

**Nomination of Scott Hugh Rash to the United States District Court for the  
District of Arizona  
Questions for the Record  
Submitted December 11, 2019**

**QUESTIONS FROM SENATOR FEINSTEIN**

1. 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?**

It is never appropriate for lower courts to depart from Supreme Court precedent. See, e.g., *Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989).

- 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?**

No. A district court judge must faithfully apply all Supreme Court precedent.

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

District court decisions do not constitute binding precedent. The Federal Rules of Civil Procedure 59(e) and 60 provide standards for a district court to reconsider its prior decision and set aside a prior ruling if appropriate.

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

The Supreme Court's decision to overrule or depart from its prior precedent is within that Court's sole discretion. See, e.g., *Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989).

2. 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”?**

Like all other Supreme Court precedent, *Roe* is binding on all lower courts regardless of how the precedent is labeled. I will fully and faithfully apply all Supreme Court precedent, including *Roe*.

**b. Is it settled law?**

Yes.

3. In *Obergefell v. Hodges*, the Supreme Court held that the Constitution guarantees same-sex couples the right to marry. **Is the holding in *Obergefell* settled law?**

Yes, *Obergefell* is binding Supreme Court precedent for the lower courts. If confirmed I will fully and faithfully apply *Obergefell*.

4. In Justice Stevens’s dissent in *District of Columbia v. Heller* he wrote: “The Second Amendment was adopted to protect the right of the people of each of the several States to maintain a well-regulated militia. It was a response to concerns raised during the ratification of the Constitution that the power of Congress to disarm the state militias and create a national standing army posed an intolerable threat to the sovereignty of the several States. Neither the text of the Amendment nor the arguments advanced by its proponents evidenced the slightest interest in limiting any legislature’s authority to regulate private civilian uses of firearms.”

**a. Do you agree with Justice Stevens? Why or why not?**

As a district court nominee, it would be inappropriate for me to comment on the merits of Supreme Court precedent, or for me to express my personal view on Justice Steven’s dissent or any other justice’s opinion in *Heller*. See Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C). If confirmed, I will fully and faithfully apply the Supreme Court’s precedent in *Heller*.

**b. Did *Heller* leave room for common-sense gun regulation?**

In *Heller*, the Supreme Court stated: “the right secured by the Second Amendment is not unlimited.” *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008); and “nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms in sensitive places such as schools and government buildings.” *Id* at 627. Beyond the language in the opinion, the policy considerations applicable to gun regulation have been debated and addressed by Congress. It would be inappropriate for me to comment on the policy considerations related to that issue pursuant to the Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

**c. Did *Heller*, in finding an individual right to bear arms, depart from decades of Supreme Court precedent?**

Please see my response to Question 4(a).

5. In *Citizens United v. FEC*, the Supreme Court held that corporations have free speech rights under the First Amendment and that any attempt to limit corporations' independent political expenditures is unconstitutional. This decision opened the floodgates to unprecedented sums of dark money in the political process.

**a. Do you believe that corporations have First Amendment rights that are equal to individuals' First Amendment rights?**

The Supreme Court has held that "First Amendment protection extends to corporations." *Citizen United v. FEC*, 558 U.S. 310, 342 (2010). Beyond the language in *Citizens United*, I believe it is inappropriate for me to comment on matters that could come before the court. See Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed, I will fully and faithfully follow the precedent in *Citizens United*.

**b. Do individuals have a First Amendment interest in not having their individual speech drowned out by wealthy corporations?**

The policy and legal considerations applicable to corporations First Amendment rights have been debated and addressed by Congress and the courts. It would be inappropriate for me to comment on the policy considerations or legal issues related to this issue pursuant to the Code of Conduct for United States Judges, Canon 3(A)(6), 5(C).

**c. Do you believe corporations also have a right to freedom of religion under the First Amendment?**

In *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), the Supreme Court held corporations are entitled to protection under the Religious Freedom Restoration Act. Beyond the holding in *Burwell v. Hobby Lobby Stores*, the policy and legal considerations of a corporation's rights under the First Amendment have been debated and addressed by Congress and the courts. Therefore, I believe it is inappropriate for me to comment on this issue pursuant to the Code of Conduct for United States Judges, Canon 3(A)(6), 5(C). If confirmed, I will fully and faithfully follow the precedent in *Burwell v. Hobby Lobby Stores*.

6. Does the Equal Protection Clause of the Fourteenth Amendment place any limits on the free exercise of religion?

The scope of the Fourteenth Amendment's Equal Protection Clause, as it applies to the free exercise of religion, is the subject of pending and impending litigation. The issue is also one that has been debated and discussed by Congress. Therefore, it would not be appropriate to comment on the legal or policy issue raised in the question pursuant to the Code of Conduct for United States Judges Canons 2, 3(A)(6) and 5.

7. Would it violate the Equal Protection Clause of the Fourteenth Amendment if a county clerk refused to provide a marriage license for an interracial couple if interracial marriage violated the clerk's sincerely held religious beliefs?

Please see my response to question 6.

8. Could a florist refuse to provide services for an interracial wedding if interracial marriage violated the florist's sincerely held religious beliefs?

Please see my response to question 6.

9. You indicated on your Senate Questionnaire that you have been a member of the Federalist Society since 2018. The Federalist Society's "About Us" webpage explains the purpose of the organization as follows: "Law schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society. While some members of the academic community have dissented from these views, by and large they are taught simultaneously with (and indeed as if they were) the law." It says that the Federalist Society seeks to "reorder priorities within the legal system to place a premium on individual liberty, traditional values, and the rule of law. It also requires restoring the recognition of the importance of these norms among lawyers, judges, law students and professors. In working to achieve these goals, the Society has created a conservative and libertarian intellectual network that extends to all levels of the legal community."

- a. **Could you please elaborate on the "form of orthodox liberal ideology which advocates a centralized and uniform society" that the Federalist Society claims dominates law schools?**

I did not draft or make this statement, nor was I previously aware of it. Therefore, I am unable to comment on the statement. I have had limited involvement with the Federalist Society, solely with the local Tucson chapter.

- b. **How exactly does the Federalist Society seek to "reorder priorities within the legal system"?**

I did not draft or make this statement, nor was I previously aware of it. I am not aware of any actions by the Federalist Society to "reorder priorities within the legal system", and I have no knowledge of who or when the statement was made. Therefore, I am unable to answer the question.

- c. **What “traditional values” does the Federalist Society seek to place a premium on?**

I do not know in what context the phrase “traditional values” was made, or what was intended by the reference to “traditional values.” Therefore, I am unable to provide an answer to the question.

- d. **Have you had any contact with anyone at the Federalist Society about your possible nomination to any federal court? If so, please identify when, who was involved, and what was discussed.**

I have not had any specific contact with someone at the Federalist Society regarding my nomination; however, I have spoken with many people about my nomination and it is possible some were members of the Federalist Society.

- e. **Why did you decide to join the Federalist Society in 2018, more than 25 years after you began practicing law?**

Some close colleagues started a local Tucson Chapter of the Federalist Society in 2018 and asked me to join and support the local chapter. I agreed.

10. On February 22, 2018, when speaking to the Conservative Political Action Conference (CPAC), former White House Counsel Don McGahn told the audience about the Administration’s interview process for judicial nominees. He said: “On the judicial piece ... one of the things we interview on is their views on administrative law. And what you’re seeing is the President nominating a number of people who have some experience, if not expertise, in dealing with the government, particularly the regulatory apparatus. This is different than judicial selection in past years...”

- a. **Did anyone in this Administration, including at the White House or the Department of Justice, ever ask you about your views on any issue related to administrative law, including your “views on administrative law”? If so, by whom, what was asked, and what was your response?**

I have not been asked about my views on administrative law.

- b. **Since 2016, has anyone with or affiliated with the Federalist Society, the Heritage Foundation, or any other group, asked you about your views on any issue related to administrative law, including your “views on administrative law”? If so, by whom, what was asked, and what was your response?**

I do not recall ever being asked by any group about my views on administrative law.

- c. **What are your “views on administrative law”?**

As a judicial nominee it would be inappropriate to comment on legal or policy issues that may come before the Court. I am aware that *Chevron U.S.A. Inc., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) is the principal case addressing the court's role in reviewing administrative law. I am committed to applying all Supreme Court and Ninth Circuit precedent regarding administrative law.

11. Do you believe that human activity is contributing to or causing climate change?

I have not studied the issue and am not qualified to offer an opinion. Furthermore, the issue of climate change and its causes have been raised in pending litigation or will likely be raised in future litigation. *See Rhode Island v. Chevron Corp.*, 393 F. Supp. 3d 142 (2019). Therefore, I do not believe it is appropriate for me to comment on the issue pursuant to the Code of Conduct for United States Judges, Canons 2, 3(A)(6) and 5.

12. When is it appropriate for judges to consider legislative history in construing a statute?

If confirmed, I would faithfully follow the relevant Supreme Court precedent regarding statutory interpretation. To that end, the Supreme Court has repeatedly held that legislative history may only be considered when the text of a statute is ambiguous. *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 568 (2005) (“As we have repeatedly held, the authoritative statement is the statutory text, not the legislative history or any other extrinsic material. Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature’s understanding of otherwise ambiguous terms.”); *see also Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992) (“When the words of a statute are unambiguous, then, this first canon is also the last: ‘judicial inquiry is complete.’” *quoting Rubin v. United States*, 449 U.S. 424, 430 (1981).

13. 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 any outside groups — about loyalty to President Trump? If so, please elaborate.

No.

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

I received these questions on Wednesday, December 11, 2019. I read them and prepared draft responses. I received comments on my draft responses, including from attorneys at the Department of Justice, Office of Legal Policy, and I considered those comments in making final revisions on December 19, 2019. Each answer herein is my own.

**Questions for Scott H. Rash  
From Senator Mazie K. Hirono**

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. Prior nominees before the Committee have spoken about the importance of training to help judges identify their implicit biases.

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

Yes.

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

Yes.

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

Judges are ethically and morally bound to decide cases without bias or prejudice. I agree that training on implicit bias is important for judges to understand and fulfill this important requirement.

3. The Center for Law & Religious Freedom has engaged in legislative advocacy and filed numerous amicus briefs, particularly on First Amendment issues.

**a. Have you had any involvement with the Center for Law & Religious Freedom?**

No.

**b. If so, please identify the cases and legislative matters in which you have been involved and the scope of your involvement.**

See my answer to Question 3(b).

**Nomination of Scott H. Rash**  
**United States District Court for the District of Arizona**  
**Questions for the Record**  
**Submitted December 11, 2019**

**QUESTIONS FROM SENATOR BOOKER**

1. In 2015, in *State v. Ibarra*, the Court of Appeals of Arizona said you “neither informed the jurors that they had to agree unanimously on which form of assault Ibarra committed nor provided an interrogatory so specifying.”<sup>1</sup> Can you explain why you failed to properly inform the jurors that they had to come to a unanimous agreement on which form of assault the defendant committed, or to provide an interrogatory stating that?’

As a trial judge who has presided over 100 jury trials, the finalizing of jury instructions at the end of the case before submission to the jury is often a chaotic process. Each side presents their requested jury instructions, and each instruction must be argued and ruled upon all while the jury is waiting. This case occurred early during my rotation on the criminal bench.

In this case, Mr. Ibarra was charged with: Aggravated Assault-Domestic Violence, a Class 4 Felony, Kidnapping-Domestic Violence, a Class 2 Felony, and Aggravated Assault-Deadly Weapon, a Class 3 Felony. While settling final jury instructions, counsel for Mr. Ibarra requested and supplied the Court with an instruction on a lesser include offense of simple assault. I believed that in all fairness to Mr. Ibarra, the instruction should be given. So, the proposed instruction was given to the jury just as Mr. Ibarra’s counsel submitted it to the court. I did not realize at the time the necessary language or interrogatory was not included.

2. You have been a member of the Federalist Society from 2018 to present.<sup>2</sup>

- a. Why did you join the Federalist Society in 2018?

Some close colleagues started a local Tucson Chapter of the Federalist Society in 2018 and asked me to join in support of the local chapter. I agreed.

- b. Was your decision to join the Federalist Society at all connected with your interest in becoming a federal judge?

I do not specifically recall whether my decision to join the Federalist Society was “at all” connected with my interest in becoming a federal judge. I can say that any possibility of judicial appointment was not a primary or even secondary motivation in my joining the Federalist Society.

3. You have been a member of the Heritage Foundation from 2012 to present.<sup>3</sup> Why did you join the Heritage Foundation in 2012?

After becoming a state court judge, I found many of Heritage’s publications useful to obtaining a broad understanding of certain issues, such as sentencing reform. I joined to

---

<sup>1</sup> *State v. Ibarra*, 2015 WL 1577179, at \*4 (Ariz. Ct. App. Apr. 8, 2015).

<sup>2</sup> SJQ at pp. 5.

<sup>3</sup> *Id.*



have regular access to their publications and research.

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

I would not define my approach to statutory interpretation by any particular label but would generally consider myself to be an originalist. While originalism and textualism often have contested meanings, I generally understand originalism to mean that words in a document should be interpreted as they were understood at the time the words were written. The Supreme Court has repeatedly held that statutory interpretation begins with the statutory text, and where the text is clear, no further inquiry is necessary. Ultimately, a district court judge must follow Supreme Court precedents without regard to whether they were decided by an originalist approach or otherwise.

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

I would not define my approach to statutory interpretation by any particular label but would generally consider myself to be a textualist. As noted in question 4, while textualism often has a contested meaning, I generally understand textualism to mean that the Constitution and statutes are to be interpreted by considering only the words used in the document as they are commonly understood. The Supreme Court has repeatedly held that statutory interpretation begins with the statutory text, and where the text is clear, no further inquiry is necessary. Ultimately, a district court judge must follow Supreme Court precedents without regard to whether they were decided by a textualist approach or otherwise.

6. 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?

The Supreme Court has "repeatedly held, the authoritative statement is the statutory text, not the legislative history or any extrinsic material. Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms." *Exxon Mobile Corp. v. Allapattah Servs. Inc.*, 545 U.S. 546, 568 (2005). *See also, Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992). If confirmed, I will faithfully apply Supreme Court and Ninth Circuit precedent regarding statutory interpretation and the use of legislative history.

- 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 6(a) above. I would also add the Supreme Court is vested with certain authority that does not rest with the district court. The Supreme Court can overrule lower court decisions and even their own prior decisions. Therefore,

situations exist where Supreme Court Justices can consider legislative history where it would not be appropriate for trial court.

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

I do believe judicial restraint is a very important principle for a district court judge to consider in deciding a case. The principle of judicial restraint flows from the separation of powers doctrine in that it is the political branches, not the courts, that make policy decisions and laws. I understand the term to generally mean that Congress enacts the laws and the judiciary defers to Congress in that it is not for the judiciary to say what the law should be.

- 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?

As a sitting state court judge and if confirmed, I will fully and faithfully apply all Supreme Court and Ninth Circuit precedent including, *District of Columbia v. Heller*. As a judicial nominee, it is inappropriate for me to state my personal views on whether any particular Supreme Court case was rightly decided or what principal guided the Supreme Court's decision.

- 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?

As a sitting state court judge and if confirmed, I will fully and faithfully apply all Supreme Court and Ninth Circuit precedent including, *Citizens United v. FEC*. As a judicial nominee, it is inappropriate for me to state my personal views on whether any particular Supreme Court case was rightly decided or what principal guided the Supreme Court's decision.

- 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?

As a sitting state court judge and if confirmed, I will fully and faithfully apply all Supreme Court and Ninth Circuit precedent including, *Shelby County v. Holder*. As a judicial nominee, it is inappropriate for me to state my personal views on whether any particular Supreme Court case was rightly decided or what principal guided the Supreme Court's decision.

8. 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

---

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

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

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

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?

As a judicial nominee, it would not be appropriate for me to comment on political issues that might come before the court. *See* Code of Conduct for United States Judges, Canon 5(C). I believe an issue of this nature could reasonably come before the court.

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

As a judicial nominee, it would not be appropriate for me to comment on political or legal issues that might come before the court. *See* Code of Conduct for United States Judges, Canons 3(A)(6) and 5(C). I believe an issue of this nature could reasonably come before the court.

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

As a judicial nominee, it would not be appropriate for me to comment on political issues. *See* Code of Conduct for United States Judges, Canon 5(C).

9. 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?

While I have not personally studied this issue, from the literature I have reviewed and the seminars I have attended during my years as a state court judge, I would conclude that some degree of implicit racial bias is present in our criminal justice system; although, I have not personally observed any implicit racial bias. To the extent any implicit racial bias exists, it is the fundamental duty of a judicial officer to treat every

---

<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.*

<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.*

litigant equally and with dignity, respect, and fairness.

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

While I have not personally studied this issue, from the literature I have reviewed and the seminars I have attended over my years as a state court judge, I would conclude that people of color are disproportionately represented in our nation's jails and prisons.

- 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 never formally studied the issue of implicit racial bias in our criminal justice system. During my years as a state court judge, I have reviewed articles and attended seminars on the issue. I cannot recall the various articles read or seminars attended, but I have read an article by the National Center for State Courts entitled "Helping Courts Address Implicit Bias" and attended a seminar on the issue in 2016 as part of our annual judicial conference.

- 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 am not qualified to render an opinion on this issue, and as a judicial nominee, it would be inappropriate for me to comment on political matters that may be the subject of litigation. *See* Code of Judicial Conduct for United States Judges, Canons 2, 3(A)(6) and 5.

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

I am not qualified to render an opinion on this issue, and as a judicial nominee, it would be inappropriate for me to comment on political matters that may be the subject of litigation. *See* Code of Judicial Conduct for United States Judges, Canons 2, 3(A)(6) and 5.

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

It is always the duty of a judge to treat every litigant equally and with dignity, respect and fairness. Judges must be aware of the existence of implicit bias and take steps to monitor their sentencing practices.

---

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

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

10. 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 studied the issue, and I am not qualified to render an opinion on the issue. Furthermore, it would be inappropriate for me to comment on matters that are political or may be the subject of litigation. *See* Code of Judicial Conduct for United States Judges, Canons 2, 3(A)(6) and 5.

- 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 the issue, and I am not qualified to render an opinion on the issue. Furthermore, it would be inappropriate for me to comment on matters that are political or may be the subject of litigation. *See* Code of Judicial Conduct for United States Judges, Canons 2, 3(A)(6) and 5.

11. 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.

12. 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?

Yes, and I have done so on several occasions as a state court judge.

13. Do you believe that *Brown v. Board of Education*<sup>17</sup> was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

Yes.

14. 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.

15. 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

---

<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).

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

whether any past Supreme Court decisions were correctly decided?

No.

16. 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?

I do not believe a judge’s race or ethnicity is a basis for recusal. *See* 28 U.S.C. § 455. Beyond that, as a judicial nominee, it would not be appropriate for me to opine on political comments regarding cases litigated in the Ninth Circuit. *See* Code of Conduct of U.S. Judges, Canons 3(A)(6), 5.

17. 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?

The constitutional principles of liberty, equality and due process apply to all persons in the United States, including immigrants regardless of their entry status. *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). Beyond that, as a judicial nominee, it would not be appropriate to opine on political comments. *See* Code of Conduct of U.S. Judges, Canons 3(A)(6), 5.

---

<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>.

**Questions for the Record from Senator Kamala D. Harris  
Submitted December 11, 2019  
For the Nomination of**

**Scott H. Rash, to the U.S. District Court for the District of Arizona**

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 state court judge who has spent over three and half years on the criminal bench, I have sentenced well over 1100 defendants. The process I use for state court sentencings, I would follow if confirmed as a district court judge. I familiarize myself with the case facts and relevant law. I review the pre-sentence report prepared by the probation department, which contains biographical information on the defendant. I also consider the probation officers' sentencing recommendation, if they have one. In Arizona state courts, we have mandatory sentencing ranges. I review the statutory sentencing range and begin with the presumptive sentence. I consider statutory mitigating and aggravating factors, and, if applicable, hear from the victims. Then, I consider how I have sentenced other defendants in similar situations.

I recognize the importance of administering an individualized evaluation based upon each case's unique facts and applicable law while considering the background and motive of the individual defendant. I would follow the sentencing procedures mandated by the Supreme Court. Accordingly, as the Supreme Court stated in *Gall v. United States*, "a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range." *Gall v. United States*, 552 U.S. 38, 49 (2007). I will also consider the statutory sentencing factors set forth in 18 U.S.C. § 3553(a) in order to "impose a sentence sufficient, but not greater than necessary." 18 U.S.C. § 3553(a).

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

Please see my response to 1(a). In addition to my approach outlined in 1(a) and my prior experience with sentencing, I would draw upon the experience of my colleagues both in the District of Arizona and other United States District Courts.

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

Part K, Chapter 5 of the Guidelines provide relevant circumstances where it may be appropriate to depart from the Guidelines. In addition to referring to Part K, Chapter 5, in any departure from the Sentencing Guidelines I would consider the

discretion mandated by the Supreme Court in *United States v. Booker*, 543 U.S. 220, 234 (2005) and provided by 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.<sup>1</sup>

i. **Do you agree with Judge Reeves?**

I believe the implementation of mandatory minimum sentences and the debates surrounding them are reserved for the legislature. Accordingly, under the Code of Conduct for United States Judges, Canons 2(A) and 5(C), it would be inappropriate for me, as a judicial nominee, to comment on such policies. As stated previously, if confirmed, I will faithfully follow all applicable sentencing statutes as passed by Congress and relevant precedent from the Supreme Court and Ninth Circuit.

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

Please see response to 1(d)(i) above.

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

Please see response to 1(d)(i) above.

- 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.<sup>2</sup> **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?**

I am unfamiliar with the opinions of Judge John Gleeson. I do not believe it is appropriate for me to comment on such a hypothetical because every sentence imposed must be based on a case's specific facts and circumstances. I also recognize the importance of an independent judiciary. Accordingly, such commentary on matters

---

<sup>1</sup> <https://www.judiciary.senate.gov/imo/media/doc/Reeves%20Responses%20to%20QFRs1.pdf>

<sup>2</sup> 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>



reserved for congress is not appropriate for me as a judicial nominee pursuant to the Code of Conduct for United States Judges. If confirmed, I will faithfully follow all applicable sentencing statutes passed by Congress and relevant precedent from the Supreme Court and Ninth Circuit.

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

There are only a few circumstances where it may be appropriate for a judge to contact the U.S. Attorney and other federal prosecutors, e.g., to address ethical or professional violations. Charging policies are within the sole purview of the executive branch via the Justice Department. In respect for the separation of powers doctrine, and pursuant to the Code of Conduct for United States Judges, I do not believe it would be appropriate to comment on those policies.

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

Similar to my response in 1(d)(iv)(2), clemency is a consideration reserved to the executive branch. In respect for the separation of powers doctrine, and pursuant to the Code of Conduct for United States Judges, I would not reach out to the U.S. Attorney or other federal prosecutors to discuss considerations of clemency.

- 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?**

If confirmed, I plan to take into account alternatives to incarceration when and where appropriate.

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 there are racial disparities in our criminal justice system? If so, please provide specific examples. If not, please explain why not.**

Unfortunately, yes. While I am not personally aware of any specific examples, in my experience as a state court judge, I have become familiar with reliable studies finding racial disparities exist in the various components of the criminal justice system: arrest, charging, and sentencing. To help better understand this issue, I have read Bryan Stevenson's book "Just Mercy" and other relevant literature.

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

a. **Do you believe 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 plan to give serious consideration to all qualified applicants, regardless of race or sex.