

**Nomination of Eric C. Tostrud to the
United States District Court
For the District of Minnesota
Questions for the Record
Submitted April 18, 2018**

QUESTIONS FROM SENATOR WHITEHOUSE

1. During his confirmation hearing, Chief Justice Roberts likened the judicial role to that of a baseball umpire, saying “[m]y job is to call balls and strikes and not to pitch or bat.”
 - a. Do you agree with Justice Roberts’ metaphor? Why or why not?

Chief Justice Roberts’s likening of the judicial role to that of a baseball umpire is a very reasonable, if imperfect, metaphor. I agree with the gist of the metaphor that judges are to neutrally apply the law to the facts of a case, and are not to advocate for any position or party in the courtroom. Particularly in the context of a trial, I also think that, like the best umpires in a baseball game, the best district court judges do an excellent job administering proceedings while going largely unnoticed in comparison to the lawyers and witnesses. The metaphor’s imperfection lies in its comparison of a baseball strike zone to the bounds established by the law in any particular case. In baseball, the rules establish the same strike zone for every game. In some cases, the law might establish a relatively narrow zone within which a district court judge may render a decision. *See, e.g., Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989) (establishing rule that certain decisions made by ERISA plan administrators are to be reviewed by a district court for abuse of discretion). In other circumstances, the law might afford the district court considerably broader discretion to reach a decision. *See, e.g., Johnson v. Ashby*, 808 F.2d 676, 678 (8th Cir. 1987) (“Trial courts have discretion to place reasonable limits on the presentation of evidence to prevent undue delay, waste of time, or needless presentation of cumulative evidence”).

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

The practical consequences of a particular ruling should affect a judge’s decision only if, and to the extent that, the law requires or allows. For example, “interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.” *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982).

2. During Justice Sotomayor's confirmation proceedings, President Obama expressed his view that a judge benefits from having a sense of empathy, for instance "to recognize what it's like to be a young teenage mom, the empathy to understand what it's like to be poor or African-American or gay or disabled or old."

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

Generally, judges should make decisions based on the application of law to facts, and without regard to sympathy or prejudice. However, the law allows for empathy to play a role in certain decisions. For example, Title 18, United States Code § 3553(a) outlines sentencing factors for judges to take into consideration, including the personal history and characteristics of the defendant.

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

All judges are a product of their personal background and life experiences. Regardless, the job of a judge is to set aside any personal preferences when making decisions. This principle, which is an important and necessary aspect of impartiality, requires the judge to decide the case in accordance with the law, including any applicable precedent, even if the judge may personally favor a different outcome.

3. In your view, is it ever appropriate for a judge to ignore, disregard, refuse to implement, or issue an order that is contrary to an order from a superior court?

No.

4. What assurance can you provide this Committee and the American people that you would, as a federal judge, equally uphold the interests of the "little guy," specifically litigants who do not have the same kind of resources to spend on their legal representation as large corporations?

If confirmed, I would faithfully obey the oath to "administer justice without respect to persons, and do equal right to the poor and to the rich." 28 U.S.C. § 453. Throughout my career, I have had the privilege of representing plaintiffs and defendants. I have represented individuals and small businesses in suits against large corporations, and I have represented large corporations in suits against individuals and small businesses. I also have had the privilege of representing *pro bono* clients in matters against the federal government. For example, I have represented disabled American veterans seeking to recover combat-service-connected benefits from the Veterans Administration. I have represented a Japanese-American in obtaining reparations stemming from his and his family's relocation and confinement to the Manzanar War Relocation Center in 1942. These professional experiences, particularly those experiences representing

the “little guy,” have made me keenly aware of the imbalances of power and challenges facing many litigants in our federal courts.

- a. In civil litigation, well-resourced parties commonly employ “paper blizzard” tactics to overwhelm their adversaries or force settlements through burdensome discovery demands, pretrial motions, and the like. Do you believe these tactics are acceptable? Or are they problematic? If they are problematic, what can and should a judge do to prevent them?

The tactics this question describes are inappropriate. The Federal Rules of Civil Procedure provide judges with the ability to actively “secure the just, speedy, and inexpensive determination of every action and proceeding[.]” Fed. R. Civ. P. 1, through the regulation of discovery that is proportional to the case. *See* Fed. R. Civ. P. 26(b)(2)(C)(iii). If confirmed, I would utilize these and other rules to limit the use and impact of such problematic tactics.

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QUESTIONS FROM SENATOR BOOKER

1. According to a Brookings Institute study, African Americans and whites use drugs at similar rates, yet blacks are 3.6 times more likely to be arrested for selling drugs and 2.5 times more likely to be arrested for possessing drugs than their white peers.¹ Notably, the same study found that whites are actually *more likely* to sell drugs than blacks.² These shocking statistics are reflected in our nation's prisons and jails. Blacks are five times more likely than whites to be incarcerated in state prisons.³ In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.⁴

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

Despite our efforts to eradicate it from all areas of our society, racial bias continues to affect our country, including the criminal justice system. The courts' commitment to equal justice under the law requires that the biases and prejudices existing in society be forbidden from entering the courthouse doors and influencing judicial proceedings. To fulfill that promise, judges and lawyers must be ever vigilant to the existence of, and risks presented by, implicit bias. If confirmed, I would do my best to ensure that bias in any form does not affect my decisions or proceedings before me. If confirmed, I would hope to participate in programs that I understand are offered through the Administrative Office of the U.S. Courts regarding the subject of addressing implicit bias, and I would periodically review my decisions, particularly sentencing decisions, in an effort to promptly address any pattern that may reflect bias.

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

Yes, based on the statistics that you cite and other articles and information I generally recall reviewing.

¹ JONATHAN ROTHWELL, HOW THE WAR ON DRUGS DAMAGES BLACK SOCIAL MOBILITY, BROOKINGS INSTITUTE (Sept. 30, 2014), available at <https://www.brookings.edu/blog/social-mobility-memos/2014/09/30/how-the-war-on-drugs-damages-black-social-mobility/>.

² *Id.*

³ ASHLEY NELLIS, PH.D., THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS, THE SENTENCING PROJECT 14 (June 14, 2016), available at <http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/>.

⁴ *Id.* at 8.

- 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.

From the time I was a college student until the present, I have reviewed many judicial opinions, academic publications, and news articles and reports regarding racial bias in our criminal justice system, including implicit bias. As a college student, I recall specifically reading about a statistical study purportedly establishing a disparity in the imposition of the death sentence in Georgia based on the race of the murder victim and the race of the defendant. The United States Supreme Court addressed the study in *McCleskey v. Kemp*, 482 U.S. 920 (1987). I believe I examined the study and case as part of a Constitutional Law course I took in college. As a relatively new lawyer, I recall following closely a series of Minnesota state-court decisions addressing an argument that a statutory distinction drawn between the quantity of crack cocaine possessed and the quantity of cocaine powder possessed violated equal protection guarantees of the Minnesota and federal constitutions. See *State of Minnesota v. Russell*, 477 N.W.2d 886 (Minn. 1991). In addition to these and similar sources, I have been a near-daily reader of a variety of news sources throughout my life. Though I do not recall any particular articles by name, I recall, for example, generally reading many articles in the New York Times regarding the subject of racial bias in our criminal justice system. Finally, I have attended a number of seminars during my career regarding the elimination of bias from the judicial system, though I do not recall whether any of the seminars I attended addressed the specific issue of implicit racial bias in the criminal justice system.

2. According to a Pew Charitable Trusts fact sheet, in the 10 states with the largest declines in their incarceration rates, crime fell an average of 14.4 percent.⁵ In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an 8.1 percent average.⁶
- a. Do you believe there is a direct link between increases of a state's incarcerated population and decreased crime rates in that state? If you believe there is a direct link, please explain your views.

I have not examined this topic but believe that increases and decreases in crime rates are influenced by a wide variety of factors.

⁵ THE PEW CHARITABLE TRUSTS, NATIONAL IMPRISONMENT AND CRIME RATES CONTINUE TO FALL 1 (Dec. 2016), available at http://www.pewtrusts.org/~media/assets/2016/12/national_imprisonment_and_crime_rates_continue_to_fall_web.pdf.

⁶ *Id.*

- b. Do you believe there is a direct link between decreases of a state's incarcerated population and decreased crime rates in that state? If you do not believe there is a direct link, please explain your views.

I do not know whether there is a direct link between decreases of a state's incarcerated population and decreased crime rates in that state. As I explained in my answer to question 2.d., this is not an issue I have examined, and I believe that a state's crime rates are influenced by a wide variety of factors

3. Do you believe it is an important goal for there to be demographic diversity in the judicial branch? If not, please explain your views.

Yes.

Questions for the Record from Senator Kamala D. Harris
Submitted April 18, 2018
For the Nominations of

Eric C. Tostrud, to be United States District Judge for the District of Minnesota

1. District court judges have great discretion when it comes to sentencing defendants. It is important that we understand your views on sentencing, with the appreciation that each case would be evaluated on its specific facts and circumstances.

- a. What is the process you would follow before you sentenced a defendant?

If confirmed, I would follow the process established by Supreme Court and Eighth Circuit precedent. *See United States v. Washington*, 515 F.3d 861, 865-66 (8th Cir. 2008). I understand that process to begin with the preparation of a Pre-Sentence Report, with input and objections from both sides, and the computation of an advisory Guidelines level. Then, after notice and in open court: parties are allowed to give a full and complete allocution; the probation office and any victims are allowed input; disputed issues are resolved; variance, downward departures, and the factors set out in 18 U.S.C. § 3553(a) are considered; and a sentence is announced. *See generally*, Federal Sentencing: The Basics, United States Sentencing Commission (August 2015). I will closely follow this process, and any further guidance from superior courts or Congress, if confirmed as a U.S. District Judge.

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

I would determine what constitutes a fair and proportional sentence by following the process described above.

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

Both the Guidelines themselves and Supreme Court precedent, including *U.S. v. Booker*, explain circumstances and considerations that can justify a departure or variance from the range specified in the Guidelines. Those include the factors discussed in 18 U.S.C. § 3553(a). I would carefully review those factors and precedents, provide the advance notice required by Fed. R. Crim. P. 32(h), and consider arguments and evidence presented by the parties before departing 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?

I have never sentenced any one or been required to impose a minimum mandatory or indeterminate sentence, and the respective deterrence effects of these penalties is not something I have knowledge of or have studied. Congress has imposed minimum mandatory sentences for some crimes. This is a power within the purview of Congress under Article I of the U.S. Constitution. I would be required to follow this law at sentencing, no matter what my agreement or personal view on the relative deterrent effects.

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

Please see my 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 my response to Question 1.d.i above.

- iv. Former-Judge John Gleeson has previously 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 be bound to impose sentences consistent with the law, regardless of my personal views one way or the other. If I concluded that the law compelled imposition of an unjust and disproportionate sentence in a particular case, I would consider commenting on the matter in a written opinion. I am generally aware that some federal judges have taken that step as a

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>

means of persuading the political branches to address this type of issue.

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

Decisions as to what charges to bring before a grand jury are committed to the authority and discretion of the Executive branch pursuant to Article II of the U.S. Constitution, and judges must be careful not to encroach upon this authority. If I concluded that the law compelled imposition of an unjust and disproportionate sentence in a particular case, and if I concluded that the Executive's charging policies were a primary factor resulting in the injustice, then I would consider raising the issue or commenting on the matter in open court as part of the sentencing process or in a written opinion. I am generally aware that some federal judges have taken that step as a means of addressing this issue.

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

Federal clemency is exclusively a function of the Executive. *Harbison v. Bell*, 556 U.S. 180, 187 (2009) (Stevens, J.). If I concluded that the law compelled imposition of an unjust and disproportionate sentence in a particular case, and that clemency might remedy the injustice, then I would consider raising the issue or commenting on the matter in open court or in a written opinion. I am generally aware of a comparatively small number of circumstances where federal judges have suggested clemency in specific cases.

- 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. A judge is duty-bound to administer justice faithfully and impartially without respect to persons, and to do equal right to the poor and to the rich. 28

U.S.C. § 453. The federal district judge, in particular, has a front-line responsibility for ensuring that all litigants receive fair, unbiased treatment, and an opportunity to be heard.

- b. Do you believe that there are racial disparities in our criminal justice system? If so, please provide specific examples. If not, please explain why not.

Despite our efforts to eradicate it from all areas of our society, racial bias continues to affect our country, including the criminal justice system. The courts' commitment to equal justice under the law requires that the biases and prejudices existing in society be forbidden from entering the courthouse doors and influencing judicial proceedings. To fulfill that promise, judges and lawyers must be ever vigilant to the existence of, and risks presented by, implicit bias. If confirmed, I would do my best to ensure that bias in any form does not affect my decisions or proceedings before me. If confirmed, I would hope to participate in programs that I understand are offered through the Administrative Office of the U.S. Courts regarding the subject of addressing implicit bias, and I would periodically review my decisions, particularly sentencing decisions, in an effort to promptly address any pattern that may reflect bias. My conclusion that racial bias affects our criminal justice system is not based on any specific example, but rather on numerous judicial decisions, academic studies, and news reports I have reviewed throughout my professional career.

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

- a. Do you believe that it is important to have a diverse staff and law clerks?

Yes.

- b. Would you commit to executing a plan to ensure that qualified minorities and women are given serious consideration for positions of power and/or supervisory positions?

If confirmed, I intend to actively recruit qualified minorities and women for all positions in chambers.