

Nomination of Matthew Walden McFarland  
United States District Court for the Southern District Of Ohio  
Questions for the Record

Submitted July 3, 2019

**Questions from Senator Booker**

1. In a 2005 decision from your time on the Ohio Fourth District Court of Appeals, you joined a majority opinion rejecting a challenge to the imposition of a mandatory minimum sentence for drug trafficking and possession. The opinion stated that mandatory minimums “represent the rational legislative policy that some crimes are so heinous that only imprisonment will punish the offender and protect the public. And they are rationally related to these legitimate state interests of punishment and protection.”<sup>1</sup>

a. Does that statement accurately reflect your views today on mandatory minimums? If not, please provide your current assessment.

This question would require me to comment on issues that may come before as a sitting Ohio appellate judge or, if I am confirmed, as a district court judge. Consistent with the Ohio Code of Judicial Conduct and the Code of Conduct for United States Judges, I must respectfully decline to comment. However, I will faithfully follow all binding Supreme Court and Sixth Circuit precedent relating to mandatory minimums.

b. The War on Drugs has been a war on people—and, disproportionately, poor people and people of color. Shouldn't our sentencing policy be guided by data about what actually works to reduce crime, instead of simply imposing potentially very lengthy sentences on people across the board?

In my 19 years on the Ohio bench as a magistrate and now appellate judge, I believe my record shows that I have acted with compassion, conscience, and competency regarding sentencing. If I am confirmed as a district court judge, I will review each sentencing on a case by case basis and treat all with fairness and impartiality.

c. If you are confirmed, would you fully and faithfully implement the letter and spirit of the First Step Act—which Congress passed late last year to begin an effort to mend our broken criminal justice system?

Pursuant to my oath of office, I will fully and faithfully follow all federal laws.

2. Impartiality is a fundamental part of a federal judge's duties. It is central to the rule of law and judicial independence. Canon 3 of the Code of Conduct for United States Judges instructs: “A Judge Should Perform the Duties of the Office Fairly, Impartially and Diligently.” Canon 3(C), moreover, specifically provides: “A judge shall disqualify himself or herself in a proceeding in

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<sup>1</sup> *State v. Cumberland*, No. 04CA14, 2005 WL 635042, ¶ 22, at \*5 (Ohio Ct. App. 4th Dist. Mar. 11, 2005).

which the judge's impartiality might reasonably be questioned.”

A 2004 article about your ultimately successful race for a seat on the Ohio Fourth District Court of Appeals reported that you stated in your “campaign literature” that you were “an avid Second Amendment supporter and a member of [your] county’s Right to Life group.”<sup>2</sup> The article continued: “While he said he would never allow his political biases to sway his decisions on the appellate court, he believes it’s legitimate to let voters know where he stands on gun rights and abortion. ‘I just thought from an electability standpoint, [voters are] electing a person, and not just a person who’s not going to bring anything of life experience to the table,’ he said. ‘I think the more voters know about a person’s personal life, the better.’”<sup>3</sup>

a. Please explain why, if you’re confirmed, someone in your courtroom should expect to get a fair hearing from an impartial judge in a case about the Second Amendment or women’s reproductive rights.

My 19 year record on the bench has demonstrated a commitment to fairness and impartiality to all, I have not allowed any personal views to impact my judicial decisions. I will continue to do the same to all individuals that may appears before me if I am confirmed.

b. Given your past positions as “an avid Second Amendment supporter and a member of [your] county’s Right to Life group” in campaign literature for a judgeship, would your impartiality in cases involving the Second Amendment or women’s reproductive rights reasonably be questioned?

Please see my response to Question 2.a.

c. If you’re confirmed, would your past positions in a judicial campaign as “an avid Second Amendment supporter and a member of [your] county’s Right to Life group” mandate your recusal in any cases that might come before you involving the Second Amendment or women’s reproductive rights?

For the past 19 years on the bench I have reviewed question of recusal on a case by case basis and will continue to do the same if I am confirmed. I will follow the Code of Conduct for United States Judges in all regards as to recusal.

3. Do you consider yourself an originalist? If so, what do you understand originalism to mean?

I prefer to resist judicial labels in this regard. If I am confirmed, I will faithfully follow all binding Supreme Court and Sixth Circuit precedent in all regards.

4. Do you consider yourself a textualist? If so, what do you understand textualism to mean?

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<sup>2</sup> Jim Phillips, *Long-Time Athens Judge, Scioto County Magistrate Seek Appeals Court Seat*, ATHENS NEWS (Oct. 18, 2004), in SJQ Attachments to Question 12(a) at 141-43.

<sup>3</sup> *Id.* at 143 (alteration in original).

Please see my response to Question 3.

5. Legislative history refers to the record Congress produces during the process of passing a bill into law, such as detailed reports by congressional committees about a pending bill or statements by key congressional leaders while a law was being drafted. The basic idea is that by consulting these documents, a judge can get a clearer view about Congress's intent. Most federal judges are willing to consider legislative history in analyzing a statute, and the Supreme Court continues to cite legislative history.

a. If you are confirmed to serve on the federal bench, would you be willing to consult and cite legislative history?

If I am confirmed, I will review the text of any statute to determine if it is ambiguous and if, it is not, the inquiry will end there. *See Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) (“[I]n any case of statutory construction, our analysis begins with the language of the statute. And where the statutory language provides a clear answer, it ends there as well.”) (internal citations and quotation omitted). If a statute is ambiguous, I will do my best to find the meaning of the statute. I would also consider the arguments of all parties to the case and I recognize that the Supreme Court has permitted use of legislative history if the statute is ambiguous.

b. If you are confirmed to serve on the federal bench, your opinions would be subject to review by the Supreme Court. Most Supreme Court Justices are willing to consider legislative history. Isn't it reasonable for you, as a lower-court judge, to evaluate any relevant arguments about legislative history in a case that comes before you?

Please see my response to Question 5.b.

6. Do you believe that judicial restraint is an important value for an appellate judge to consider in deciding a case? If so, what do you understand judicial restraint to mean?

If I am confirmed as a district court judge, I would be in a different judicial role than that of an appellate judge. However, as a sitting Ohio appellate judge, I do understand that role and the limits placed upon me by the Ohio constitution and statutes. For me, it means deciding the case or controversy in front of me and not one that is not. Judicial activism would be the opposite of judicial restraint.

a. The Supreme Court's decision in *District of Columbia v. Heller* dramatically changed the Court's longstanding interpretation of the Second Amendment.<sup>4</sup> Was that decision guided by the principle of judicial restraint?

*Heller* is binding Supreme Court precedent, and as a district court judge I would faithfully apply all binding precedent on me if I am confirmed. Due to my ethical obligations as a sitting Ohio appellate judge and a nominee, I respectfully decline to comment further.

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<sup>4</sup> 554 U.S. 570 (2008).

b. The Supreme Court's decision in *Citizens United v. FEC* opened the floodgates to big money in politics.<sup>5</sup> Was that decision guided by the principle of judicial restraint?

*Citizens United* is binding Supreme Court precedent, and as a district court judge I will faithfully apply all binding precedent if I am confirmed. Due to my ethical obligations as a sitting Ohio appellate judge and a nominee, I respectfully decline to comment further.

c. The Supreme Court's decision in *Shelby County v. Holder* gutted Section 5 of the Voting Rights Act.<sup>6</sup> Was that decision guided by the principle of judicial restraint?

*Shelby County* is binding Supreme Court precedent and as a district court judge I will faithfully apply all binding precedent if I am confirmed. Due to my ethical obligations as a sitting Ohio appellate judge and a nominee, I respectfully decline to comment further.

7. Since the Supreme Court's *Shelby County* decision in 2013, states across the country have adopted restrictive voting laws that make it harder for people to vote. From stringent voter ID laws to voter roll purges to the elimination of early voting, these laws disproportionately disenfranchise people in poor and minority communities. These laws are often passed under the guise of addressing purported widespread voter fraud. Study after study has demonstrated, however, that widespread voter fraud is a myth.<sup>7</sup> In fact, in-person voter fraud is so exceptionally rare that an American is more likely to be struck by lightning than to impersonate someone at the polls.<sup>8</sup>

a. Do you believe that in-person voter fraud is a widespread problem in American elections?

I have not researched this issue. Because there may be litigation pending I must respectfully decline to comment further consistent with my ethical obligations as a sitting Ohio appellate judge and a nominee.

b. In your assessment, do restrictive voter ID laws suppress the vote in poor and minority communities?

Please see my response to Question 7.a.

c. Do you agree with the statement that voter ID laws are the twenty-first-century equivalent of poll taxes?

Please see my response to Question 7.a.

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<sup>5</sup> 558 U.S. 310 (2010).

<sup>6</sup> 570 U.S. 529 (2013).

<sup>7</sup> *Debunking the Voter Fraud Myth*, BRENNAN CTR. FOR JUSTICE (Jan. 31, 2017), <https://www.brennancenter.org/analysis/debunking-voter-fraud-myth>.

<sup>8</sup> *Id.*

8. 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.<sup>9</sup> Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.<sup>10</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>11</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>12</sup>

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

I have not researched this issue.

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

I have not researched this issue.

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.

d. According to a report by the United States Sentencing Commission, black men who commit the same crimes as white men receive federal prison sentences that are an average of 19.1 percent longer.<sup>13</sup> Why do you think that is the case?

I have not researched this issue.

e. According to an academic study, black men are 75 percent more likely than similarly situated white men to be charged with federal offenses that carry harsh

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<sup>9</sup> 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>.

<sup>10</sup> *Id.*

<sup>11</sup> 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>.

<sup>12</sup> *Id.*

<sup>13</sup> U.S. SENTENCING COMM'N, DEMOGRAPHIC DIFFERENCES IN SENTENCING: AN UPDATE TO THE 2012 *BOOKER* REPORT 2 (Nov. 2017), [https://www.uscc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114\\_Demographics.pdf](https://www.uscc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114_Demographics.pdf).

mandatory minimum sentences.<sup>14</sup> Why do you think that is the case?

I have not researched this issue.

f. What role do you think federal appeals judges, who review difficult, complex criminal cases, can play in addressing implicit racial bias in our criminal justice system?

I believe the role of any judge is to be fair and impartial to all who appear in their court and consider all legally relevant circumstances of each defendant to make sure the sentence is sufficient but not greater than necessary.

9. 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.<sup>15</sup> In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.<sup>16</sup>

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 researched this issue and recognize this is a complex 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.

Please see my response to Question 9.b.

10. 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.

11. Would you honor the request of a plaintiff, defendant, or witness in a case before you who is transgender to be referred to in accordance with that person's gender identity?

I would treat each person appearing in court with dignity and respect in all regards.

12. Do you believe that *Brown v. Board of Education*<sup>17</sup> was correctly decided? If you cannot

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<sup>14</sup> Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1323 (2014).

<sup>15</sup> 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>.

<sup>16</sup> *Id.*

<sup>17</sup> 347 U.S. 483 (1954).

give a direct answer, please explain why and provide at least one supportive citation.

Yes.

13. Do you believe that *Plessy v. Ferguson*<sup>18</sup> was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

No, it was not correctly decided.

14. 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?

No.

15. As a candidate in 2016, President Trump said that U.S. District Judge Gonzalo Curiel, who was born in Indiana to parents who had immigrated from Mexico, had “an absolute conflict” in presiding over civil fraud lawsuits against Trump University because he was “of Mexican heritage.”<sup>19</sup> Do you agree with President Trump’s view that a judge’s race or ethnicity can be a basis for recusal or disqualification?

Any recusal questions, as I have done in the past, are reviewed on a case by case basis and pursuant to the Ohio Code of Judicial Conduct and if I am confirmed, the Code of Conduct for United States Judges.

16. President Trump has stated 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.”<sup>20</sup> Do you believe that immigrants, regardless of status, are entitled to due process and fair adjudication of their claims?

If I am confirmed, I will follow my oath and faithfully apply all binding Supreme Court and Sixth Circuit precedent in this area of the law.

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<sup>18</sup> 163 U.S. 537 (1896).

<sup>19</sup> Brent Kendall, *Trump Says Judge’s Mexican Heritage Presents ‘Absolute Conflict,’* WALL ST. J. (June 3, 2016), <https://www.wsj.com/articles/donald-trump-keeps-up-attacks-on-judge-gonzalo-curiel-1464911442>.

<sup>20</sup> Donald J. Trump (@realDonaldTrump), TWITTER (June 24, 2018, 8:02 A.M.), <https://twitter.com/realDonaldTrump/status/1010900865602019329>.