Nomination of Jennifer Paige Togliatti to the United States District Court for the District of Nevada
Questions for the Record
Submitted March 11, 2020

QUESTIONS FROM SENATOR FEINSTEIN

1. At your hearing, Senator Cruz asked you a number of questions about a capital case that you handled as a state trial court judge. Is there anything you wish to add to the response you provided at your hearing?

   I would simply clarify that I endeavored to explain the procedural irregularities with the case that are detailed in the voluminous record of the case in my trial court, the record of the Nevada Supreme Court, and in the oral arguments of the Nevada Solicitor General and the Defendant before the Nevada Supreme Court, but are not highlighted in the opinion of the Nevada Supreme Court. My point of doing so was not to suggest that I did not err in the ruling of the case, but to demonstrate that I made a procedural error based upon the arguments of the parties, and did not reject substantive precedent as a matter of convenience or based upon personal views. Rather, I relied upon and agreed with the parties' procedural arguments made outside Nevada's habeas statutes, a decision which was ultimately rejected by the Nevada Supreme Court. As a state court trial judge who has made hundreds of appealable decisions a month for 20 years, I have accepted each higher court ruling, and fully and faithfully applied it in each and every case.

2. At your hearing, Senator Hawley asked you a number of questions about the authority of judges to enjoin state actions absent authorization under a statute or a state constitution. Is there anything you wish to add to the response you provided at your hearing?

   The Supreme Court has recognized that district courts possess certain, very limited inherent powers "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link v. Wabash R.R. Co.*, 370 U.S. 626 (1962). The Supreme Court has upheld a limited scope of administrative powers under that doctrine—for example, the authority to bar a disruptive criminal defendant from the courtroom, or to dismiss a suit for failure to prosecute. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991). Additionally, even within the limited scope of a court's inherent authority, any exercise of that inherent authority "cannot be contrary to any express grant of or limitation on the district court's power contained in a rule or statute." *Dietz v. Bouldin*, 136 S. Ct. 1885 (2016). I am not aware of any Supreme Court precedent holding that a district court may grant an injunction against state action as part of its inherent authority. If I am so fortunate as to be confirmed, I would follow all binding precedent on the scope of a district court's inherent powers.

3. 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.

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?

A judge must follow all Supreme Court precedent, and it is not appropriate for a lower court to insert personal views to evaluate the propriety of the Supreme Court's opinions. I am unable to imagine a circumstance as a trial judge where it would be necessary or appropriate in the conduct of my duties for me to share my personal opinions on a dissent of a United States Supreme Court opinion.

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

District court decisions do not create binding precedent. For the parties to a given case, the Federal Rules of Civil Procedure, Rules 59(e) and 60 provide the criteria which a court may consider for alteration, amendment or relief from a judgment.

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

Only the Supreme Court can decide when, and if, it is appropriate to overturn Supreme Court precedent. In *Gamble v. United States*, 139 S. Ct. 1960 (2019), the Supreme Court detailed the factors it may consider in exercising its authority in this regard. As a nominee for the district court, it would be inappropriate for me to opine as to the propriety of the Supreme Court overturning their own precedent.

4. 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"?

I have not studied the writings referenced in Question 4, but I do acknowledge that *Roe v. Wade* is binding Supreme Court precedent that has been relied upon as precedent in many subsequent cases. If I am confirmed, I will fully and faithfully apply the holding in *Roe v. Wade.*

b. Is it settled law?

Yes.

5. 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.

6. 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?

   Canons 2(A), 3(A)(6) and 5(A) of the Code of Conduct for United States Judges prohibit me as a nominee from commenting on the merits of Justice Stevens' dissent, as does Rule 2.10(A) and 2.11(A)(5) of the Revised Nevada Code of Judicial Conduct. If confirmed, I will fully and faithfully apply all Supreme Court authority, including this case.

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

   In *District of Columbia v. Heller*, the Supreme Court stated, "[l]ike most rights, the right secured by the Second Amendment is not unlimited. . ." The Court went on to state that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." 554 U.S. 570, 626–27 (2008). Because there are cases pending, and could be filed in the future, related to the application of the Second Amendment and the *Heller* decision to gun regulations, it would not be appropriate for me to elaborate further on the decision pursuant to the Code of Judicial Conduct for United States Judges, Canon 3(A)(6).

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

   Under Canons 2(A), 3(A)(6) and 5(A) of the Code of Conduct for United States Judges it would be inappropriate for me as a nominee to comment on the correctness of binding Supreme Court precedent. If confirmed, I will fully and faithfully apply

all binding authority, without regard to my personal views.

7. 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?

   In the *Citizens United* case, the Supreme Court recognized that corporations are entitled to First Amendment protections. If confirmed, I will fully and faithfully follow the decision of the Supreme Court in *Citizens United*. As a nominee and state court senior judge, I believe it would be inappropriate for me to comment further under the Code of Conduct for United States Judges, Canons 2(A), 3(A)(6) and 5(A).

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

   In the *Citizens United* case, the Supreme Court recognized that corporations are entitled to First Amendment protections. If confirmed, I will fully and faithfully follow the decision of the Supreme Court in *Citizens United*. As a nominee and state court senior judge, I believe it would be inappropriate for me to comment further under the Code of Conduct for United States Judges, Canons 2(A), 3(A)(6) and 5(A).

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

   In *Burwell v. Hobby Lobby Stores, Inc.*, the Supreme Court held that a closely held corporation is a "person" under the Religious Freedom Restoration Act. 573 U.S. 682, 707-708 (2014). If confirmed, I will fully and faithfully follow the holding in *Hobby Lobby* and all other binding precedent related to the right to freedom of religion that corporations may have. Because the issues of religious freedom under the First Amendment related to corporations is or may be litigated in federal court, it would be inappropriate for me to comment further pursuant to Canon 3(A)(6) of the Code of Conduct for United States Judges.

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

   The right to free exercise of religion and equal protection of the laws are guaranteed by the Constitution. In the event I am called upon to rule on a case where the above referenced issue were raised, I would consider all binding authority in analyzing the facts of the case in

order to make my decision. Pursuant to the Code of Conduct for United States Judges, Canon 3(A)(6), I believe as a nominee it would be inappropriate for me to comment further.

9. 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?

   If called upon to rule on a case involving this issue, I would consider all binding authority, including *Loving v. Virginia*, 388 U.S. 1 (1967). Pursuant to the Code of Conduct for United States Judges, Canon 3(A)(6), I believe as a nominee it would be inappropriate for me to comment further.

10. 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 responses to Questions 8 and 9 above.

11. 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.

    No.

12. 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 never been asked by anyone about my views on administrative law, nor have I sua sponte shared any 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?

    No, as discussed in Question 12(a), no one has asked me about my views on administrative law.

c. What are your "views on administrative law"?

As a state court judge, I have handled hundreds of administrative law matters or petitions for judicial review on administrative matters including, but not limited to, matters from the Nevada Dental Board, the Nevada Medical Board, the Unemployment Division, Worker's Compensation, the Employee Management Relations Board, the Department of Health and Human Services, and the Department of Motor Vehicles. In those cases, I made decisions based upon the applicable Nevada Statutes and the record of facts in the case. If I am fortunate enough to be confirmed, I will similarly decide all cases on the basis of the applicable law and facts.

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

As a nominee I am governed by the Code of Conduct for United States Judges, Canon 3(a)(6), and it would be inappropriate to discuss my personal views on climate change because those issues could come before the federal courts.

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

Judges may consider legislative history when construing the meaning of an ambiguous statute. *Milner v. Dep't of the Navy*, 562 U.S. 562 (2011). If confirmed, I will fully and faithfully follow all binding precedent governing the use of legislative history.

15. 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. No one at any time has discussed with me loyalty to President Trump.

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

I received the questions via email March 11, 2020. On March 12 and 13, 2020, I reviewed the questions, conducted research, and drafted answers. On March 13, 2020 I sought comment on my answers from the Office of Legal Policy and incorporated any suggestions I deemed appropriate. All responses to the questions posed to me herein are mine.

Nomination of Jennifer P. Togliatti, to be United States District Court Judge for the District of Nevada
Questions for the Record
Submitted March 11, 2020

QUESTIONS FROM SENATOR COONS

1. With respect to substantive due process, what factors do you look to when a case requires you to determine whether a right is fundamental and protected under the Fourteenth Amendment?

   a. Would you consider whether the right is expressly enumerated in the Constitution?

      Yes.

   b. Would you consider whether the right is deeply rooted in this nation's history and tradition? If so, what types of sources would you consult to determine whether a right is deeply rooted in this nation's history and tradition?

      Yes. Sources such as treatises, persuasive authority, and the common law may be sources to consult to make that determination.

   c. Would you consider whether the right has previously been recognized by Supreme Court or circuit precedent? What about the precedent of any court of appeals?

      Yes, I would fully and faithfully follow Ninth Circuit and Supreme Court precedent. If there were no binding authority, I would consider other circuit court holdings and the reasons for those holdings.

   d. Would you consider whether a similar right has previously been recognized by Supreme Court or circuit precedent? What about whether a similar right has been recognized by any court of appeals?

      Yes, I would consider whether a right has been previously recognized by the Supreme Court and the Ninth Circuit and I would fully and faithfully follow those holdings. Absent binding authority, I would look to other circuit court and district court decisions as potentially persuasive on the issue.

   e. Would you consider whether the right is central to "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life"? *See Planned Parenthood v. Casey*, 505 U.S. 833, 581 (1992); *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (quoting *Casey*).

      Yes, I would fully and faithfully apply the Supreme Court's decisions in *Casey* and *Lawrence*.

   f. What other factors would you consider?

I would consider all factors enumerated by the Supreme Court and the Ninth Circuit in their opinions.

2. Does the Fourteenth Amendment's promise of "equal protection" guarantee equality across race and gender, or does it only require racial equality?

   The Supreme Court has repeatedly held that the Equal Protection Clause provides protections against gender discrimination. *See e.g., Sessions v. Morales-Santana*, 137 S.Ct. 1678, 1689-90 (2017); *United States v. Virginia*, 518 U.S. 515, 531-532 (1996). If confirmed, I would fully and faithfully follow this precedent.

   a. If you conclude that it does require gender equality under the law, how do you respond to the argument that the Fourteenth Amendment was passed to address certain forms of racial inequality during Reconstruction, and thus was not intended to create a new protection against gender discrimination?

      If confirmed I will fully and faithfully apply all Supreme Court and Ninth Circuit precedent. If confirmed, arguments contrary to existing precedent would have no effect on any decision I am called upon to render.

   b. If you conclude that the Fourteenth Amendment has always required equal treatment of men and women, as some originalists contend, why was it not until 1996, in *United States v. Virginia*, 518 U.S. 515 (1996), that states were required to provide the same educational opportunities to men and women?

      I cannot speculate as to why the *United States v. Virginia* case arose when it did.

   c. Does the Fourteenth Amendment require that states treat gay and lesbian couples the same as heterosexual couples? Why or why not?

      In *Obergefell v. Hodges* the Supreme Court held that same-sex couples have a right to marry "on the same terms" as opposite sex couples. 135 S.Ct. 2584, 2607 (2015). I will fully and faithfully apply *Obergefell* and all other binding precedent. I cannot comment further because as a nominee I am governed by the Code of Conduct for United States Judges, Canon 3(A)(6), which does not allow me to comment on matters that are pending in, or could come before, the federal courts.

   d. Does the Fourteenth Amendment require that states treat transgender people the same as those who are not transgender? Why or why not?

      As a nominee I am governed by the Code of Conduct for United States Judges, Canon (3)(A)(6), which does not allow me to comment on a matter that is pending or impending in the federal courts.

3. Do you agree that there is a constitutional right to privacy that protects a woman's right to use contraceptives?

   In *Griswold v. Connecticut*, 381 U.S. 479 (1965) the Supreme Court recognized this right. If confirmed, I will faithfully apply this precedent and all related binding precedent.

   a. Do you agree that there is a constitutional right to privacy that protects a woman's right to obtain an abortion?

      I would fully and faithfully follow the Supreme Court's ruling in *Roe v. Wade*, and all related binding precedent as it relates to a women's right to obtain an abortion.

   b. Do you agree that there is a constitutional right to privacy that protects intimate relations between two consenting adults, regardless of their sexes or genders?

      The Supreme Court recognized this right in *Lawrence v. Texas*, 539 U.S. 558 (2003). If confirmed, I will fully and faithfully follow this and all related binding precedent.

   c. If you do not agree with any of the above, please explain whether these rights are protected or not and which constitutional rights or provisions encompass them.

      Please see previous Reponses to Question 3 and all its subparts.

4. In *United States v. Virginia*, 518 U.S. 515, 536 (1996), the Court explained that in 1839, when the Virginia Military Institute was established, "[h]igher education at the time was considered dangerous for women," a view widely rejected today. In *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600-01 (2015), the Court reasoned, "As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. . . . Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser." This conclusion rejects arguments made by campaigns to prohibit same-sex marriage based on the purported negative impact of such marriages on children.

   a. When is it appropriate to consider evidence that sheds light on our changing understanding of society?

      It is appropriate to consider such evidence when Supreme Court and Ninth Circuit precedent direct the lower courts to so. If confirmed, I will fully and faithfully follow the binding precedent that requires the consideration of such evidence.

   b. What is the role of sociology, scientific evidence, and data in judicial analysis?

      The Supreme Court and the Ninth Circuit precedent give direction and guidance to judges depending on the facts and circumstances in each case. The Supreme Court has deemed

that judges should act as 'gatekeepers' when determining whether or not to admit this type of evidence. See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

5. In the Supreme Court's *Obergefell* opinion, Justice Kennedy explained, "If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied. This Court has rejected that approach, both with respect to the right to marry and the rights of gays and lesbians."

   a. Do you agree that after *Obergefell*, history and tradition should not limit the rights afforded to LGBT individuals?

      If confirmed, I will fully and faithfully follow *Obergefell* and all other binding precedent.

   b. When is it appropriate to apply Justice Kennedy's formulation of substantive due process?

      Please see Responses provided to Question 1 and its subparts.

6. In his opinion for the unanimous Court in *Brown v. Board of Education*, 347 U.S. 483 (1954), Chief Justice Warren wrote that although the "circumstances surrounding the adoption of the Fourteenth Amendment in 1868 . . . cast some light" on the amendment's original meaning, "it is not enough to resolve the problem with which we are faced. At best, they are inconclusive . . . . We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws." 347 U.S. at 489, 490-93.
   a. Do you consider *Brown* to be consistent with originalism even though the Court in *Brown* explicitly rejected the notion that the original meaning of the Fourteenth Amendment was dispositive or even conclusively supportive?

      I have not undertaken study in great detail of how *Brown* relates to originalism. If confirmed, I would follow *Brown* and all related binding precedent.

   b. How do you respond to the criticism of originalism that terms like "'the freedom of speech,' or 'equal protection,' or 'due process of law' are not precise or self-defining"? Robert Post & Reva Siegel, *Democratic Constitutionalism*, National Constitution Center, https://constitutioncenter.org/interactive-constitution/white-papers/democratic-constitutionalism (last visited Mar. 4, 2020).

      My 20 years on the state court bench in Nevada did not require me to undertake and analyze these issues in an academic manner. If confirmed I commit to follow the Supreme Court and Ninth Circuit precedent to consider and interpret all constitutional provisions.

c. Should the public's understanding of a constitutional provision's meaning at the time of its adoption ever be dispositive when interpreting that constitutional provision today?

The Supreme Court's decisions on the Constitution's meaning bind the lower courts. If confirmed, I will fully and faithfully follow all Supreme Court and Ninth Circuit precedent.

d. Does the public's original understanding of the scope of a constitutional provision constrain its application decades later?

Please see Response to Question 6(c) above.

e. What sources would you employ to discern the contours of a constitutional provision?

I would apply all Supreme Court and Ninth Circuit precedent to discern the contours of a constitutional provision.

Nominations
Hearing before the Senate Committee on the Judiciary
March 4, 2020

QUESTIONS FROM SENATOR BLUMENTHAL

Question for Judge Jennifer Togliatti

1. Again and again, we have watched in horror as gunmen have torn apart countless American communities. The Las Vegas massacre in October 2017 is the deadliest mass shooting in modern American history, but there have been others since.

   Horrific mass shootings in communities across the country—including Newtown, Charleston, and Parkland, among so many others—have occurred amidst an epidemic of gun violence that claims 30,000 American lives a year, mostly in tragedies that never make the headlines.

   You served as a mediator in thousands of civil liability cases stemming from the Las Vegas shooting. In your Senate Judiciary Questionnaire, you wrote that "[t]he shooting resulted in deaths, significant non-fatal shooting injuries, trampling injuries, and claims of post-traumatic stress disorder." I would assume that, through your work, you have seen both the toll and the trauma that gun violence and mass shootings have had on real people and lives.

   a. Please describe the experience you have had as a mediator in these cases.

   I was retained, along with a retired judge from California, to mediate the claims and potential claims of approximately 4,300 people who suffered significant physical and emotional injuries, in addition to relatives of persons killed, during the Route 91 concert on October 1. The settlement involved protracted discussions, over days and weeks, of all the legal and factual issues associated with the case, including, but not limited to the implications of the federal Safety Act, potential liability, or non-liability of corporate defendants and potential defendants in the case. This process necessarily included all towers and layers of insurance policy carriers that may have had coverage implicated.

   Subsequent to the resolution of the claims, my co-mediator and I were retained as administrators to develop a protocol for the administration and distribution of settlement funds among claimants, as well as to be the final arbiter of each claimant's claim valuation and any appeals of that valuation afforded by the settlement protocol.

   b. Please describe whether there are any practical lessons to be learned from the trauma caused by this kind of gun violence.

   The trauma caused by the gun violence during the Route 91 concert was devastating to the Las Vegas community where I have lived for over 42 years, and where I am raising my children. People from other states and countries visiting Las Vegas were also victimized by this senseless act of violence, to an incalculable degree. As a judge for the

last 20 years, I have not engaged in policy discussions and considerations, based upon the ethical canons applicable to judges in my state. What I can state with complete conviction is that in the event I am confirmed, I will use my experience on the bench and my best judgment without consideration of personal views to adjudicate matters related to gun violence that are assigned to me, based upon the law, fully and faithfully applying all binding authority.

Questions for the Record for Jennifer Togliatti
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?**

      I have accrued over 450 hours of judicial education, approved by the Nevada Supreme Court, during my 20 years on the bench in the State of Nevada. While my judicial education records do not provide specific detail as to topics addressed, inherent racial bias has been recognized in our state as an issue, and has been a topic of discussion in criminal law education for judges and lawyers in the past.

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

      I believe further education on this issue would be useful in the exercise of my duties in the event I am fortunate enough to be confirmed.

Nomination of Jennifer Togliatti
United States District Court for the District of Nevada
Questions for the Record
Submitted March 11, 2020

QUESTIONS FROM SENATOR BOOKER

1. The Eight Amendment protects the American people against the imposition of "cruel and unusual punishments."[1] Many scholars and judges have argued that "the death penalty is in all circumstances [a] cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments . . . ."[2] During your testimony before the Senate Judiciary Committee, you stated that you have tried several capital cases including *State of Nevada v. Scott Dozier*.[3]

a. Do you believe that drugs designed to induce paralysis that could mask suffering are unconstitutional?

As a state senior judge and a nominee, I am bound by judicial canons that prohibit me from making comments that may show a predisposition to rule a particular way in a certain case or controversy, thus causing my potential disqualification. Specifically, I am governed by the Revised Nevada Code of Judicial Conduct Rule 2.11(5), and the Code of Conduct for United States Judges, Canon 3(A)(6).

b. In your opinion in *State of Nevada v. Scott Dozier*, did you express any position on whether your support or oppose the death penalty? If so, what was your position?

My judicial opinion in the *Dozier* case did not express any position on the death penalty.

c. While evaluating expert testimony, did you formulate a position on whether the imposition of capital punishment is a violation of the Eight Amendment? If so, what was that position?

My judicial opinion in the *Dozier* case did not express any position on whether a sentence of capital punishment is a violation of the Eighth Amendment.

2. In 2018, Congress passed the First Step Act and the President signed it into law. The bill expanded the safety valve to allow judges to sentence qualified low-level nonviolent drug offenders below the mandatory minimum if they cooperate with the government. If confirmed, how would you utilize the safety valve for qualifying individuals?

As a state court judge in Nevada for 20 years I handled thousands of criminal cases. My experience and judicial education, as well as my previous work as a criminal prosecutor,

[1] U.S. Const. amend. XIII.
[2] *Coker v. Georgia*, 433 U.S. 584, 600 (1977) (Brennan, J., concurring).
[3] Case No. 05-C-215039, Eighth Judicial District Court, Las Vegas Nevada, *aff'd*, *Dozier v. State*, 381 P.3d 608 (Nev. 2012).

would serve me well in evaluating cases and all programs available for sentencing of defendants. While I do not have specific experience with the First Step Act in the federal system, if confirmed, I will carefully consider the facts and circumstances of every case and consider the options set forth by the First Step Act in conjunction with the sentencing guidelines provided by the U.S. Sentencing Commission before sentencing.

3. During your hearing with the Senate Judiciary Committee, your fellow nominee, Thomas Cullen, stated that statistically there are more acts of violence perpetrated by far right extremists than any other group. In fact, between 2001 and 2015, more Americans were killed by homegrown right-wing extremists than by Islamist terrorists.[4] Additionally, a 2017 GAO report found that "Of the 85 violent extremist incidents that resulted in death since September 12, 2001, far-right wing violent extremist groups were responsible for 62 (73 percent) while radical Islamist violent extremists were responsible for 23 (27 percent)."[5]

    a. Do you believe Cullen's statement to be true? Please site any evidence you find regarding your answer.

    Before Mr. Cullen detailed them in the hearing last week, I had not reviewed, nor heard of the study or studies he referenced. As a result, I have not formulated a belief regarding Mr. Cullen's statement.

    b. If you have not studied the issue, do you have any reason to doubt the statistics cited above?

    Please see my response to Question 3(a).

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

    In my 20 years as a state court judge, I have never categorized myself using any particular label. I have always followed binding precedent in interpreting and applying the law.

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

    Please see above response to Question 4.

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?

    I agree that judicial restraint is an important value for a judge to consider in deciding a case. I understand judicial restraint to mean that judges understand and adhere to the

[4] Jennifer Williams, *White American men are a bigger domestic terrorist threat than Muslim foreigners*, VOX (Oct. 2, 2017), https://www.vox.com/world/2017/10/2/16396612/las-vegas-mass-shooting-terrorism-islam.
[5] UNITED STATES GOV'T ACCOUNTABILITY OFFICE, COUNTERING VIOLENT EXTREMISM 4 (Apr. 2017), https://www.gao.gov/assets/690/683984.pdf.

limited nature of the judicial role, deciding cases based on the applicable law and facts rather than imposing their own viewpoints.

a. The Supreme Court's decision in *District of Columbia v. Heller* dramatically changed the Court's longstanding interpretation of the Second Amendment.[6] Was that decision guided by the principle of judicial restraint?

As a nominee, I am governed by the Code of Conduct for United States Judges and under Canons 2(A), 3(A)(6), and 5(A), it would be inappropriate for me to comment on the correctness of a Supreme Court opinion. If confirmed, I will not by guided by my personal views and will fully and faithfully apply all binding precedent.

b. The Supreme Court's decision in *Citizens United v. FEC* opened the floodgates to big money in politics.[7] Was that decision guided by the principle of judicial restraint?

As a nominee, I am governed by the Code of Conduct for United States Judges and under Canons 2(A), 3(A)(6), and 5(A), it would be inappropriate for me to comment on the correctness of a Supreme Court opinion. If confirmed, I will not by guided by my personal views and will fully and faithfully apply all binding precedent.

c. The Supreme Court's decision in *Shelby County v. Holder* gutted Section 5 of the Voting Rights Act.[8] Was that decision guided by the principle of judicial restraint?

As a nominee, I am governed by the Code of Conduct for United States Judges and under Canons 2(A), 3(A)(6) and 5(A), it would be inappropriate for me to comment on the correctness of a Supreme Court opinion. If confirmed, I will not by guided by my personal views and will fully and faithfully apply all binding precedent.

7. 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.[9] Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.[10] 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.[11] In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.[12]

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

---

[6] 554 U.S. 570 (2008).
[7] 558 U.S. 310 (2010).
[8] 570 U.S. 529 (2013).
[9] 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.
[10] *Id.*
[11] 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.
[12] *Id.*

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.

I have accrued over 450 hours of judicial education, approved by the Nevada Supreme Court, during my 20 years on the bench in the State of Nevada. While my judicial education records do not provide specific details upon which I could rely for specific topics like inherent racial bias, inherent racial bias has been recognized in our state as an issue and has been a subtopic of discussion in criminal law education for judges and lawyers in the past.

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.[13] Why do you think that is the case?

As a state court judge for the last 20 years, I have not had educational programs or the opportunity to carefully review studies related to issues of disproportional sentences in federal system. In the event I am confirmed, I am committed to educating myself on these issues in order to understand the causes and potential solutions to problems with any disproportional sentencing based on race.

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.[14] Why do you think that is the case?

As a state court judge for the last 20 years, I have not had educational programs or the opportunity to carefully review studies related to issues of disproportional sentences in federal system. Additionally, I have not been privy to the charging guidelines, or other policies and practices of federal prosecutors. In the event I am confirmed, I am committed to educating myself on these issues in order to understand the causes and potential solutions to problems with disproportional sentencing based on race.

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?

[13] 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.
[14] Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1323 (2014).

Judges should remain committed throughout their careers to seek out judicial education on fundamental fairness in sentencing and racial disparities in sentencing. This would assist judges in difficult or complex criminal cases to comply with the mandate of Congress that judges avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct. *See* U.S.C. § 3553(a)(6).

8. 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.[15] In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.[16]

    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 relationship between crime rates and incarceration rates. I am unable to make an informed opinion on this particular 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 the response to Question 8(a) above.

9. 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.

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

    While nominees are governed by the Code of Judicial Conduct for United States Judges and should not comment on the correctness of Supreme Court precedent, I agree with the numerous other nominees who have made an exception for this case because of its significance in our nation's history in addressing the grave injustice in the *Plessy v. Ferguson* case. I believe that *Brown v. Board of Education* was correctly decided.

11. Do you believe that *Plessy v. Ferguson*[18] was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

---

[15] 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.
[16] *Id.*
[17] 347 U.S. 483 (1954).
[18] 163 U.S. 537 (1896).

I can unequivocally state that *Plessy* was a terrible injustice in our country's history and was wrongly decided. In *Brown,* as discussed in my response to Question 10, the Supreme Court rejected the separate but equal holding in *Plessy*.

12. 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.

13. 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."[19] Do you agree with President Trump's view that a judge's race or ethnicity can be a basis for recusal or disqualification?

    I have significant experience in Nevada state courts with issues of disqualification and recusals because as Chief Judge for four years, the court rules required assignment of all disqualification motions for 52 civil, criminal, and family court judges in my general jurisdiction trial court to me. Judges must be bound by their judicial canons, any statutory grounds for disqualification or recusal, and binding precedent. The judge's personal views, or those of any other person cannot be the basis for disqualification. If confirmed, I will fully and faithfully follow the judicial canons, applicable statutes and binding precedent from the Ninth Circuit and the Supreme Court.

14. 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."[20] Do you believe that immigrants, regardless of status, are entitled to due process and fair adjudication of their claims?

    In *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001), the Supreme Court held that the Due Process Clause applies to all persons within the United States, including lawful or unlawful aliens. If confirmed, I will fully and faithfully follow Supreme Court and Ninth Circuit precedent.

[19] 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.
[20] 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 March 11, 2020
For the Nomination of:

Jennifer P. Togliatti, to be United States District Judge for the District of Nevada

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?**

    18 U.S.C. §3553 lists the factors to be considered in determining an appropriate sentence, which I would carefully consider after fully familiarizing myself with the entirety of the record of the case. This would necessarily include the presentence report and all evidence presented by the parties, including statements from victims, the defendant and other interested persons, as well as review of any sentencing memorandums filed by the parties. I would also have to carefully evaluate the calculations under the Sentencing Guidelines.

    In my 20 years on the state court bench I sentenced thousands of defendants for every criminal violation under Nevada law imaginable. I was assigned a docket of over 65 murder cases for several years, in addition to other matters. If confirmed, I will use my significant experience in criminal matters to impose a sentence that complies with the mandate of Congress that the sentence be "[s]ufficient, but not greater than necessary, to comply with the purposes" enumerated by Congress in 18 U.S.C. §3553.

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

    I would prepare for sentencing in the manner detailed in my Response to Question 1(a) above. I addition to specific case preparation, I would ensure that I engage in judicial education regularly, in addition to independent education on all issues related to sentencing of criminal defendants in the federal courts.

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

    If confirmed, I will rely on the Sentencing Guidelines, and fully and faithfully follow any Supreme Court and Ninth Circuit precedent related to departure from 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?**

As a state court judge, I have not worked with the federal guidelines and have not studied this issue. As a nominee, it would not be appropriate for me to comment on Congress's decisions regarding mandatory minimum sentences pursuant to the Code of Judicial Conduct for Federal Judges, Canons 2(A), 3(A)(6), and 5(C).

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

Please see Response to Question 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 Question 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.[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?**

If confirmed, I would make a record regarding the sentence imposed. While I cannot appropriately opine on what I would do in hypotheticals that are likely or may occur, I do not believe there is anything in the Code that limits a judge's ability to express their sentencing constraints on the record in any particular case. That said, if confirmed I would fully and faithfully follow the sentencing statutes and binding precedent in all cases.

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

---

[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.

It is within the discretion of the Executive Branch to make charging decisions.

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

   I believe a judge's record in a case is what speaks to this issue. The power of clemency rests with the Executive Branch. However, the record a judge makes regarding sentencing constraints is available to the executive and the public for consideration of these issues.

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

      Yes, I believe that there are racial disparities in every criminal justice system in our country. I do not have the criminal experience in federal courts to give a specific example. In the state system where my experience is significant, studies have proven that this is an issue that judges and prosecutors alike must consider and be educated as to causes and solutions.

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?**

      Yes.

Senator Josh Hawley
Questions for the Record

Jennifer P. Togliatti
Nominee, U.S. District Court for the District of Nevada

1. **Under what circumstances do you believe it is appropriate for a federal district judge to issue a nationwide injunction against the implementation of a federal law, administrative agency decision, executive order, or similar federal policy?**

   I am aware of the controversy surrounding nationwide injunctions granted by United States District Judges in certain cases throughout the country. I am also aware of different Supreme Court Justices' criticism of the practice of the lower courts granting injunctive relief that extends beyond the parties to the case before them in the cases of *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) and *Dep't of Homeland Security v. New York*, 589 U. S. ___ (2020). Because cases involving requests for injunctive relief are and could be litigated in federal court, it would be inappropriate for me to comment in a manner that would indicate a predetermined decision on a disputed matter because as a nominee I am governed by the Code of Conduct of United States Judges, Canon 3(A)(6). However, if confirmed I would carefully consider Rule 65 of the Federal Rules of Civil Procedure and fully and faithfully follow all binding precedent in rendering my decision related to any requests for injunctive relief.

2. **What is your understanding of the Supreme Court's holding in *Gill v. Whitford*, 138 S. Ct. 1916 (2018)? Please explain.**

   Gill v. Whitford was a case in which the United States Supreme Court remanded the case back to the District Court finding that the Plaintiffs failed to present sufficient evidence of personal harm to have standing under Article III to challenge the state's redistricting plan as an unconstitutional gerrymander. The majority opinion written by Chief Justice Roberts explained the three-part test the Court used to determine whether a plaintiff had standing under Article III. That test requires that the Plaintiffs suffered an injury in fact, that is fairly traceable to the conduct of the Defendant and that is likely to be redressed by a favorable judicial decision. Chief Justice Roberts noted in the opinion that properly limited role of the courts in a democratic society depends on a plaintiff showing a personal stake in the outcome and not simply a generalized complaint to invoke federal court jurisdiction. Ultimately, the Court remanded the case back to the District Court for

the Plaintiffs to have the opportunity to present concrete and particularized injuries using evidence.

3. **Does the Supreme Court's instruction in *Gill v. Whitford*, 138 S. Ct. at 1934, that "[a] plaintiff's remedy must be tailored to redress the plaintiff's particular injury" bear on federal district courts' authority to issue nationwide injunctions? If yes, how?**

   Because cases involving requests for injunctive relief are and could be litigated in federal court, it would be inappropriate for me to comment in a manner that could indicate a predetermined decision on a disputed matter because as a nominee I am governed by the Code of Conduct of United States Judges, Canon 3(A)(6). However, if confirmed I would carefully consider Rule 65 of the Federal Rules of Civil Procedure, fully and faithfully follow all binding precedent and consider instructive precedent in rendering my decision related to any requests for injunctive relief.

4. **Do federal judges have the inherent authority to enjoin state actions without any authorization from a federal statute or the Constitution? If yes, what is the source and scope of that authority?**

   The Supreme Court has recognized that district courts possess certain, very limited inherent powers "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link v. Wabash R.R. Co.*, 370 U.S. 626 (1962). The Supreme Court has upheld a limited scope of administrative powers under that doctrine—for example, the authority to bar a disruptive criminal defendant from the courtroom, or to dismiss a suit for failure to prosecute. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991). Additionally, even within the limited scope of a court's inherent authority, any exercise of that inherent authority "cannot be contrary to any express grant of or limitation on the district court's power contained in a rule or statute." *Dietz v. Bouldin*, 136 S. Ct. 1885 (2016). I am not aware of any Supreme Court precedent holding that a district court may grant an injunction against state action as part of its inherent authority. If I am so fortunate as to be confirmed, I would follow all binding precedent on the scope of a district court's inherent powers.