

**Nomination of Nancy E. Brasel to the  
United States District Court  
For the District of Montana  
Questions for the Record  
Submitted April 18, 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?

While no metaphor is perfect, Justice Roberts’ metaphor accurately describes some of the aspects of presiding over a case, in the sense that judges apply the law fairly and without regard their own personal beliefs. Justice Roberts also used the metaphor in his confirmation hearing to describe a judge’s role as “a limited role. Nobody ever went to a ball game to see the umpire. Judges have to have the humility to recognize that they operate within a system of precedent, shaped by other judges equally striving to live up to the judicial oath.” To the extent Justice Roberts used the metaphor to emphasize humility and judicial restraint, I find the metaphor to be apt.

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

A judge should consider practical consequences only when the law requires it, as is the case with sentencing, or the consideration of equitable relief. In all cases, however, a judge should be *aware of* the practical consequences of her decision, as a part of a thorough understanding of the case.

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?

I believe that empathy greatly assists a judge in gaining a thorough understanding of the parties and their arguments. Empathy also plays a role in conduct on the bench, including the delivery of rulings and the treatment of litigants. Ultimately, however, empathy is not a basis for deciding cases, which must be decided impartially based on the legal and factual issues before the court.

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

A judge is required to put personal beliefs aside when making decisions. However, to the extent that “personal life experience” includes legal training and experience that lead to wisdom and good judgment, judges can and should rely on such experiences to assist in the decision-making process. In addition, judges sitting as fact-finders use life experiences and common sense, just as we expect jurors to do.

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?

In my time as a state court judge, I have been committed to ensuring equal access to justice for all litigants, as I have been committed to ensuring that all litigants are treated fairly and equally in my courtroom. My experience on the state court bench in Hennepin County, which is an extremely busy urban court, includes work in the civil, criminal, juvenile delinquency, and child protection arenas. In that time, I have handled thousands of cases, the majority of which have involved citizens who are disadvantaged in some way, and I take seriously my obligation to ensure that every person in my courtroom is heard and respected equally. A federal judge takes an oath to “administer justice without respect to persons, and do equal right to the poor and the rich.” I have lived that principle over the past seven years on the bench, and the committee should feel confident I will continue to do so.

- 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?

These tactics are not acceptable and they are problematic. The amendments to Federal Rule of Civil Procedure 26(b), requiring that discovery be proportional to the needs of the case, provide an additional tool for curbing such discovery practices. In the District of Minnesota, where the Magistrate Judges are largely responsible for overseeing discovery, it is important for a District Court Judge to work closely with the Magistrate Judge assigned to the case to ensure efficient and effective case management, including working under the Federal Rules of Civil Procedure to curb any abuses.

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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.<sup>1</sup> Notably, the same study found that whites are actually *more likely* to sell drugs than blacks.<sup>2</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>3</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>4</sup>

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

I am aware of and have reviewed studies demonstrating racial disparity in the criminal justice system, and I have similarly reviewed materials regarding implicit racial bias and attended training on the subject. I am committed to ensure that everyone in my courtroom is treated fairly, equally, and respectfully, and to otherwise work within my role and ethical obligations to combat racism and implicit racial bias.

- 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.

As a part of a Criminal Justice Task Force I served for my church, I reviewed many materials, including most of those cited in the task force report "Calling for Systemic Change," included in my Senate Questionnaire materials (Question 12b). These materials include Michelle Alexander's book The New Jim Crow. I have also read Bryan Stevenson's book Just Mercy, and I found both to be compelling and illuminating on this topic.

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<sup>1</sup> 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/>.

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

<sup>3</sup> 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/>.

<sup>4</sup> *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.<sup>5</sup> In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an 8.1 percent average.<sup>6</sup>
  - 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 simply have not studied this particular issue enough to express an opinion, and it would be inappropriate for me, as a judicial nominee, to offer an opinion on this topic.

- 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 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.

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<sup>5</sup> 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](http://www.pewtrusts.org/~media/assets/2016/12/national_imprisonment_and_crime_rates_continue_to_fall_web.pdf).

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

**Questions for the Record from Senator Kamala D. Harris  
Submitted April 18, 2018  
For the Nominations of**

**Nancy E. Brasel, to be United States District Judge for the District of Minnesota**

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 carefully and thoughtfully work to ensure that every sentence I impose is “sufficient, but not greater than necessary” to achieve the sentencing purposes set forth by Congress. 18 U.S.C. § 3553(a)(2). In order to achieve this goal, I would consider arguments of counsel, statements of victims or witnesses, the presentence report, recommendations of probation, the governing statutes, the Sentencing Guidelines and any grounds for departure, and precedent of the Eighth Circuit. I fully recognize the weighty nature of sentencing and the care it requires, and I will faithfully follow the law and my oath in carrying out this responsibility.

**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?**

While the Guidelines are advisory, they use the term “departure” as a term of art, and both the Guidelines and precedent explain circumstances that can justify a departure or variance from the advisory Guidelines range. I would carefully review the Guidelines and precedent, provide advance notice required by Fed. R. Crim. P. 32(h) if required, and consider the arguments of the parties before departing under the Guidelines.

**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?**

I believe this question is one of policy, reserved to Congress. Therefore, I believe it would be inappropriate for me under the Judicial Canons to express an opinion on this matter. I would be required to follow the law of mandatory minimums regardless of my personal view on the

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

deterrent effect of such minimum sentences.

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

Please see my response to Question 1.d.i. above.

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

Please see my response to Question 1.d.i. above.

**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.<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 believe it is appropriate for a judge to comment on his or her disagreement with a law in rare instances. I would evaluate each case individually and would consider taking such a step if it is consistent with the law and my ethical obligations.

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

Please see my response to Question 1.d.iv.1 above.

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

Please see my response to Question 1.d.i. above.

**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.

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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>

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.

**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 have studied materials in this area, including a study indicating that in Minnesota, the African-American population is approximately 6 percent, while nearly 37 percent of the state's prison population is black. Similar disparities exist for the Native American population as well. As I have done as a judge on the state court bench, if confirmed, I will "administer justice faithfully and impartially without respect to persons," which includes not just "equal right to the poor and to the rich," but equal right to persons irrespective of race. 28 U.S.C. § 453.

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?**

Yes.