

Questions for the Record
From Senator Mazie K. Hirono
For Diane Gujarati, Eric Komitee, John L. Sinatra, Jr., Rachel P., Kovner, Lewis J. Liman,
Mary Kay Vyskocil and Gary Brown

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.

2. In these hearings, when a Senator asks about a nominee's personal views on a topic, about their involvement in certain organizations or their decisions to advocate for certain points of view, they tell us that those parts of their records don't matter, that as judges they will simply "follow the law." But, cases are so infrequently decided by the direct application of legal precedent that at some point, as one nominee told us, "judging kicks in."

Do you acknowledge that there will be times on the bench, that a judge does bring personal experiences and views to bear on their decisions?

I believe that judges are duty bound to decide cases impartially, by applying the law to the facts before them. I agree that, in doing so, judges sometimes confront legal questions that are not squarely controlled by direct application of legal precedent. I believe that judges should decide those questions by applying the tools of legal interpretation set out in Supreme Court and circuit law, and not based on their personal views or policy preferences.

3. A recent nominee before the Committee spoke about the importance of training to help judges identify their implicit biases.

- a. Would you agree that training on implicit bias is important for judges to have?**

Racial bias has no place in the judicial system. I have not studied the efficacy of any particular training program, but if I were so fortunate as to be confirmed, I would work to ensure that racial bias does not affect the administration of justice in my courtroom.

- b. Have you ever taken such training?**

No.

c. If confirmed, do you commit to taking training on implicit bias?

If confirmed, I would faithfully carry out my duty to administer justice impartially, without bias of any kind, 28 U.S.C. § 453, and would seek out resources to help me in performing that duty.

**Nomination of Rachel P. Kovner
United States District Court for the Eastern District of New York
Questions for the Record
Submitted August 7, 2018**

QUESTIONS FROM SENATOR BOOKER

1. According to a Brookings Institution 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* than blacks to sell drugs.² These shocking statistics are reflected in our nation's prisons and jails. Blacks are five times more likely than whites to be incarcerated in state prisons.³ In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.⁴

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

Yes, I believe that racial bias exists and can be conscious or subconscious. Participants in the criminal justice system are not immune from the prejudices that exist in society as a whole.

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

Yes, it is my understanding that there are racial disparities in incarceration rates and that, as the preface to the question states, African-Americans are incarcerated at higher rates than whites.

- 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.

Yes, prior to my nomination I had read some books, articles, and reports addressing racial bias, including implicit or subconscious bias, as relevant to my work as a lawyer at the Department of Justice. These materials included Ellen S. Cohn et al., *Reducing White Juror Bias: The Role of Race Salience and Racial Attitudes*, 39 J. Applied Soc. Psychol. 1953 (2009); Alyson A. Grine & Emily Coward, *Raising Issues of Race in North Carolina Criminal Cases* (2014); Jeff Robinson & Jodie English, *Confronting the Race Issue in Jury Selection*, The Advocate, May 2008; Regina A. Schuller et al., *The Impact of Prejudice Screening Procedures on Racial Bias in the Courtroom*, 33 Law & Hum. Behav. 320 (2009); and Samuel R. Sommers & Phoebe C. Ellsworth, Symposium, *How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research*, 78 Chi.-Kent L. Rev. 997 (2003).

2. According to a Pew Charitable Trusts fact sheet, in the 10 states with the largest declines

in their incarceration rates, crime fell by an average of 14.4 percent.⁵ In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.⁶

- a. Do you believe there is a direct link between increases in 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 or formed a view on that issue.

- b. Do you believe there is a direct link between decreases in 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.

I have not studied or formed a view on that issue.

¹ Jonathan Rothwell, *How the War on Drugs Damages Black Social Mobility*, BROOKINGS INST. (Sept. 30, 2014), <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, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, SENTENCING PROJECT (June 14, 2016), <http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons>.

⁴ *Id.*

⁵ Fact Sheet, *National Imprisonment and Crime Rates Continue To Fall*, PEW CHARITABLE TRUSTS (Dec. 29, 2016), <http://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2016/12/national-imprisonment-and-crime-rates-continue-to-fall>.

⁶ *Id.*

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. Do you believe that *Brown v. Board of Education*⁷ was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

Brown v. Board of Education corrected a badly erroneous decision in *Plessy* and vindicated Justice Harlan's *Plessy* dissent correctly stating that separate to the benefit of one race could never be equal. I agree with the many scholars and jurists who have said that it is one of the great stains on the Supreme Court's history that it took the Court so long to get to that decision in *Brown*.

5. Do you believe that *Plessy v. Ferguson*⁸ was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

As stated above, I believe Justice Harlan rightly concluded in dissent in *Plessy* that *Plessy*'s "separate but equal" policies could never be equal as required under the Equal Protection Clause.

6. Has any official from the White House or the Department of Justice, or anyone else involved in your nomination or confirmation process, instructed or suggested that you not opine on whether any past Supreme Court decisions were correctly decided?

Lawyers from the Department of Justice have provided guidance on questions that have been raised at past hearings, the Code of Conduct for Judges, and the manner in which nominees have understood and applied that code, but the answers I am providing are my own.

7. President Trump stated recently on Twitter: "We cannot allow all of these people to invade our Country. When somebody comes in, we must immediately, with no Judges or Court Cases, bring them back from where they came."⁹ Do you believe that immigrants, regardless of status, are entitled to due process and fair adjudication of their claims?

Because of the ongoing legal disputes concerning what immigration procedures comport with due process principles, it would be improper for me to express a view on the contours of due process in this area under Canon 3(A)(6) of the Code of Conduct for United States Judges, which bars judicial nominees from commenting on matters pending or impending in any court.

⁷ 347 U.S. 483 (1954).

⁸ 163 U.S. 537 (1896).

⁹ Donald J. Trump (@realDonaldTrump), TWITTER (June 24, 2018, 8:02 A.M.), <https://twitter.com/realDonaldTrump/status/1010900865602019329>.

**Questions for the Record from Senator Kamala D. Harris
Submitted August 8, 2018
For the Nominations of**

Gary Brown, to the U.S. District Court for the Eastern District of New York

Diane Gujarati, to the U.S. District Court for the Eastern District of New York

Eric R. Komitee, to the U.S. District Court for the Eastern District of New York

Rachel P. Kovner, to the U.S. District Court for the Eastern District of New York

Lewis J. Liman, to the U.S. District Court for the Southern District of New York

John L. Sinatra, Jr., to the U.S. District Court for the Western District of New York

Mary Kay Vyskocil, to the U.S. District Court for the Southern District of New York

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?

Guided by Federal Rule of Criminal Procedure 32 and 18 U.S.C. § 3553, I would review all relevant materials, including the Presentence Investigation Report, the sentencing submission for the defendant and any letters and other documents submitted on the defendant's behalf, any allocution by the defendant, the government's sentencing submission, and any victim statements. I would calculate the advisory Sentencing Guidelines range and determine whether there was a basis for a departure. I would then consider each of the objectives of sentencing specified by Congress in order to arrive at a sentence sufficient, but not greater than necessary to comply with the purposes of sentencing identified by Congress. *See* 18 U.S.C. § 3553(a). Throughout the process, I would carefully consider the arguments of the parties. And I would endeavor to explain my reasons thoroughly and clearly, so that the public and the individuals involved in the case would understand the basis for the sentence.

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

I would use the procedures set out above in every case. I would also review sentencing data for my district and the nation, reports and guidance from the Sentencing Commission, sentencing-related judicial decisions, and other relevant materials.

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

Part K of Chapter 5 of the Sentencing Guidelines lists the circumstances under which the Sentencing Guidelines authorize departures from an advisory Guidelines range. In addition, judges may impose non-Guidelines sentences when they determine that such sentences are warranted based on the objectives of sentencing set out in 18 U.S.C. § 3553(a).

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 Judge Reeves' statement or the basis for his conclusion. I am aware, however, that there are policy debates about whether mandatory minimum sentences deter crime and about the merits of such policies more broadly. Ultimately, the decision whether to maintain mandatory minimum sentences is one for Congress, and if confirmed as a judge, I would be required to fully and faithfully apply all controlling statutes.

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

Please see answer 1.d.i.

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

Please see answer 1.d.i.

iv. Former-Judge John Gleeson has 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?

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>

While I believe that judges should focus their judicial opinions on the legal arguments in the case at hand, I would not rule out expressing disagreement with the law in an exceptional case, if I determined that doing so was consistent with my ethical obligations.

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

While mindful that charging decisions are vested in the Executive Branch, I would not rule out reaching out to the U.S. Attorney's Office or taking other steps to call attention to a prosecutorial policy that I regarded as unjust, after carefully reviewing the applicable rules, precedent, and ethical guidance.

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

While mindful that clemency determinations are vested in the President, I would not rule out calling attention to features of a case that might make consideration of clemency warranted.

- 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.

- 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, my understanding is that there are racial disparities in our criminal justice system, including in rates of incarceration across racial groups.

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

a. Do you believe that it is important to have a diverse staff and law clerks?

Yes.

b. Would you commit to executing a plan to ensure that qualified minorities and women are given serious consideration for positions of power and/or supervisory positions?

If confirmed, I would seek to arrange my hiring practices to ensure that qualified minorities and women are given serious consideration for staff and law clerk positions and for any other positions that I would fill.

**Senate Judiciary Committee – Questions for the Record
August 1, 2018**

Hearing entitled: “Nominations”

Panel I

Questions for Richard Sullivan, to be United States Circuit Judge for the Second Circuit

1. Can you name something that is constitutional that you think should be unconstitutional?
2. Why do you think it is okay for you to give your opinion about the death penalty?
 - a. If a death penalty case comes before you and you’ve already announced that you’re against the death penalty, doesn’t that violate your rule that you shouldn’t comment about constitutionality and unconstitutionality?
3. What does the ninth amendment mean?
 - a. What are those other rights in your opinion?
 - b. What’s a penumbra?
 - c. Are there other penumbras in the Constitution?
 - d. Can you see a penumbra?
 - e. Well if you can’t see it, how do you know it’s there?
 - f. What other penumbras are there in the Constitution?
4. A guy is walking down the street in a high crime area. We know statistically that it’s a high crime area, it’s not a subjective thing. It’s the middle of August and he’s wearing a really heavy coat and he’s got a big satchel with him. Every now and then he looks into a car.
 - a. Can the police stop and talk to him?
 - b. Is there reasonable suspicion?

Panel II

Questions for Diane Gujarati, to be United States District Judge for the Eastern District of New York, and

Questions for Eric Ross Komitee, to be United States District Judge for the Eastern District of New York, and

Questions for John L. Sinatra, Jr., to be United States District Judge for the Western District of New York, and

Questions for Rachel P. Kovner, to be United States District Judge for the Eastern District of New York, and

Questions for Lewis J. Liman, to be United States District Judge for the Southern District of New York, and

Questions for Mary Kay Vyskocil, to be United States District Judge for the Southern District of New York:

1. The following are yes or no answers.

a. Do you believe that retribution is a legitimate purpose of our penal system?

Yes.

b. Do you believe that adult incest is protected by the Bill of Rights?

No.

c. If *Brown v Board of Education* were overruled and *Plessy v Ferguson* were reinstated, would you resign?

No. I believe I would likely conclude that it would compound the harm of such a decision if all the judges who disagreed with it stepped aside. In my view, racial equality would likely be better served if judges who fervently disagreed with the overruling remained in office.

d. Do you believe that the US Constitution should be interpreted in the context of an ever-changing world?

Yes.

e. Do you believe that the founder's original intent is most important thing in interpreting the Bill of Rights?

No. In the absence of any precedent, I believe that judges should start with the constitutional text and how it was publicly understood when ratified, which are more important than subjective intent.

f. Do you believe that the founder's original intent in drafting the Bill of Rights should determine today how the constitution is interpreted?

No, as set forth above.