

**Nomination of Susan Marie Brnovich  
United States District Court  
For the District of Arizona  
Questions for the Record  
Submitted May 16, 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?

I think the metaphor does a good job of describing the role of a judge. The role of a judge is to interpret the law and apply it to the facts of each case. A judge is charged with making sure that everyone plays by the rules. The judge should not be concerned with who wins a particular case but should ensure that the hearing is fair.

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

The practical consequences of a particular ruling should generally not be considered by a judge. The judge should be guided to a result by the law and the facts. However, there are circumstances when it is legally appropriate to consider the practical consequences such as when considering equitable relief.

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?

A judge’s role is to fairly apply the law, regardless of the judge’s personal views. Empathy plays a role in helping a judge ensure that the parties are treated with dignity and respect, helping a judge understand the positions taken by a party, and in criminal sentencing. But federal judges must ensure that they abide by their oath to “administer justice without respect to persons, and do equal right to the poor and the rich.” 28 U.S.C. §453.

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

Please see the response to Question 2(a) above. The judge’s personal life experiences come into play when he or she is a fact finder. In Arizona, we instruct jurors to evaluate the evidence in light of reason, common sense and experience, and judges do the same when they are sitting as fact finders. Additionally, a judge’s life experience, as it refers to professional experience, is essential to a judge’s ability to control the courtroom, manage a docket, and interpret the law.

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?

I have been a judicial officer in the Arizona courts for 14 years. During that time, I have presided over criminal, civil, family, and juvenile cases. I have been committed to ensuring that everyone appearing before me is treated with respect and dignity and that they all receive fair treatment. I have experience presiding over cases where one side is represented by counsel and the other side is not. In those cases, I sought to ensure that the self-represented litigant was treated fairly by the other side. I will honor my oath to be impartial and to “administer justice without respect to persons, and do equal right to the poor and to the rich.” 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?

These tactics are not acceptable. A judge should take care to control abusive discovery tactics. Federal Rule of Civil Procedure 26(b) requires that discovery be proportional to the needs of the case. This mirrors an Arizona rule that I have used to keep discovery from becoming abusive or overwhelming; I would continue to do so if I am 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?

Yes, discrimination exists. As a federal judge, cases alleging discrimination will come before me. It will be my job to ensure that victims of discrimination get a fair trial. I will honor my oath to be impartial and to “administer justice without respect to persons, and do equal right to the poor and to the rich.” 28 U.S.C. § 453.

6. How, if at all, will your experiences as a Deputy County Attorney and criminal prosecutor (including your recognition by the Phoenix Police Department) impact your judgement and decision-making in regard to criminal defendants?

My experiences as a prosecutor have helped me understand the importance of treating each criminal defendant as an individual. As a prosecutor, my job was to ensure that the rights of the victim were respected and protected but also to ensure that defendants were treated fairly. I took great care to use my discretion to show leniency in making plea offers or sentencing recommendations when appropriate, but also to stand firm when the maximum penalty was appropriate. I had the opportunity to talk directly to defendants during settlement conferences and hear their life stories and explanations. I understand that criminal defendants are defined by more than just their crime.

**Questions for the Record for Susan Brnovich**  
**Senator Mazie K. Hirono**  
**May 16, 2018**

**Questions for Susan Brnovich, nominee for the District of Arizona**

1. Chief Justice John Roberts has recognized that “the judicial branch is not immune” from the widespread problem of sexual harassment and assault and has taken steps to address this issue. As part of my responsibility as a member of this committee to ensure the fitness of nominees for a lifetime appointment to the federal bench, I would like each nominee to answer 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 Susan Brnovich to the  
United States District Court for the District of Arizona  
Questions for the Record  
Submitted May 16, 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.<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 believe that racial bias, including implicit racial bias, exists in society in general. During my time as a state court judge, I have worked hard to ensure that racial bias does not infect any proceedings in my courtroom and I am committed to do the same if I am confirmed as a federal district court judge.

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 not studied the issue of implicit bias prior to my nomination.

---

<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 have not studied this issue and have not formed any opinion about a potential link between incarceration rates and 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.

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.<sup>7</sup> One study that examined over one billion ballots cast between 2000 and 2014, found only 31 credible instances of voter fraud.<sup>8</sup> 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.

---

<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.*

<sup>7</sup> 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>.

<sup>8</sup> 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](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?

I have not studied the issue of voter fraud and have formed no opinions about the issue. Additionally, as the issue of voter fraud may potentially come before me as a district court judge, it would be inappropriate for me as a judicial nominee to comment on this issue under Canon 3(A)(6) of the Code of Conduct for United States Judges.

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

See my response to Question 4(a).

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

I have not studied how voter ID laws affect poor and minority communities. Additionally, this issue may potentially come before me as a district court judge so it would be inappropriate for me to comment on this issue under Canon 3(A)(6) of the Code of Conduct for United States Judges.

**Questions for the Record from Senator Kamala D. Harris**  
**Submitted May 16, 2018**  
**For the Nominations of Susan Brnovich**  
**to be U.S. District Judge on the District of Arizona**

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 as a district court judge, I would approach sentencing in the same way that I do now as a judge for the State of Arizona. I prepare for all sentencing hearings by reading the presentence report, any materials submitted by the prosecution and defense, and statutory sentencing factors. At the sentencing hearing, I listen carefully to any additional evidence or argument presented. I then impose a sentence after fully considering all of the information available. As a district court judge, that sentence would be imposed keeping in mind the primary purposes of sentencing as stated at 18 U.S.C. § 3553(a)(2) and the goal of avoiding sentencing disparities as stated in 18 U.S.C. § 3553(a)(6).

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

See my response to Question 1(a).

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

It is only appropriate to depart from the Sentencing Guidelines as allowed by law, guided by Part K of Section 5 of the Guidelines. A departure should not be applied without first giving notice to the parties that the judge is considering a departure. Fed. R. Crim. P. 32(h). The judge should also consider any arguments of the parties before making a final decision.

**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?**

The decision of what type of sentencing system best serves the community is a policy decision within the authority of Congress. It would be inappropriate for me to comment on any policy decision because there is potential for a case to come before me in the future involving the statutes.

---

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

Canon 3(A)(6) of the Code of Conduct for United States Judges precludes judges from commenting on issues that may come before them. If confirmed, I will faithfully apply the mandatory 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).

**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).

**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?**

If I am confirmed and confronted with having to impose an unjust sentence, I would consider what appropriate action to take after considering applicable laws, rules, and ethical obligations. Part of those obligations is to recognize that the inclusion of mandatory minimum sentences in the statutes falls within the purview of Congress under Article 1 of the United States Constitution.

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

Article II of the United States Constitution vests the authority to make charging decisions in the executive branch. Judges should be careful not to encroach upon this authority or interfere with those decisions.

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

---

<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>



Federal clemency is exclusively a function of the executive branch. *See Harbison v. Bell*, 556 U.S. 180 (2009). Judges should respect that authority.

- 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?**

Yes. A judge takes an oath to administer justice faithfully and impartially without respect to persons, and do equal right to the poor and the rich. 28 U.S.C. § 453. If confirmed as a district court judge, I will uphold that oath.

- 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 that studies exist, showing evidence of racial disparities in the criminal justice system. But I have not studied the issue enough to cite specific examples. It is important for judges to be aware of the problem and to ensure that every person in his or her courtroom is treated fairly. *See* 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?**

If I am confirmed to serve as a district court judge, I will seek applicants from a wide variety of backgrounds and give serious consideration to all applicants regardless of their age, gender, race, color, national origin, or religion.