Nomination of Dominic Lanza to the
United States District Court for the District of Arizona
Questions for the Record
March 14, 2018

QUESTIONS FROM SENATOR FEINSTEIN

1. In 2016, you served as a panelist for "*Miranda* at 50," a discussion at an Arizona State Bar Convention. When asked what you would change about the law or application of the U.S. Supreme Court's decision in *Miranda v. Arizona*, you responded, in part, that you would "[s]trengthen the presumption that, if the defendant is provided with advisements and agrees to talk, the resulting statements are voluntary." You continued, "[w]e are seeing a lot of litigation about IQs, learning disabilities, and cultural backgrounds, which chips away at the *Miranda* Court's attempt to establish an easily-administrable test that limits the need for case-by-case adjudication." (Panelist, "*Miranda* at 50," Arizona State Bar Convention, June 6, 2016)

   How is the Supreme Court's decision in *Miranda* inconsistent with taking account of a suspect's IQ, learning disabilities, or cultural background in the application of the case's protections?

   It would be inappropriate for me, as a judicial nominee, to offer an opinion on how the *Miranda* opinion might apply in various factual scenarios because such questions are the subject of pending or reasonably anticipated litigation. Also, during the discussion at the state bar convention, I was simply attempting to address the differences between bright-line rules, which are prevalent some areas of criminal law, and other legal tests requiring case-by-case adjudication.

2. From 2006 to 2008, you served on the legal team representing General Motors and other automakers in their defense of a tort suit brought by the State of California for billions of dollars incurred as a result of climate change, contributed to by automobile emissions. You appeared on a Ninth Circuit brief arguing that California had improperly sought "to conscript the federal judiciary into its effort to breathe life into a sweeping new 'global warming' tort," which you argued was a "quintessentially political question[]" that could not be adjudicated by the court. (Appellees' Answer Brief, *California ex rel. Brown v. General Motors Corp.*, No. 07-16909 (9th Cir. 2008), 2008 WL 2131094)

   What legal recourse do states have to recover monetary damages from companies whose actions specifically harm their residents and natural resources?

   It would be inappropriate for me, as a judicial nominee, to offer an opinion on this topic because it addresses an issue that is the subject of pending or reasonably anticipated litigation.

3. In 2006, you were on the team that served as counsel to the Product Liability Advisory Council, which submitted a Supreme Court amicus brief in *Philip Morris USA v. Williams*. The brief argued that "products liability cases pose special dangers of arbitrary

punitive damage awards." (Brief of the Product Liability Advisory Council as *Amicus Curiae* in Support of Petitioner, *Philip Morris v. Williams,* 549 U.S. 346 (2007))

a. What are the "special dangers" that lead to "arbitrary punitive damage awards"?

The Supreme Court has addressed this topic on several occasions. In *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), Justice Kennedy said for the Court: "Although [punitive damage] awards serve the same purposes as criminal penalties, defendants subjected to punitive damages in civil cases have not been accorded the protections applicable in a criminal proceeding. This increases our concerns over the imprecise manner in which punitive damages systems are administered. We have admonished that '[p]unitive damages pose an acute danger of arbitrary deprivation of property. Jury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences.'" *Id.* at 417 (citation omitted).

In *Philip Morris USA v. Williams*, 549 U.S. 346 (2007), Justice Breyer added for the Court: "[W]e have emphasized the need to avoid an arbitrary determination of [a punitive damage] award's amount. Unless a State insists upon proper standards that will cabin the jury's discretionary authority, its punitive damages system may deprive a defendant of 'fair notice . . . of the severity of the penalty that a State may impose'; it may threaten 'arbitrary punishments,' *i.e.*, punishments that reflect not an 'application of law' but 'a decisionmaker's caprice'; and, where the amounts are sufficiently large, it may impose one State's (or one jury's) 'policy choice,' say, as to the conditions under which (or even whether) certain products can be sold, upon 'neighboring States' with different public policies." *Id.* at 352-53 (citations omitted).

b. What values of justice, if any, do grants of punitive damages serve in products liability cases?

In *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), the Supreme Court stated that "[p]unitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition." *Id.* at 568.

4. 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?

    Never.

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

    District judges ordinarily do not have the ability to issue concurring and dissenting opinions. Moreover, district judges must faithfully apply all Supreme Court precedent. As the Supreme Court has stated, "unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be." *Hutto v. Davis*, 454 U.S. 370, 375 (1982) (per curiam).

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

    The precedents that bind a district judge in Arizona are the opinions of the Ninth Circuit and the Supreme Court.

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

    As a nominee to an inferior federal court, I believe it would be inappropriate for me to express an opinion on this topic.

5. 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"?

    From the perspective of a district judge, there is no distinction between the precedents of the Supreme Court. All of them are binding and must be faithfully applied.

    b. Is it settled law?

See answer to question 5a.

6. 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 at outside groups — about loyalty to President Trump? If so, please elaborate.

   No.

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

   I received these questions by email from the Office of Legal Policy ("OLP") on March 14, 2018. Afterward, I consulted my questionnaire, reviewed relevant case law, and personally drafted answers to the questions. I emailed my responses to OLP on March 16, 2018.

Senator Dick Durbin
Written Questions for John Nalbandian, Dominic Lanza, and Joseph Hunt
March 14, 2018

For questions with subparts, please answer each subpart separately.

Questions for Dominic Lanza

1. You say in your questionnaire that you joined the Federalist Society in 2015, which also appears to be the year that you became the Chief/Executive Assistant U.S. Attorney in the District of Arizona. **Why did you decide to join the Federalist Society that year?**

   In the summer of 2015, a friend of mine who was a board member of the Phoenix lawyers' chapter of the Federalist Society asked if I would be interested in serving, in a personal capacity, as the co-presenter during the chapter's annual "Supreme Court Review" event. (As noted in my questionnaire, I frequently have been asked by other groups, including the Arizona State Bar, the Federal Bar Association, local schools, and various trade associations, to speak on legal topics.) I accepted the invitation and ended up greatly enjoying the event. I also enjoyed the intellectual stimulation of discussing current developments in the law with other attendees, who approached these issues from many different viewpoints and perspectives. As a result, I began regularly attending other Federalist Society programming events in Phoenix. I was also asked to serve as the co-presenter during the 2016 iteration of the "Supreme Court Review" event. Once again, I enjoyed this experience.

2. You published a law review article in 2008 entitled "Global Warming Tort Litigation: The Real Public Nuisance." **Do you believe, as a matter of scientific evidence, that human activity is causing the climate to change in ways that may be harmful to human health and our environment?**

   It would be inappropriate for me, as a judicial nominee, to offer an opinion on this topic because it addresses an issue that is the subject of pending or reasonably anticipated litigation. I would further note that the 2008 article does not express an opinion on this topic.

3. **In your view, is there any role for empathy when a judge is considering a criminal case – empathy for the victims of the alleged crime, for the defendant, or for their loved ones?**

   A judge's role in a criminal case is to fairly apply the law regardless of the judge's personal views. That said, I am well aware from my decade of experience as a federal prosecutor that 18 U.S.C. § 3553 contains provisions that may call for a judge to consider empathy as part of the sentencing calculus. For example, judges are required by subdivision (a)(1) to consider the "history and characteristics of the defendant." This factor could lead a judge to consider imposing a lower sentence if the defendant's crime represented an aberration from an otherwise law-abiding life. Such an approach—considering the entirety of the defendant's

life instead of focusing narrowly and exclusively on the circumstances of the crime at issue—can be characterized as a statutorily-mandated exhibition of empathy.

Separately, I am familiar from my work as a federal prosecutor with the Crime Victims' Rights Act, which is codified at 18 U.S.C. § 3771. Subdivision (b)(1) of this statute provides that, before excluding a victim from a public court proceeding, a judge "shall make every effort to permit the fullest attendance possible by the victim and shall consider all reasonable alternatives to the exclusion of the victim from the criminal proceeding." This, too, can be characterized as a statutorily-mandated exhibition of empathy—recognizing the profound impact that crimes may have on victims and ensuring the needs and rights of victims aren't overlooked during the criminal process.

Nomination of Dominic W. Lanza to the
United States District Court
For the District of Arizona
Questions for the Record
Submitted March 14, 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?

    No metaphor is perfect, but I believe Chief Justice Roberts's baseball metaphor is a good one. Judges are duty-bound to fairly and impartially ascertain and apply the law, regardless of their personal views. Similarly, an umpire should apply the same strike zone to both teams' pitchers, regardless of any rooting interests the umpire might personally harbor.

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

    In our system of government, it is the role of the political branches to evaluate and weigh the practical consequences of different policy choices. The judiciary's role is different—it is to fairly and impartially ascertain and apply the law, even if doing so generates an outcome the judge might not personally prefer. That said, the Supreme Court has stated that, at least in certain contexts and circumstances, "absurd results are to be avoided" when interpreting statutes. *United States v. Turkette*, 452 U.S. 576, 580 (1981). This canon of construction suggests that judges may sometimes consider the practical consequences of ruling in a particular fashion. Additionally, some equitable doctrines require judges to consider factors (*i.e.*, irreparable injury) that necessarily entail some consideration of the practical consequences of action or inaction. Finally, district judges are also vested with consideration discretion when it comes to certain case- and trial-management issues, and it is important that such rulings be practical.

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. That said, I am well aware from my decade of experience as a federal prosecutor that 18 U.S.C. § 3553 contains provisions that may call for a judge to consider empathy as part of the sentencing calculus. For example, judges are required by subdivision (a)(1) to consider the "history and characteristics of the defendant." This factor could lead a judge to consider imposing a lower sentence if the

defendant's crime represented an aberration from an otherwise law-abiding life. Such an approach—considering the entirety of the defendant's life instead of focusing narrowly and exclusively on the circumstances of the crime at issue—can be characterized as a statutorily-mandated exhibition of empathy.

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

On the one hand, judges are bound to apply the law fairly and impartially, regardless of their personal views and life experiences. It would be inappropriate for a judge to disregard the law, and tilt the scales in favor of a particular litigant, due to the judge's personal preferences. On the other hand, wisdom is often the byproduct of experience, and it would be entirely appropriate for a judge to draw upon such wisdom when engaging in certain types of judicial decision-making. For example, district judges are vested with consideration discretion when it comes to certain case- and trial-management issues. One would hope that a judge would draw upon his or her pre-judicial experience as a litigator when addressing such issues. A contrary approach would tend to generate impractical rulings.

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?

My professional record should provide complete assurance to the Committee and the American people that all litigants will be treated fairly and equally in my courtroom, regardless of their power or wealth. During my five years in private practice, I engaged in extensive *pro bono* work and received my law firm's "Most Challenging Pro Bono Matter" award. After my time in private practice provided enough financial stability to address my student loans, I left to pursue a career in public service. In my decade as a federal prosecutor, I have focused primarily on white collar fraud and public corruption cases. This work has frequently led me to prosecute wealthy and powerful businesspeople and corporations (and, in the process, to protect the rights and interests of their relatively powerless victims). Finally, as noted during my hearing, my father was a solo practitioner whose work consisted almost exclusively of representing the "little guys" in personal injury, worker's compensation, and bankruptcy matters. Growing up in this environment, I witnessed first-hand the deep importance of treating all litigants with courtesy, respect, and fairness.

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 unacceptable. As noted above, district judges are vested with consideration discretion when it comes to case- and trial-management issues. Judges can and should utilize their discretion in these areas to thwart "paper blizzard" and other abusive tactics.

5. You have represented corporate clients against claims that they should be held liable for damages as a result of their contributions to climate change, and in your personal capacity you have advocated against such climate change-based tort litigation.

    a. What assurances can you provide that you would be a fair and impartial arbiter of cases involving issues related to climate change?

    Over ten years ago, while still in private practice, I helped assert good-faith legal arguments on behalf of a client. The district court agreed with those arguments and determined they were meritorious. Afterward, I helped co-author a law review article (which did not express any opinion concerning the existence or non-existence of climate change) that summarized several additional cases in which other courts had issued legal rulings similar to the district court's ruling in our case. These factors, coupled with the vow I will take under 28 U.S.C. § 453 to "administer justice without respect to persons, and . . . faithfully and impartially discharge all duties incumbent upon me . . . under the Constitution and the laws of the United States," should provide ample assurance that I will be a fair and impartial arbiter in future cases.

    b. Given your personal advocacy on this issue, and your conclusion that climate change-based tort lawsuits are a "nuisance," will you agree to recuse yourself from such cases? If not, why not? Given your personal views on these cases generally, how could a plaintiff bringing such a claim have any confidence that you would be a fair and impartial adjudicator of his or her case?

    See answer to question 5a.

Senate Judiciary Committee
"Nominations"
Questions for the Record
March 7, 2018
Senator Amy Klobuchar

Questions for District Court Nominees
[For Mari Dooley, Nominee to be United States District Judge for the District of Connecticut; Dominic Lanza, Nominee to be United States District Judge for the District of Arizona; and Jill Otake, Nominee to be United States District Judge for the District of Hawaii]

- You all have experience working as an Assistant U.S. Attorney. As a former prosecutor, I would like to ask: What have you learned from your experience as a prosecutor, and how has that experience prepared you to serve as a federal judge?

  I learned many valuable lessons during my time as a federal prosecutor. Perhaps the most important lesson was the need to represent the facts and the law fairly and accurately to the Court and opposing counsel. The prosecutor's role is to do justice, not simply to win at all costs, and a prosecutor who misstates the facts or the law in an attempt to gain an advantage in a particular case violates this fundamental precept. Similarly, federal judges are duty-bound to fairly and impartially ascertain and apply the law, regardless of their personal views.

  Another lesson I learned as a federal prosecutor was the necessity of treating everybody involved in the legal process—from judges to jurors to court staff to opposing counsel to defendants—with courtesy, dignity, patience, and respect. It is important that federal judges display similar qualities.

- How would you view the importance of adhering to precedent – even precedent where you felt that the case was wrongly decided – if you are confirmed as a federal judge?

  If confirmed as a district judge, I will faithfully apply and adhere to all applicable precedent. As the Supreme Court explained in *Hutto v. Davis*, 454 U.S. 370, 375 (1982) (per curiam): "[U]nless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be."

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Submitted March 14, 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?

    The unfortunate but undeniable reality is that racial bias continues to exist in America. Racial bias and discrimination are antithetical to the rule of law and to the core liberties protected by the Constitution. During my tenure in the U.S. Attorney's Office, I have attempted to address these issues by serving on the office's diversity committee, serving as a volunteer participant in the "Court Works" program (in which local students hailing primarily from at-risk schools act as the attorneys, witnesses, jurors, and judge in a simulated trial), helping oversee our office's civil rights prosecutions, and participating in outreach activities to various community groups.

    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 this issue prior to my nomination.

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[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 previously reviewed these studies and statistics. In any event, 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.

    See answer to question 2a.

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.

[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.*