

Questions for the Record
From Senator Mazie K. Hirono
For Diane Gujarati, Eric Komitee, John L. Sinatra, Jr., Rachel P., Kovner, Lewis J. Liman,
Mary Kay Vyskocil and Gary Brown

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?**

Response: No

- b. Have you ever faced discipline, or entered into a settlement related to this kind of conduct?**

Response: No

2. In these hearings, when a Senator asks about a nominee's personal views on a topic, about their involvement in certain organizations or their decisions to advocate for certain points of view, they tell us that those parts of their records don't matter, that as judges they will simply "follow the law." But, cases are so infrequently decided by the direct application of legal precedent that at some point, as one nominee told us, "judging kicks in."

Do you acknowledge that there will be times on the bench, that a judge does bring personal experiences and views to bear on their decisions?

Response: To quote the Honorable Jacob Mishler, for whom I clerked, a district court "is bound by the decisions of the Court of Appeals . . . and the Supreme Court." *Ramos v. Boehringer Mannheim Corp.*, 896 F. Supp. 1213, 1215 (S.D. Fla. 1994). If confirmed as a district judge, I would apply precedent irrespective of any contrary views I might hold. During my time as a Magistrate Judge, I have not issued any decisions based upon my personal views; rather, all of my decisions have been firmly grounded in the law.

3. A recent nominee before the Committee spoke about the importance of training to help judges identify their implicit biases.

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

Response: I believe that judges should make every effort to ensure that bias has no place in their courtrooms. As such, if training on implicit bias would help in this regard, such training would be a welcome additional resource.

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

Response: As Chief Compliance Officer at CA Technologies, I not only received training designed to combat bias and discrimination (as well as other compliance issues), but played a role in designing and disseminating such training. While none of this training was specific to the issue of implicit racial bias, I believe some of this experience bears on the question.

- c. If confirmed, do you commit to taking training on implicit bias?**
If offered for judges, I would be willing to take such training.

Nomination of Gary R. Brown
United States District Court for the Eastern District of New York
Questions for the Record
Submitted August 7, 2018

QUESTIONS FROM SENATOR BOOKER

1. 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.¹ Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.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?

Response: While unfamiliar with the particular study cited, I am familiar with statistics demonstrating that racial minorities are disproportionately represented in correctional facilities. *See, e.g.*, Bureau of Justice Statistics, "Prisoners in 2016," available at https://www.bjs.gov/content/pub/pdf/p16_sum.pdf (discussing "[b]lack to white racial disparity"). As a Magistrate Judge, I recognize that racial bias of any kind has no place in the courtroom, and have endeavored to ensure that everyone who comes into my courtroom is treated fairly, equally and courteously, without regard to race or other personal characteristics.

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

Response: Please see Response 1(a).

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.

Response: I have not studied the 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 by an average of 14.4 percent.⁵ In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.⁶

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.

Response: While I have not studied the issue specifically, I am aware, based on general knowledge and my experience in the criminal justice system that incarceration rates are only one factor in the crime rates in a given region.

- 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.**

Response: Please see Response 2(a).

¹ 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>.

² *Id.*

³ 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>.

⁴ *Id.*

⁵ 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>.

⁶ *Id.*

- 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.**

Response: Yes.

- 4. Do you believe that *Brown v. Board of Education*⁷ was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.**

Response: As the Second Circuit has held, “*Brown* is the law.” *Offermann v. Nitkowski*, 378 F.2d 22, 24 (2d Cir. 1967).

- 5. Do you believe that *Plessy v. Ferguson*⁸ was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.**

Response: As the Supreme Court has held, “*Plessy v. Ferguson*[] has no place in our modern equal protection jurisprudence.” *Powers v. Ohio*, 499 U.S. 400, 410, 111 S. Ct. 1364, 1370, 113 L. Ed. 2d 411 (1991).

- 6. 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?**

Response: No.

- 7. President Trump stated recently 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.”⁹ Do you believe that immigrants, regardless of status, are entitled to due process and fair adjudication of their claims?**

Response: As a sitting Magistrate Judge, and as a district court nominee, I believe it would be inappropriate to respond to this question, which implicates matters that are pending or impending in the federal court system.

⁷ 347 U.S. 483 (1954).

⁸ 163 U.S. 537 (1896).

⁹ 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 August 8, 2018
For the Nominations of**

Gary Brown, to the U.S. District Court for the Eastern District of New York

Diane Gujarati, to the U.S. District Court for the Eastern District of New York

Eric R. Komitee, to the U.S. District Court for the Eastern District of New York

Rachel P. Kovner, to the U.S. District Court for the Eastern District of New York

Lewis J. Liman, to the U.S. District Court for the Southern District of New York

John L. Sinatra, Jr., to the U.S. District Court for the Western District of New York

Mary Kay Vyskocil, to the U.S. District Court for the Southern District of New York

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?

Response: As a Magistrate Judge, I have sentenced a number of defendants in misdemeanor cases and, based on that experience, can speak to the process I have and would continue to employ in sentencing criminal defendants if confirmed as a district judge. This process includes consulting and applying the rules and procedures prescribed by the relevant statutes, binding case law, the Sentencing Guidelines, and the Federal Rules of Criminal Procedure. The process includes careful review of the Presentence Report and the relevant filings made by the government and the defendant. Following that review, I would make a determination considering the applicable Sentencing Guidelines and the case law interpreting and applying those Guidelines, consider the factors set forth in 18 U.S.C. § 3553(a), read and listen to any victim statements, and consider the presentations made by counsel, the defendant, and other relevant parties. After review and consideration, I would then impose a sentence “sufficient but not greater than necessary” to address the sentencing factors, and setting forth the reasons for the sentence on the record as required by § 3553(c).

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

Response: Please see Response 1(a).

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

Response: Under binding Supreme Court case law, the Guidelines are advisory, but consideration of the Guidelines remains mandatory. As such, the sentencing

judge may consider imposing a sentence outside of the advisory Guidelines range. Setting aside those departures from the Guidelines range authorized by the express terms of the Guidelines, other departures may be appropriate and necessary when compelled by the dictates set forth in 18 USC § 3553(a), which include a sentence “sufficient but not greater than necessary” to address the sentencing factors described therein. Such a departure is appropriate only where supported by sufficient factual findings and after providing the parties notice and an opportunity to be heard.

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?

Response: Congress is empowered to consider and enact mandatory minimum sentences. If confirmed, I would be duty bound to impose such minimum mandatory minimum sentences without regard to any personal opinion I might hold. *See, e.g., United States v. Dossie*, 851 F. Supp. 2d 478, 489 (E.D.N.Y. 2012) (imposing mandatory minimum because “the law . . . required it”).

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

Response: Please see my response to Question 1(d)(i).

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

Response: Please see my response to Question 1(d)(i).

iv. Former-Judge John Gleeson has criticized mandatory minimums in various opinions he has authored, and has taken proactive efforts to remedy unjust sentences that result from mandatory minimums.² If confirmed, and you are required to impose an unjust and disproportionate sentence, would you commit to taking proactive efforts to address the injustice, including:

1. Describing the injustice in your opinions?

Response: As a sitting Magistrate Judge, as well as a nominee for a district judgeship, I believe it would be inappropriate to discuss the steps I might take in a case that may come before me.

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>

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

Response: No, as I believe that such effort would run afoul of Fed. R. Crim. P. 11(c)(1) and the Canons of Judicial Ethics.

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

Response: I believe that “reaching out” to discuss considerations of clemency are generally outside the appropriate role of a judge, and would be proscribed by the Canons of Judicial Ethics.

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?

Response: Yes. In light of my experience working in the Pretrial Opportunity Program in the Eastern District of New York, I am familiar with the societal benefits that can be achieved, in appropriate cases, with programs aimed at providing alternatives to incarceration.

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?

Response: Yes

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

I am familiar with statistics demonstrating that racial minorities are disproportionately represented in correctional facilities. *See, e.g.*, Bureau of Justice Statistics, “Prisoners in 2016,” available at https://www.bjs.gov/content/pub/pdf/p16_sum.pdf (discussing “[b]lack to white racial disparity”). As a Magistrate Judge, I recognize that racial bias of any kind has no place in the courtroom, and have endeavored to ensure that everyone who comes into my courtroom is treated fairly, equally and courteously, without regard to race or other personal characteristics.

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?

Response: Yes. As a Magistrate Judge, I have hired law clerks and deputy clerks that have not only been highly qualified and industrious, but also a very diverse group. In fact, women and racial minorities comprise a majority of the deputy clerks and law clerks whom I have hired.

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?

Response: While I cannot commit without more specifics, I would be happy to consider such a plan.