, I would consider the arguments of the parties, study the briefs, and rule in accordance with Supreme Court and Seventh Circuit precedent.

3. The Supreme Court has decided several key cases addressing the scope of the right to privacy under the Constitution.

- a. Do you agree that there is a constitutional right to privacy that protects a woman's right to use contraceptives?

The Supreme Court has repeatedly held that there is a constitutional right to privacy that protects a woman's right to use contraceptives.

- b. Do you agree that there is a constitutional right to privacy that protects a woman's right to obtain an abortion?

The Supreme Court has repeatedly held that there is a constitutional right to privacy that protects a woman's right to obtain an abortion.

- c. Do you agree that there is a constitutional right to privacy that protects intimate relations between two consenting adults, regardless of their sexes or genders?

The Supreme Court has repeatedly held that there is a constitutional right to privacy that protects intimate relations between two consenting adults, regardless of their sexes or genders.

- d. If you do not agree with any of the above, please explain whether these rights are protected or not and which constitutional rights or provisions encompass them.

Not applicable.

4. In *United States v. Virginia*, 518 U.S. 515, 536 (1996), the Court explained that in 1839, when the Virginia Military Institute was established, "Higher education at the time was considered dangerous for women," a view widely rejected today. In *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600-01 (2015), the Court reasoned, "As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. . . . Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser." This conclusion rejects

arguments made by campaigns to prohibit same-sex marriage based on the purported negative impact of such marriages on children.

- a. When is it appropriate to consider evidence that sheds light on our changing understanding of society?

If I am so fortunate as to be confirmed, I will faithfully apply the precedent of the United States Supreme Court and the Seventh Circuit to determine when to consider evidence, and what evidence to consider, in cases before me. Where this precedent permits consideration of evidence of changing understanding, I will do so.

- b. What is the role of sociology, scientific evidence, and data in judicial analysis?

Sociology, scientific evidence, and data analysis can serve important roles, depending on the case, in judicial analysis. Of course, any evidence must pass muster under *Daubert* and similar precedent. As a lower court judge, I would follow the United States Supreme Court precedent and the Seventh Circuit precedent in determining what, if any, the role of sociology, scientific evidence, and data may play in a particular case.

5. In his opinion for the unanimous Court in *Brown v. Board of Education*, 347 U.S. 483 (1954), Chief Justice Warren wrote that although the “circumstances surrounding the adoption of the Fourteenth Amendment in 1868 . . . cast some light” on the amendment’s original meaning, “it is not enough to resolve the problem with which we are faced. At best, they are inconclusive We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.” 347 U.S. at 489, 490-93.

- a. Do you consider *Brown* to be consistent with originalism even though the Court in *Brown* explicitly rejected the notion that the original meaning of the Fourteenth Amendment was dispositive or even conclusively supportive?

I have not studied originalism in any depth, and so I am not able to speak to this question, even if the Code of Judicial Conduct permitted me to offer my personal opinion. If I am confirmed, I will faithfully apply the United States Supreme Court precedent in *Brown v. Board of Education*, and all applicable precedent from the United States Supreme Court and the Seventh Circuit.

- b. How do you respond to the criticism of originalism that terms like “‘the freedom of speech,’ ‘equal protection,’ and ‘due process of law’ are not precise or self-defining”? Robert Post & Reva Siegel, *Democratic Constitutionalism*, National Constitution Center, <https://constitutioncenter.org/interactive-constitution/white-papers/democratic-constitutionalism> (last visited June 13, 2018).

Please see my answer to Question 2.b. If I am confirmed, I will faithfully apply the United States Supreme Court and Seventh Circuit precedent on the meaning given by the Courts to the freedom of speech, equal protection, and due process of law, and follow all

other applicable precedent.

6. In 2015, you asserted that concerns regarding the potential discriminatory impact of an Indiana religious freedom law amounted to “hoopla” and that the law would not “open the door to new discrimination.” In your opinion, is it ever appropriate for a court to override an employer’s religious beliefs when they conflict with generally applicable laws that protect others’ fundamental rights?

The question of balancing religious beliefs and other fundamental rights is a matter of continuing litigation in the federal courts. Canon 3(A)(6) of the Code of Conduct for United States Judges prohibits me from “mak[ing] public comments on the merits of a matter pending or impending in any court.” If I am fortunate enough to be confirmed, I would faithfully apply the applicable United States Supreme Court and Seventh Circuit precedent in this regard.

Senator Mazie K. Hirono
Questions for the Record for Holly Brady

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 Holly A. Brady
United States District Court for the Northern District of Indiana
Questions for the Record
Submitted June 13, 2018

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?

I have not researched the issue of implicit racial bias in our criminal justice system. I believe that racial bias exists and continues to pose a challenge for our country, including the criminal justice system. If I am fortunate enough to be confirmed as a District Court Judge, I will treat everyone equally, fairly and with respect and demand the same of anyone appearing, in any capacity, in my courtroom.

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

I have not researched this issue, but I am aware of statistics demonstrating that people of color make up a higher percentage of incarcerated people than they do of the population as a whole.

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.

Please see my answer to Question 1.a.

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.

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

- 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 whether there is a link between a state's incarcerated population and its crime rate, and therefore have not formed a belief about the subject. I am generally aware that others have concluded that a variety of factors influence crime rates.

- 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.

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.

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.*

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.

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

This is a factual question that is currently being litigated and which may come before me if I am confirmed as a district judge. Canon 3(A)(6) of the Code of Conduct for United States Judges prohibits me from “mak[ing] public comments on the merits of a matter pending or impending in any court.”

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

This is a political question about which ethically I cannot opine. *See* Canon 5 of the Code of Conduct for United States Judges.

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

Please see my answer to Question 4.b.

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?

A capital case, or one implicating the death penalty, are the most serious matters that can come before a judge. 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. 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.

- 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?

It would not be appropriate for me to express any views on this question because a similar issue might come before me as a district judge, should I be fortunate enough to be confirmed. *See* Canons 2 and 3, Code of Conduct for United States Judges; *cf. also* Canon 1, Commentary (“The Code is designed to provide guidance to judges and nominees for judicial office.”). If I am confirmed, I will apply all relevant Supreme Court and Seventh Circuit precedent faithfully.

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).

- 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?

Please see my answer to Question 5.b.

Questions for the Record from Senator Kamala D. Harris
Submitted June 13, 2018
For the Nominations of Holly A. Brady

- Holly A. Brady, to be U.S. District Judge for the Northern District of Indiana
 - Andrew Brasher, to be U.S. District Judge for the Middle District of Alabama
 - James Patrick (“JP”) Hanlon, to be U.S. District Judge for Southern District of Indiana
 - David Steven Morales, to be U.S. District Judge for the Southern District of Texas
 - Lance Edward Walker, to be U.S. District Judge for the District of Maine
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?

Answer: I believe a United States District Court Judge’s obligation to sentence defendants is amongst the most important of all responsibilities. If I am confirmed to serve as a district court judge, I would ensure that I was fully prepared and had fully considered all information relevant to the sentencing. As part of my preparation, I would consider the presentence investigation report, the applicable advisory sentencing guidelines, the statutory sentencing factors enumerated in 18 U.S.C. § 3553(a), the arguments of counsel, statements from the victims, and statements from the defendant.

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

Please see my answer to Question 1.a.

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

The Supreme Court’s decision in *United States v. Booker*, 543 U.S. 220 (2005), which declared the Sentencing Guidelines to be advisory, enhanced judicial discretion in sentencing. I will determine whether to depart from a guidelines sentence by examining statutory provisions (for example, 18 U.S.C. § 3553(b)(1) allows for a departure from the Sentencing Guidelines if a court finds that there exists “an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines”) and by consulting Supreme Court and Seventh Circuit precedent.

- 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.¹

- i. Do you agree with Judge Reeves?

I am not familiar with the basis of Judge Reeves' statement, and I note that determinations about the efficacy of mandatory minimum sentences are political questions that are 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 Supreme Court and Seventh Circuit precedent regarding sentencing.

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

Please see the answer to Question 1.d.ii.

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

Please see the answer to Question 1.d.ii.

- iv. 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.² 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?

If I am fortunate enough to be confirmed and am presented with a situation where I am required to impose what appears to be an unjust and disproportionate sentence, I would follow the statute and binding precedent. Although in rare cases a judge criticizes the statute for working an injustice, it is generally inappropriate for judges to publicly comment on matter of legislative policy.

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

² 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>

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

The authority to charge individuals with crimes lies with the Executive Branch. If I am so fortunate to be confirmed, I will be bound to respect the separation of powers in the constitutional framework, and would not intrude upon the Executive Branch's authority.

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

Please see the answer to Question 1.d.iv.2.

- 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?

If I am fortunate enough to be confirmed, I will follow all applicable precedent in determining whether or not an alternative to incarceration is appropriate in any particular case.

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?

Judges certainly have a role in ensuring that our justice system is a fair and equitable. Judges are duty-bound to "administer justice without respect to persons," to "do equal right to the poor and to the rich," and to "faithfully and impartially discharge and perform all [their] duties." 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.

While I have not personally researched the issue of racial disparity in our criminal justice system, I am generally aware of studies which suggest that there are racial disparities in our criminal justice system. 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. I believe it is important and beneficial to have a diverse staff and law clerks.

- 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 I am fortunate enough to be confirmed, I will ensure that qualified minorities and women are given serious consideration for positions of power and supervisory positions.