

**Nomination of Chad Francis Kenney Sr.
United States District Court
For the Eastern District of Pennsylvania
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 agree with Chief Justice Robert’s metaphor. It is the role of the judge to interpret and apply the law to the facts presented and not to advocate or rule based upon their own personal beliefs.

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

The practical consequence of a ruling of a judge generally should play no role in the rendering of a decision unless the applicable law or rules provide for such consideration.

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. I would be bound by the judicial oath of office requiring impartiality and administration of justice “without respect to the persons, and do equal right to the poor and to the rich.” 28 U.S.C. § 453. I would apply the law to the facts without allowing personal opinions, emotions, or policy preferences to affect decisions. Though empathy should play no role in deciding cases, there are circumstances allowed for under the law where empathy can and should appropriately affect the judicial function such as in criminal sentencing.

- 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. A judge’s personal life experiences should play no role in his or her decision making. A judge should apply the law fairly and impartially, “without respect to the persons.” 28 U.S.C. § 453.

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?

Access to the courts and one’s ability to have one’s day in court is a simple but critical concept in our American jurisprudence. As a Pennsylvania State Trial Judge sitting in a court of general jurisdiction for the last fourteen years, I have had the “little guy” appear in front of me in all types of cases. To the litigant, there is no small case. Every case and every litigant deserves respect and in return the court can expect respect from the litigants and from the litigants towards each other regardless of disparities. These litigants come from all backgrounds. It is important to allow all litigants to create a record that fairly reflects their respective positions in order to allow the fact finder to make a ruling in which all litigants conclude they were treated equally under the law and had their day in court regardless of the outcome. I believe I have maintained that environment in my courtroom for the last fourteen years and I intend to maintain it in my role as a federal judge. *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?

“Paper blizzard” tactics are problematic and not acceptable. As a litigator and as a trial judge I have had extensive experience reviewing pre-trial motions and discovery motions. The best way for a trial judge to manage this system to protect against abuses, such as “paper blizzard” tactics, is for the judge to be actively engaged early on in the litigation process. The Federal Rules of Civil Procedure, Rule 16, requires a judges early intervention and requires the attorneys, in conjunction with the court, to agree on the discovery parameters and case management early on. Indeed, proportional discovery under Fed. R. Civ. P. 26(b)(1), was specifically enacted in 2015 to aide the trial judge in preventing abuses such as “paper blizzard” tactics. All these rules are meant to aide the court in following through on Fed. R. Civ. P. 1, which forms the foundation of the Federal Civil Rules, which is to “secure the just, speedy and inexpensive determination of every action and proceeding.” A trial judge needs to actively manage cases so that the requests and motions stay proportional with the particular case or controversy to be decided and avoid the potential for “paper blizzard” abuse.

5. For Question 17 of your Senate Judiciary Committee Questionnaire, you noted that you no longer have records from your years of practice. Can you provide any additional details (including case names) regarding your time in private practice, as a defense attorney, or as an Assistant County Solicitor in the Delaware County Solicitor’s Office?

I do not have any further details to provide other than what I provided in my answer to Question 17.

Questions for the Record for Chad F. Kenney
Senator Mazie K. Hirono
May 16, 2018

Questions for Chad F. Kenney, nominee for the Eastern District of Pennsylvania

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 Chad F. Kenney to the
United States District Court for the Eastern District of Pennsylvania
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.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 do believe that racial bias exists in our country and if I were fortunate enough to be confirmed, I will honor my judicial oath and “administer justice faithfully and impartially without respect to persons,” granting equal rights under the law to all who appear before me, regarding of race. 28 U.S.C. § 453.

- 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 had not specifically studied the issue of implicit racial bias prior to my nomination.

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

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

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.

Under the Judicial Canons, it would be inappropriate as a judicial nominee to offer any opinion on this topic. Furthermore, I have not had occasion to review these studies and statistics.

- 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.

Under the Judicial Canons, it would be inappropriate as a judicial nominee to offer any opinion on this topic. Furthermore, I have not had occasion to review these studies and statistics.

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.

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?

Under the Judicial Canons, it would be inappropriate for me to comment on this issue given pending litigation and the policy and political nature of the matter.

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

Under the Judicial Canons, it would be inappropriate for me to comment on this issue given pending litigation and the policy and political nature of the matter.

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

Under the Judicial Canons, it would be inappropriate for me to comment on this issue given pending litigation and the policy and political nature of the matter.

Questions for the Record from Senator Kamala D. Harris
Submitted May 16, 2018
For the Nominations of Chad Kenney
to be U.S. District Judge on the Eastern District of Pennsylvania

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?

As a District Court Judge, I would fairly and faithfully apply the law, rules, and the United States Sentencing Guidelines and procedures, as construed and set forth by the United State circuit Court for the Third Circuit and the Supreme Court, to determine a fair and just sentence. Prior to imposing sentence, I would thoroughly review the Presentence Investigation Report, the sentencing guidelines, any filings, arguments, or witnesses/victims presented by the parties, and any allocution by the defendant to ensure a fair and just sentence. I would adhere to the law, ensuring every sentence imposed is “sufficient, but not greater than necessary” to achieve the sentencing purposes established by Congress. 18 U.S.C. § 3553(a)(2).

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

In addition to my answer to 1(a), in any given case, the applicable and controlling statutes, rules, guidelines and rulings of the Supreme Court of the United States and the Third Circuit Court are the foundation upon which a district court judge may use as a guide in determining what constitutes a fair and proportional sentence in any given case.

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

The United States Sentencing Guidelines are advisory. The sentencing judge must consider the Sentencing Guidelines when imposing a sentence. A sentencing judge may depart from the guidelines only when it finds “and aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines...” 18 U.S.C. § 3553(b). If a sentencing judge finds a case that is outside the intended heartland of the guidelines, the judge may consider under the proscribed Sentencing Guidelines, Part K of Section 5, whether a departure is warranted. I would carefully review the guidelines and any applicable precedent, provide advance notice if required by the Federal Rule of Criminal Procedure, and consider the arguments and positions of the litigants, statements by witnesses/victims, and allocution of the defendant before departing from the guidelines. I would ensure that any sentence I imposed was “sufficient, but not

greater than necessary” to achieve the sentencing purposes established by Congress. 18 U.S.C. § 3553(a)(2).

- 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?

It would be inappropriate for me under the Judicial Canons to express an opinion on this matter as this is an issue of legislative policy that is under the purview of Congress under the United States Constitution. If I were fortunate enough to be confirmed as an United States district court judge, I would fairly and faithfully apply all controlling laws, rules, guidelines, and procedures as construed by the United States Court of Appeals for the Third Circuit and the Supreme Court of the United States in order to determine a fair and just sentence.

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

It would be inappropriate for me under the Judicial Canons to express an opinion on this matter as this is an issue of legislative policy that is under the purview of Congress under the United States Constitution.

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

It would be inappropriate for me under the Judicial Canons to express an opinion on this matter. The decision to charge a defendant under a statute that calls for the application of a mandatory minimum sentence is exclusively under the purview of the executive branch. If I were fortunate enough to be confirmed as a United States district court judge, I would fairly and justly apply all controlling laws and precedents, including statutes where Congress has provided for the imposition of a mandatory minimum sentence.

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

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>

an unjust and disproportionate sentence, would you commit to taking proactive efforts to address the injustice, including:

1. Describing the injustice in your opinions?

Under Article I of the United States Constitution, the decision whether to enact a statute that carries a mandatory minimum sentence is solely vested with Congress. Though some judges have commented on statutes that they believe can result in an unjust sentence in extremely limited circumstances, it is imperative to be mindful of the judiciary's role and not violate the sanctity of our separation of powers. If I were fortunate enough to be confirmed, in the extreme circumstance where I was required to impose a sentence that resulted in manifest injustice, I would consider commenting about this matter in my judicial opinion.

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

Under Article II of the United States Constitution, the decision whether to charge a defendant with an offense that carries an otherwise applicable mandatory minimum sentence is solely vested with the executive branch and a judge must avoid encroaching upon this authority. Accordingly, a district court judge should not discuss or attempt to influence charging decisions by the executive branch.

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)(iv)(2). As the determination whether to grant clemency rests within the purview of the Executive Branch and not the Judiciary, I would be mindful not to tread on this 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, if and when permitted under the law.

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. The judicial oath requires judges to administer justice both faithfully and impartially. If I were fortunate enough to be confirmed as a United States District Court Judge, I vow to uphold this 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.**

Yes, unfortunately, racial disparities still exist and there are studies showing evidence of racial disparities in our criminal justice system. I have not studied the issue enough to cite specific examples. If I were fortunate enough to be confirmed, I vow to apply my judicial oath and “administer justice faithfully and impartially without respect to persons,” granting equal rights under the law to all who appear before me, regardless 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?**

I will seek to make all hiring decisions based on the quality of the applicant, regardless of age, gender, race, color, national origin, or religion.