

**Questions for the Record from Senator Kamala D. Harris
Submitted January 12, 2018**

For the Nominations of:

R. Stan Baker, to be United States District Judge for the Southern District of Georgia

- 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 United States Magistrate Judge, I approach sentencing decisions with a great deal of preparation, thought, and consideration. I follow the statutes, rules, and procedures required by law. Prior to sentencing defendants, I consider the Presentence Investigation Report, the Advisory Sentencing Guidelines, the statutory sentencing factors set out at 18 U.S.C. § 3553(a), the arguments of counsel, any written or oral statements made by victims, and any requests for leniency by the defendant and/or others. At each sentencing hearing, I do my best to impose a sentence that is “sufficient, but not greater than necessary” to achieve the sentencing purposes that Congress enumerates at 18 U.S.C. § 3553(a)(2). If I am confirmed to serve as a district court judge, I would continue to follow the same process.

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

As a United States District Court Judge, I would follow largely the same process to impose a fair and impartial sentence that I currently follow as a United States Magistrate Judge and that is set forth in response to Question 1.a. above.

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

“Departure” is a term of art used in the United States Sentencing Guidelines. Part K of Section 5 of the Guidelines sets forth numerous circumstances where it may be appropriate for the sentencing judge to “depart” by imposing a sentence below or above the sentencing range otherwise called for by the Guidelines. These contemplated departures range from a downward departure based on the defendant’s substantial assistance to law enforcement authorities to an upward departure based on the defendant’s use of a semiautomatic firearm during the underlying offense. See U.S.S.G. §§ 5K 1.1, 5K2.17. It would not be appropriate for the sentencing judge to impose a departure without first providing the parties reasonable advanced notice that the judge is contemplating the departure. Fed. R. Crim. P. 32(h).

Additionally, a sentencing judge may impose a sentence above or below the range called for by the Guidelines by way of a variance. While a departure is based on the circumstances listed in Part K of Section 5 of the Guidelines, a variance is justified by the factors listed at 18 U.S.C. § 3553(a). A district judge's authority to sentence by variance is grounded in the United States Supreme Court's holding that the Guidelines are merely advisory. *See United States v. Booker*, 543 U.S. 220 (2005). Ultimately, regardless of the guideline range, a judge must impose a sentence that is "sufficient, but not greater than necessary" to achieve the sentencing purposes that Congress enumerates at 18 U.S.C. § 3553(a)(2).

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?

Whether to include mandatory minimum sentences in criminal statutes falls within the purview of Congress under Article I of the United States Constitution. As a sitting United States Magistrate Judge and prospective United States District Judge, it would be inappropriate for me to publicly comment on matters of legislative policy and to address political questions. Additionally, I currently have pending cases involving statutes with mandatory minimum sentences, and future cases before me will also involve such statutes. It would compromise the appearance of my impartiality in those pending and impending cases to publicly comment on the propriety and efficacy of the statutes at the center of those cases. *See* Canon 3(A)(6), Code of Conduct for United States Judges. If confirmed to be a district judge, I will faithfully apply all federal statutory and guideline sentencing provisions, as interpreted by the Supreme Court of the United States and the Eleventh Circuit Court of Appeals.

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

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

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?

Whether to include mandatory minimum sentences in criminal statutes falls within the authority and discretion of Congress under Article I of the United States Constitution. While judges have criticized statutes that lead to unjust results in extreme cases, judges must generally be careful not to encroach upon the purview of Congress to make such policy decisions.

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 fall within the authority and discretion of the United States Attorney under Article II of the United States Constitution. *United States v. Smith*, 231 F.3d 800, 807 (11th Cir. 2000) (“The decision as to which crimes and criminals to prosecute is entrusted by the Constitution not to the judiciary, but to the executive who is charged with seeing that laws are enforced.”); *United States v. Cespedes*, 151 F.3d 1329, 1332 (11th Cir. 1998) (“The Supreme Court has unambiguously upheld the prosecutor’s ability to influence the sentence through the charging decision”). “[A]s long as the prosecutor has probable cause to believe that an accused has committed an offense defined by statute, the decision whether or not to prosecute, and if so, what charge to bring before the grand jury, rests in the prosecutor’s discretion.” *United States v. Cole*, 755 F.2d 748, 758 (11th Cir. 1985). Just as judges must be careful not to encroach upon the authority the Constitution affords Congress to make legislative decisions, they must also be careful to not encroach upon the deference afforded to the United States Attorney to make charging decisions. That said, in extreme cases, a judge may discuss such decisions with the United States Attorney’s office.

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

“Federal clemency is exclusively executive.” *Harbison v. Bell*, 556 U.S. 180, 187 (2009) (Stevens, J.); *see also Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 280-81 (1998) (executive

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>

clemency is “a matter of grace” that allows “the executive to consider a wide range of factors not comprehended by earlier judicial proceedings and sentencing determinations”); *Faulder v. Texas Bd. of Pardons & Paroles*, 178 F.3d 343 (5th Cir. 1999) (“[P]ardon and commutation decisions are not traditionally the business of courts . . .”); *Valle v. Scott*, No. 3:11-CV-953-J-34JRK, 2011 WL 13175739, at *15 (M.D. Fla. Sept. 27, 2011), *aff’d*, 441 F. App’x 688 (11th Cir. 2011) (“Indeed, it is not this Court’s function to disturb executive discretion, as pardon and commutation decisions are not the business of courts.”). Thus, if federal judges reach out to the United States Attorney’s office regarding clemency, they must do so with substantial deference to the executive’s authority over such decisions.

- 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 United States Magistrate Judge, I have imposed sentences other than imprisonment where permitted by the applicable statutes and warranted by the facts of the case. If am confirmed to be a District Judge, I will assess the prudence of a sentence other than imprisonment in appropriate cases.

- 2. Judges are one of the cornerstones of our justice system. If confirmed, you will be in a position to deciding 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 just one?**

Yes. A judge takes an oath to administer justice faithfully and impartially without respect to persons, and do equal right to the poor and to the rich. 28 U.S.C. § 453. To me, these are not merely words at an investiture ceremony but a charge that has guided and will guide my judicial career.

- 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 certainly aware that during the history of our nation, there have been appalling racial disparities in our criminal justice system. I have not conducted sufficient research or investigation to assess the prevalence of racial disparities today. In our court, I make certain that my fellow court employees and I treat every person that comes into the courthouse with equal courtesy, dignity, and respect and that we apply the law without favor or prejudice.

- 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 think it is beneficial to have a chambers staff with a range of backgrounds, life experiences, viewpoints, talents, and interests. As a United States District Judge, I would give serious consideration to all qualified applicants for positions on my staff regardless of their age, gender, race, color, national origin, or religion.

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. As a United States Magistrate Judge, when reviewing applications and conducting interviews for positions in my chambers staff, I have ensured that I do not discriminate against applicants based their age, gender, race, color, national origin, or religion. I have hired minorities and women. As a United States District Judge, I would ensure that all qualified applicants for positions over which I have hiring authority are given serious consideration without bias or prejudice.