

**Nomination of
Martha Maria Pacold, to be United States District Judge for the Northern District of
Illinois**

Submitted August 29, 2018

QUESTIONS FROM SENATOR WHITEHOUSE

All judicial nominees listed above are directed to answer each of the following questions:

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?

Yes. The role of a judge is to decide cases impartially based on the facts and the law, not to advocate for either side of a case.

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

A judge’s decisions have real-world consequences and are important to the parties. Also, in certain instances, for example, in ruling on a preliminary injunction, the law itself calls for consideration of the practical consequences of the ruling. *See Winter v. Natural Resources Defense Council*, 555 U.S. 7, 20 (2008) (“A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is *likely to suffer irreparable harm in the absence of preliminary relief*, that the balance of equities tips in his favor, and that an injunction is in the public interest.”) (emphasis added).

At the same time, a judge’s role is to decide cases fairly, impartially, and evenhandedly, based on the law and the facts, and not to rule based on favoritism for one party or another, personal policy preferences, or other inappropriate considerations.

2. During Justice Sotomayor’s confirmation proceedings, President Obama expressed his view that a judge benefits from having a sense of empathy.

- a. What role, if any, should empathy play in a judge’s decision-making process?

Everyone, including judges, benefits from having empathy—from being able to put yourself in others’ shoes and understand others’ perspectives. A judge should treat everyone who appears in court with dignity and respect. As Canon 3A(3) states, “A judge should be patient, dignified, respectful, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity.” In addition, the law directs a sentencing judge to consider various factors, including the “history and characteristics of the defendant.” 18 U.S.C. § 3553(a)(1); *see also Koon v. United States*, 518 U.S. 81, 113 (1996) (“It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.”).

At the same time, judges are not legislators, and it is not their role to make policy. Impartiality is a bedrock principle of our judicial system. The judicial oath of office requires that a judge “administer justice without respect to persons, and do equal right to the poor and to the rich, and . . . faithfully and impartially discharge and perform all the duties incumbent upon me . . . under the Constitution and laws of the United States.” 28 U.S.C. § 453. The Commentary to Canon 1 of the Code of Conduct for United States Judges states, “The integrity and independence of judges depend . . . on their acting without fear or favor.” A judge must decide cases fairly, impartially, and dispassionately, and must decide based on the law and the facts, not on favoritism toward one party or another, personal policy preferences, or other inappropriate considerations.

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

Personal life experiences can heighten a person’s empathy, and everyone, including judges, benefits from having empathy, as discussed above. Personal life experiences also include legal education and legal practice. A judge’s experiences in these areas would hopefully help the judge with legal writing and other technical aspects of the judge’s duties.

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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?

Impartiality is a bedrock principle of the judicial system. The judicial oath of office requires that a judge “administer justice without respect to persons, and do equal right to the poor and to the rich, and . . . faithfully and impartially discharge and perform all the duties incumbent upon me . . . under the Constitution and laws of the United States.” 28 U.S.C. § 453. The Commentary to Canon 1 of the Code of Conduct for United States Judges states, “The integrity and independence of judges depend . . . on their acting without fear or favor.” A judge must decide cases impartially and evenhandedly, based on the law and the facts, and not based on favoritism toward one party or another, personal policy preferences, or other inappropriate considerations.

My experience, both within and outside my legal practice, reflects an ability to treat all persons fairly and with respect. In private practice, I represented an individual inventor in a patent infringement action against a major corporation in the Northern District of Illinois. Outside the law, in 2011 I served as a tutor through Literacy Chicago, an adult literacy organization.

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 unfortunately exists throughout our society. If confirmed, I would do everything in my power to ensure fairness and impartiality in the administration of justice. I would follow the judicial oath of office, which requires that a judge “administer justice without respect to persons, and do equal right to the poor and to the rich, and . . . faithfully and impartially discharge and perform all the duties incumbent upon me . . . under the Constitution and laws of the United States.” 28 U.S.C. § 453.

**Nomination of Martha Maria Pacold
United States District Court for the Northern District of Illinois
Questions for the Record
Submitted August 29, 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?

Yes.

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.

While I have not studied the issue of implicit racial bias in our criminal justice system, I am aware of the issue of implicit bias more generally through informal discussions with friends and colleagues.

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 http://www.pewtrusts.org/~media/assets/2016/12/national_imprisonment_and_crime_rates_continue_to_fall_web.pdf.

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.

This question raises important public policy issues that properly are the subject of serious consideration and a robust public conversation in our society, both by the public and their elected representatives and by scholars. Although I have not had an occasion to study these issues personally or form a view on them myself, I appreciate their importance.

- 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 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. The color of a criminal defendant plays a significant role in capital punishment cases. For instance, people of color have accounted for 43 percent of total executions since 1976 and 55 percent of those currently awaiting the death penalty.⁷

- a. Do those statistics alarm you?

Yes, the statistics are troubling. The administration of justice must be fair and impartial. Sentencing disparities raise important issues that properly are the subject of substantial study and a robust conversation in our society, both by the public and their elected representatives, scholars, and others. Given the gravity and finality of capital punishment, capital cases must be approached with extraordinary care.

- b. Do you believe it is cruel and unusual to disproportionately apply the death penalty on people of color in compared to whites? Why not?

The administration of justice must be fair and impartial. Given the gravity and finality of capital punishment, capital cases must be approached with extraordinary care. To the extent the question is asking about the Eighth

⁶ *Id.*

⁷ The American Civil Liberties Association, Race and the Death Penalty, <https://www.aclu.org/other/race-and-death-penalty> (Last visited June 13, 2018).

Amendment, Eighth Amendment issues are frequently litigated, and Canon 3A(6) of the Code of Conduct for United States Judges prohibits me from commenting on the merits of a matter pending or impending in any court.

- c. The color of the victim also plays an important role in determining whether the death penalty applies in a particular case. White victims account for about half of all murder victims, but 80 percent of all death penalty cases involve white victims. If you were a judge, and those statistics were playing out in your courtroom, what would you do?

The statistics are troubling. The administration of justice must be fair and impartial. Sentencing disparities raise important issues that properly are the subject of substantial study and a robust conversation in our society, both by the public and their elected representatives, scholars, and others. Given the gravity and finality of capital punishment, capital cases must be approached with extraordinary care.

If confirmed and assigned a capital case, I would do everything in my power to ensure fairness and impartiality in the administration of justice. I would carefully consider the briefs and arguments of the parties and the facts and circumstances of the case. I would faithfully and impartially apply the relevant statutes, Federal Rules of Criminal Procedure, and Supreme Court and Seventh Circuit precedent. If I were to notice or suspect impropriety in a charging decision, I would consult within the court as to the appropriate steps, consistent with the law and my ethical obligations.

Questions for the Record from Senator Kamala D. Harris
Submitted August 29, 2018
For the Nominations of

Martha Pacold, to the U.S. District Court for the Northern District of Illinois

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, I would follow the relevant legal authorities, including 18 U.S.C. § 3553, any other applicable statutes, Fed. R. Crim. P. 32, and the applicable Supreme Court and Seventh Circuit precedent. As the question notes, I would evaluate each case on its specific facts and circumstances. I would review the case materials, including the presentence report, the briefs and arguments of the parties, materials submitted in support of the defendant, and victim statements. I would calculate the advisory Sentencing Guidelines range, consider whether there was any basis for a departure from the Guidelines range, and consider the factors set forth in 18 U.S.C. § 3553(a), as well as Congress’s direction that “[t]he court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in” § 3553(a)(2).

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

If confirmed, I would follow the process described above in any particular case. As a general matter, I would consider any resources available to me through the U.S. District Court for the Northern District of Illinois, the U.S. Sentencing Commission, and the Federal Judicial Center.

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

The Sentencing Guidelines are “effectively advisory.” *United States v. Booker*, 543 U.S. 220, 245 (2005). However, “district courts must begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process.” *Gall v. United States*, 552 U.S. 38, 50 n.6 (2007). A district judge may impose a sentence within or outside the Guidelines range based on consideration of the factors in 18 U.S.C. § 3553(a) and the specific facts of the case. In addition, the Guidelines themselves include provisions governing departures and variances from the Guidelines sentencing range. If confirmed, in each case, I would consider the briefs and arguments of the parties and the specific facts and circumstances of the case, and I would follow all binding precedent of the Supreme Court and the Seventh Circuit on the application of the Guidelines.

- 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?

The use of mandatory minimum sentences raises important public policy issues that properly are the subject of serious consideration and a robust public conversation in our society, both by the public and their elected representatives and by scholars. It is up to Congress whether to continue using mandatory minimum sentences. If confirmed, I would apply the law faithfully and impartially, following Supreme Court and Seventh Circuit precedent and other applicable authorities, and considering the briefs and arguments of the parties and the facts and circumstances of the particular case.

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

See answer to 1(d)(i).

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

See answer to 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?

Sentencing is an extraordinary responsibility. If confirmed, I would take my responsibilities for sentencing extremely seriously. As a general matter, I would address the arguments raised by the parties. In an extraordinary case, if required to impose a sentence that I thought was unjust, I would consider noting that, to the

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>

extent consistent with the Code of Conduct for United States Judges and other ethical obligations.

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

Charging decisions are the constitutional responsibility of the Executive Branch, but if I were to notice or suspect impropriety in charging policies, I would consult within the court as to the appropriate steps, consistent with the law and my ethical obligations.

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

See answer to 1(d)(iv)(2).

- 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. *See Demographic Differences in Sentencing: An Update to the 2012 Booker Report* (United States Sentencing Commission 2017).

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?**

Yes.