

Questions for the Record for Pamela A. Barker
From Senator Mazie K. Hirono

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.

Nomination of Pamela A. Barker
United States District Court for the Northern District of Ohio
Questions for the Record
Submitted October 17, 2018

QUESTIONS FROM SENATOR BOOKER

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

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

Yes, I do believe there is implicit racial bias in our system. As a state trial court Judge in an urban county in Ohio, I strive for consistency and fairness in my Courtroom. As a federal jurist I would continue that effort to ensure a fair process for all.

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 not studied specific reports or studies on this topic but have been generally trained at the Ohio Judicial College. As a state trial court Judge, I am aware of this issue as it relates to undermining transparency and fairness in our 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 specifically studied this issue, but I believe there are many factors

which may contribute to an increase or decrease in crime rates.

- 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.**

Please see Response to Question 2(a).

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

Yes.

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

- a. Do those statistics alarm you?**

Yes.

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

I have not had occasion to study the Eighth Amendment as a state trial court judge, and submit that under Canon 2(A) of the Judicial Code of Conduct for U.S. Judges, it would be inappropriate for me to weigh in or comment on this issue. I agree, however, that it is not appropriate for the race of a criminal defendant to be considered as a factor in making death penalty decisions.

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

As a federal judge, it would be my duty to ensure a fair and transparent proceeding for all defendants. I cannot speak to specifics of any case that may come before me.

- 5. As a trial judge in state court, you've often had the responsibility to impose sentences for criminal defendants. Could you describe a case in which you found it particularly difficult to decide the appropriate sentence, and could you describe how you reached your ultimate decision?**

In one case I determined the sentence for an 18-year-old high school student who was

charged with the kidnapping and robbery of, and felonious assault upon, his girlfriend. The defendant was a gifted basketball player and had many advocates at his sentencing requesting leniency. In deciding the defendant's sentence, I started with the law that felonies of the first and second degree carry a presumption of imprisonment under Ohio law, and that felonies of the third degree carry no presumption in favor of or against prison. I applied and discussed the statutory sentencing factors, including whether the offense was more serious or less serious and whether recidivism was more or less likely. Another important factor in my sentencing decision was that the defendant had threatened the victim after being released on bond, which resulted in a second case. I gave the defendant the minimum prison sentences on each count and ran them concurrently. I placed on the record that the defendant could apply for judicial release at the appropriate time or after he had completed the mandatory minimum before being eligible, or six months. The defendant never filed for judicial release.

6. Before your current service on the Cuyahoga County Court of Common Pleas, you served as a Magistrate Judge in juvenile diversion cases. I understand that these juvenile diversion programs involve finding positive alternatives to detention and incarceration, and that the data has shown them to be successful in Ohio. Did your work on these cases inform any of your broader views about sentencing for adults and alternatives to incarceration?

Yes, it did. As a juvenile diversion magistrate, I saw mistakes and bad choices that were sometimes driven by family problems, lack of maturity and peer pressure. Successful completion of the conditions I imposed meant that a young person did not carry forward any record of involvement with the juvenile criminal justice system, that otherwise might negatively impact their opportunities for further education, employment, and service.

In my role as a Judge on the Cuyahoga County Court of Common Pleas, whenever a defendant qualifies for alternatives to incarceration, i.e., the Diversion Program, Intervention of Lieu of Conviction, and the Early Intervention Program, I always place them in that programming and upon successful completion of the terms and conditions thereof, dismiss the case and seal the record. When a defendant applies for an expungement and qualifies by law for the expungement, I grant the expungement and seal the record. I believe that these programs and expungements, like the juvenile diversion program, give people a second chance and help promote and provide them with opportunities they might not otherwise have if they had a felony conviction.

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

² *Id.*

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

⁴ *Id.* at 8.

⁵ THE PEW CHARITABLE TRUSTS, NATIONAL IMPRISONMENT AND CRIME RATES CONTINUE TO FALL 1 (Dec. 2016), available at

[http://www.pewtrusts.org/~media/assets/2016/12/national imprisonment and crime rates continue to fall web.pdf](http://www.pewtrusts.org/~media/assets/2016/12/national_imprisonment_and_crime_rates_continue_to_fall_web.pdf).

⁶ *Id.*

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

**Questions for the Record from Senator Kamala D. Harris
Submitted October 17, 2018
For the Nominations of**

Pamela Ann Barker, to the U.S. District Court for the Northern District of Ohio

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

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

As a sitting Judge in the Cuyahoga County Court of Common Pleas for over seven (7) years, I have sentenced thousands of defendants and understand the importance of a fair and consistent approach to sentencing. During each and every sentencing hearing I consider and apply statutory sentencing factors. I review the presentence investigation report prepared by the county probation department to provide a fair and thorough picture of the defendant's background and possible needs, e.g., treatment. At the sentencing hearing, I treat people with dignity and respect, listen to any arguments or information provided by the parties (the Defendant, Defense Counsel, the Prosecutor and any victim(s)) and keep an open mind as I formulate a sentence that is fair, consistent, protects the public and reflects the seriousness of the offense. As a Federal Judge, I would continue this approach to sentencing, while consulting and applying the rules and procedures outlined by the Federal Rules of Criminal Procedure, any statutory authority, case law, and the Sentencing Guidelines.

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

As a current Judge I strive to implement a balanced and consistent approach to sentencing. As a federal Judge, I plan to continue to review all pre-sentence materials and statements provided by the parties. I will adhere to the Sentencing Guidelines, as appropriate. I believe it is important for a Judge to formulate consistent and appropriate sentences for defendants regardless of their race or economic status. I would consider the factors present in 18 U.S.C. § 3553(a), and impose a sentence "sufficient but not greater than necessary", placing such reasons for the sentence on the record per § 3553(c).

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

As a federal Judge, I would review the Grounds for Departure, Part K, Chapter 5 of the Sentencing Guidelines. I would consider the factors present in 18 U.S.C. § 3553 and place such reasons for any departure from the Sentencing Guidelines on the record per § 3553(c).

- d. Judge Danny Reeves of the Eastern District of Kentucky – who also serves on the U.S. Sentencing Commission – has stated that he believes mandatory minimum sentences are more likely to deter certain types of crime than discretionary or indeterminate sentencing.¹**

i. Do you agree with Judge Reeves?

The application or appropriateness of any mandatory minimum sentence is a consideration for Congress. I have not had occasion to study the issue, and submit that under Canon 2(A) of the Judicial Code of Conduct for U.S. Judges, it would be inappropriate for me to weigh in or comment on this issue. As a Judge I would be required to faithfully follow the law.

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).

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).

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?

As a nominee for District Court, it would not be appropriate to discuss possible issues that may arise before me given the Canons of Judicial Ethics.

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

No, as reaching out in this manner may be contrary to Fed.R.Crim.P. 11(c)(1), the Canons of Judicial Ethics and infringe upon discretion vested in the Executive Branch.

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>

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

This would be outside of my role as a judge since Clemency is within the purview of the President. I am mindful of my ethical obligations and the separation of powers of branches of government.

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. As a current state trial court Judge in Ohio, I do permit defendants to participate in diversion, intervention in lieu of conviction, and treatment programs supervised by the Cuyahoga County Probation Department. The opportunity for rehabilitation is an important part of the criminal justice system and many non-violent or first-time offenders should be given a chance to explore 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?

Absolutely. As a current state court trial Judge, I think it is important to ensure a fair and balanced approach to cases and to provide consistency in application of the law. A judge should ensure that parties have an opportunity to be heard. A judge should also exhibit an even judicial temperament.

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 cognizant of studies that indicate there is racial disparity in sentencing. As a current state court trial Judge in an urban county, I take steps to ensure a fair process by striving for consistency in my Courtroom.

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. I welcome input from my staff and appreciate the different experiences that they bring to my Courtroom. During the seven years that I have been a state trial

court Judge, I have had a female staff attorney, and have mentored several interns and externs with diverse backgrounds.

- 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, I would ensure that qualified minorities and women be given serious consideration for positions I am responsible for hiring at the Federal Court level.