

**Nomination of John Michael Gallagher to the United States District Court for the  
Eastern District of Pennsylvania  
Questions for the Record  
Submitted October 23, 2019**

**QUESTIONS FROM SENATOR FEINSTEIN**

1. In 2017, you participated in a conference on the opioid epidemic, hosted by the Police Executive Research Forum. During a panel discussion, you stated that “[u]nder current federal laws, to get some teeth, to get a mandatory minimum sentence, you need 100 grams of heroin. That’s way too high.” (Police Executive Research Forum, *The Unprecedented Opioid Epidemic: Police, Sheriffs, and Health Agencies Must Step Up Their Responsibilities*, 2017)

- a. **Is it your view that we should be arresting and incarcerating more people, as a response to the opioid epidemic?**

That is a subject of considerable political debate. As a judicial nominee, it would not be appropriate for me to offer an opinion on which criminal laws should be passed and how they should be enforced.

In 2017, I participated in an advisory panel about the opioid epidemic that was organized by the Police Executive Research Forum, an independent research organization that focuses on critical issues in policing.

Like other advisory panels I have served on during my career, this advisory panel brought together leading police professionals to discuss ways that we can more effectively and professionally police in our free society. This particular panel brought together hundreds of participants from law enforcement, medicine, and addiction counseling to discuss the tools that could be brought to bear from their respective disciplines to address the opioid epidemic.

During the panel discussion, I noted that we “cannot arrest our way out of this problem, but arrest has to be part of the solution here.” The problem I was referring to is the opioid epidemic. I made this comment in the context of the panel’s discussion of the distinction between the criminal prosecution of drug dealers, who profit from the distribution of opioids to drug users, and the debatable value of prosecuting their addicted customers without providing avenues for these drug users to overcome their addictions.

At the same conference on the opioid epidemic, you said, “drug distribution is treated like a nonviolent offense. I think that’s a fallacy; it’s a violent crime.” (Police Executive Research Forum, *The Unprecedented Opioid Epidemic: Police, Sheriffs, and Health Agencies Must Step Up Their Responsibilities*, 2017)

- b. **Do you think that companies that intentionally flooded the population with opioids have committed a violent crime?**

It is my understanding that there is litigation pending, and potentially impending, on the legal liability of companies that manufacture, produce, and distribute prescription opioids. Canon 3(a)(6) of the Code of Conduct for United States Judges prohibits me from making “public comment on the merits of a matter pending or impending in any court.”

My statement was intended to convey that drug distribution, and disputes related to such distribution, often also involve violence. Sadly, that has been my experience during my law enforcement career. For instance, I helped successfully prosecute a violent Philadelphia drug trafficking organization for 12 murders, including the arson murder of two women and four children who were burned to death to avenge the testimony of a former associate of the organization. As a result, the leader of that drug trafficking organization was held accountable for more murders than any person in the history of Pennsylvania.

2. You have worked on helping police departments develop policies and training methods regarding the use of force. It also appears—from your Committee Questionnaire—that you handled “police misconduct cases prosecuted before an administrative trial forum” as an Assistant Special Prosecutor with the New York Police Department.

**a. Did any of the misconduct cases that you handled involve the use of force? Approximately how many and what were the outcomes in those cases?**

I have investigated and prosecuted specific acts of official misconduct by police officers as an Assistant Special Prosecutor in the New York City Police Department, and as an Assistant United States Attorney. Several of these cases involved the excessive use of force, though I do not have a precise estimate. I recall at least two of these cases resulted in convictions.

**b. What do you believe is the most important thing that police departments can do to minimize use-of-force incidents?**

Regrettably, in my experience, it is not possible to eliminate all instances in which an officer must use force to protect himself or others. However, my work helping to develop police use of force policies for the Philadelphia and Miami police departments has demonstrated to me that police officers must be given clear guidance and training on use of force given the serious consequences that can result from the use of force. Such guidance and training can help minimize use-of-force incidents.

For instance, in Miami, I helped develop use of force policies and training that changed the focus from when a police officer was legally authorized to use force to emphasizing the use of force only as a last resort when no other options are available. These policies and training proved successful. After they were implemented, the number of police firearm discharges in Miami was reduced to zero over a prolonged period of time. At that time, the Mayor of Miami was Manny Diaz. He has written a letter to the Senate

Judiciary Committee in support of my nomination to the district court. His letter reiterates the critical importance of law enforcement agencies implementing effective use of force policies. In his letter, he stated:

"The most fundamental responsibility of government is to provide for the safety and security of its people. Successful policing involves more than just crime statistics; you must earn the trust of all residents through a professionally trained force governed by a clear set of rules, including the use of force that respects the dignity and rights of your residents. Chief Gallagher fully embraced that responsibility and helped implement the reforms that resulted in our becoming a model that other American cities sought to emulate."

Similarly, in Philadelphia, I helped develop use of force policies and training that emphasized the primary duty of police to protect and preserve life. These policies are summarized in a letter written to the Senate Judiciary Committee in support of my nomination. The letter is from Chuck Wexler, the executive director of the Police Executive Research Forum, an independent research organization that focuses on critical issues in policing. In his letter, Mr. Wexler explained:

"[Philadelphia Police Commissioner] Timoney and Gallagher also revamped the department's policy on officers' use of force, including a prohibition on shooting at moving vehicles and the elimination of the 'blackjack' as a tool for overcoming resistance - a weapon that figured in an inordinate number of citizen complaints and lawsuits. Gallagher also helped write a policy requiring police officers to intervene if they believe that a fellow officer is losing his composure. The policies against shooting at moving vehicles and creating a 'duty to intervene,' implemented by Gallagher and Timoney 20 years ago in Philadelphia, have been recognized as best practices in policing."

**c. Do you believe that a judge can play a role in ensuring that police officers do not commit misconduct?**

Yes, a judge can by faithfully applying the law and precedent related to police misconduct. Matters involving allegations of police misconduct are not uncommon in federal courts. The Supreme Court has determined that evidence obtained through police disregard of constitutional protections is subject to suppression. *Mapp v. Ohio*, 367 U.S. 643 (1961). Officers who use the authority of their badge to deprive people of their civil rights face potential criminal charges for "color of law" violations, pursuant to 18 U.S.C. § 242. Officers also face potential civil liability for constitutional violations, often pursuant to 42 U.S.C. § 1983. If confirmed, I would faithfully apply the law and precedent related to police misconduct.

3. According to your Committee Questionnaire, you participated in two panel discussions in 2018, both of which were titled: "Sanctuary Cities and Their Impact on Community Safety." You stated that you had "no notes, transcript or recording" of these panel discussions.

**Would you please tell us about your remarks at these panel discussions?**

In 2018, I was a participant in two legal panel discussions titled “Sanctuary Cities and Their Impact on Community Safety” at universities in Philadelphia.

One panel was held at the University of Pennsylvania Law School and was organized by the University of Pennsylvania Law School American Inns of Court. The American Inns of Court is an association of lawyers, judges, and other legal professionals from all levels and backgrounds who share a passion for professional excellence. U.S. Supreme Court Chief Justice Warren Burger helped to found the American Inns of Court. The other panel was held at Temple University and was organized by the Osher Lifelong Learning Institute, an academic institute where people 50 years and older can attend classes.

The attorneys and immigration rights advocates who participated on these panels discussed whether sanctuary cities pose a risk to public safety. The discussions acknowledged that this is a complex issue. On the one hand, the discussions noted that sanctuary city policies have resulted in the release of people with criminal records, some of whom have gone on to commit new crimes. There have been high profile examples of this occurring in Philadelphia. On the other hand, the discussions noted that there are strongly held concerns that involving local police in federal immigration enforcement deters victims and witnesses of crimes who are in the country illegally from coming forward to report crimes to the police. During the panel discussions, I explained that I have seen both sides of this complex issue play out in my professional career in law enforcement.

4. You were a police officer in the NYPD from 1989 to 1994. You worked as both a Community Patrol Officer and a Plainclothes Anti-Crime Officer.

**How do you think your time as a police officer will inform your approach to being a judge?**

My time as a police officer will inform my approach to being a judge in several ways. I learned early in my career as a young police officer in New York City the necessity and importance of applying the law equally and fairly. I will bring that same perspective to the bench, if I am confirmed. My time as a police officer also instilled in me a lifelong passion to serve the public, which is a passion I would also bring to the bench. Serving as a police officer also provided me a tremendous opportunity to meet and interact with people of diverse backgrounds and experiences both in the community and on the police force. I gained from that an appreciation for treating people with dignity and respect, especially when they are facing difficult circumstances. If confirmed, I would apply that same approach to how I interact with the parties, witnesses, and other people who appear in court.

5. During the 2000 Republican National Convention—which took place in Philadelphia—protestors alleged that the Philadelphia Police Department used too much force in managing the protests. At the time, you worked in the Philadelphia Police Department as Special Counsel to the Police Commissioner. You were quoted in the press as saying: “Where are all the injuries for all these people who were tortured?” You added, “It’s absolutely absurd.” (Philadelphia Inquirer, Aug. 20, 2000)

**a. Are visible injuries necessary for a protester to have a valid claim that police officers have infringed their constitutional rights?**

Incidents of police misconduct can occur both in and out of public view, and with and without visible injuries. My comments to the press in 2000 were in response to allegations that the police had used excessive force that was essentially being equated to torture. The press article referenced in your question cites an investigation by the Philadelphia Inquirer that found exceedingly thin evidence to support these allegations. That being said, I could have chosen my words more carefully when I was speaking to the press in 2000. With the benefit of almost twenty years of hindsight and further experience, I can say now that I would not make the same comment today.

Police officers have a responsibility to respect the dignity and rights of the people they encounter on the job, which is especially true when they must use force to protect the public or themselves. The use of force by police officers is a grave matter given the serious consequences that can result from the use of force. Throughout my career, including during my service with the Philadelphia and Miami police departments, I have helped develop use of force policies that were intended to reduce the police use of force.

**b. Does the use-of-force need to amount to torture for it to be problematic?**

No. Any exercise of police use-of-force beyond that necessary and proper under the law and police policy is problematic. Please also see my response to question 5.a.

6. 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 a lower court to depart from binding 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?**

No. It is the role of the district court judge to faithfully apply, rather than question, precedent of the Supreme Court. In a rare particular instance where such precedent seemingly conflicts with other authority, the district court might respectfully note such an observation.

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

The Supreme Court has said, “A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case.” *Camreta v. Greene*, 563 U.S. 692, 709, fn 7 (2011), citing 18 J. Moore et al., *Moore's Federal Practice* § 134.02[1] [d], p. 134–26 (3d ed.2011). Generally, to foster predictability and reliance on the rule of law, the district

court should avoid rendering dissimilar decisions on similar issues and facts, without a reasoned opinion explaining the reasons for doing so.

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

The decision of whether and when to overturn its own precedent falls exclusively in the realm of the Supreme Court. A recent case involving a double jeopardy challenge demonstrates the varying opinions on the Court as to how and when to overturn its own precedent. *Gamble v. United States*, 139 S. Ct. 1960 (2019). If confirmed to the district court, I would faithfully apply all Supreme Court and Third Circuit precedent.

7. 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”?**

For a district court judge, all Supreme Court precedent is binding, and must be faithfully followed, regardless of how it is labelled. *Roe v. Wade* is binding Supreme Court precedent and is therefore settled for inferior courts. If confirmed, I will fully and faithfully apply *Roe* and all binding Supreme Court and Third Circuit precedent.

**b. Is it settled law?**

Yes. *Roe v. Wade* is binding Supreme Court precedent and I would faithfully apply the holding in *Roe v. Wade*, as I would that of all binding Supreme Court and Third Circuit precedent.

8. 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. *Obergefell v. Hodges* is binding Supreme Court precedent and I would faithfully apply the holding in *Obergefell v. Hodges*, as I would that of all binding Supreme Court and Third Circuit precedent.

9. 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?**

The Supreme Court's majority's opinion in *Heller* is binding precedent on lower courts and I would follow it, as I would follow all precedent of the Supreme Court. As a judicial nominee, it would not be appropriate for me to express my personal opinion or viewpoint on any of the justices' opinions in *Heller*. If confirmed, I would faithfully apply *Heller* and all binding Supreme Court precedent.

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

In *Heller*, the Supreme Court noted that "the right secured by the Second Amendment is not unlimited." 554 U.S. 570, 626 (2008). Further, the Supreme Court stated that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms in sensitive places such as schools and government buildings." *Id.* at 626-37.

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

I have not had the opportunity to study *Heller* and prior Second Amendment precedent in depth. I understand that the Supreme Court stated in *Heller* that "nothing in our precedents forecloses our adoption of the original understanding of the Second Amendment" and that the question presented was "judicially unresolved." *Id.* at 625. As a nominee to a lower court, I am bound by the Supreme Court's own reading of its precedent.

10. 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 *Citizens United v. FEC*, the Supreme Court stated, "First Amendment protection extends to corporations." 558 U.S. 310, 342 (2010). As a judicial nominee, it would not be appropriate for me to express an opinion about whether a corporation's First Amendment rights are equal to individuals' First Amendment rights. If the resolution of a case required this analysis, I would examine all relevant Supreme Court and Third Circuit precedent.

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

First Amendment protection of free speech is an important issue that is subject of numerous Supreme Court and Third Circuit opinions. As a nominee to the district court, it would not be appropriate for me to state how I would decide a potential case or controversy involving a conflict between the free speech rights of an individual and a corporation. However, I can say that in deciding such a case or controversy I would look to relevant Supreme Court and Third Circuit precedent.

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

The Supreme Court held in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014), that "a federal regulation's restriction on the activities of a for-profit closely held corporation must comply with Religious Freedom Restoration Act." The Court, however, also noted the limits of its holding. *Id.* at 2759-2760. There is ongoing debate, and pending or likely impending litigation, regarding the scope of the religious rights of corporation under the First Amendment. Therefore, as a district court nominee, it would not be appropriate for me to comment further on the matter. If confirmed, I would faithfully apply *Hobby Lobby* and all binding Supreme Court precedent.

11. 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?**

No. I have no recollection of being asked by anyone about my "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. I have no recollection of being asked by anyone about my “views on administrative law.”

- c. What are your “views on administrative law”?**

I have generally not dealt with administrative law in my career as a federal prosecutor. I am generally aware of deference given to administrative agencies as developed by the Supreme Court, such as the deference to an agency’s “reasonable” interpretation of an ambiguous statute under the agency’s purview. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). If confirmed, I would faithfully apply Supreme Court and Third Circuit precedent regarding administrative law.

12. 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.

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

This is not a subject that I have studied in depth. I am generally aware that there are scientists who believe that human activity is contributing to or causing climate change.

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

The Supreme Court has held that it is appropriate for judges to consider legislative history when the text of a statute is ambiguous. The Supreme Court has also stated that when “interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. . . . When the words of a statute are unambiguous, then, this first canon is also the last: ‘judicial inquiry is complete.’” *Connecticut National Bank v. Germain*, 503 U.S. 249, 253-54 (1992), quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981).

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.

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

I received the questions on Thursday, October 24, 2019. I prepared draft responses and solicited feedback on my draft responses, including from attorneys at the Department of Justice, Office of Legal Policy, and I considered those comments in making final revisions on Monday, October 28, 2019. Each answer herein is my own.

**Nomination of John M. Gallagher  
to the United States District Court for the Eastern District of Pennsylvania  
Questions for the Record  
Submitted October 23, 2019**

**QUESTIONS FROM SENATOR WHITEHOUSE**

1. A Washington Post report from May 21, 2019 (“A conservative activist’s behind-the-scenes campaign to remake the nation’s courts”) documented that Federalist Society Executive Vice President Leonard Leo raised \$250 million, much of it contributed anonymously, to influence the selection and confirmation of judges to the U.S. Supreme Court, lower federal courts, and state courts. If you haven’t already read that story and listened to recording of Mr. Leo published by the Washington Post, I request that you do so in order to fully respond to the following questions.

- a. Have you read the Washington Post story and listened to the associated recordings of Mr. Leo?

Yes, as requested, I read the story and listened to the recordings.

- b. Do you believe that anonymous or opaque spending related to judicial nominations of the sort described in that story risk corrupting the integrity of the federal judiciary? Please explain your answer.

I have no personal knowledge of anonymous or opaque spending related to judicial nominations. Judicial independence is a core constitutional principle. Canon 1 of the Code of Conduct for U.S. Judges states: “An independent and honorable judiciary is indispensable to justice in our society.” If confirmed, I will decide all matters before me fairly and impartially and uphold the integrity and independence of the judiciary.

- c. Mr. Leo was recorded as saying: “We’re going to have to understand that judicial confirmations these days are more like political campaigns.” Is that a view you share? Do you believe that the judicial selection process would benefit from the same kinds of spending disclosures that are required for spending on federal elections? If not, why not?

I have not studied this issue. Further, to the extent that this question concerns a political matter relating to the nomination and confirmation process for judges, I respectfully refrain from responding further pursuant to Canon 5 of the Code of Conduct for United States Judges, which applies to judicial nominees.

- d. Do you have any knowledge of Leonard Leo, the Federalist Society, or any of the entities identified in that story taking a position on, or otherwise advocating for or against, your judicial nomination? If you do, please describe the circumstances of that advocacy.

I do not.

- e. As part of this story, the Washington Post published an audio recording of Leonard Leo stating that he believes we “stand at the threshold of an exciting moment” marked by a “newfound embrace of limited constitutional government in our country [that hasn’t happened] since before the New Deal.” Do you share the beliefs espoused by Mr. Leo in that recording?

I believe the role of a judge is to faithfully adhere to the oath of office in 28 U.S.C. 453. If confirmed, I will administer justice fairly and impartially to all parties. I will also faithfully follow Supreme Court and Third Circuit precedent.

2. 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?

To the extent that Justice Roberts was stating that the judge’s role is to impartially apply the law, as opposed to taking a side or creating the law, I agree with his metaphor. As a district court nominee, I understand that the rules are dictated by statute and precedent. The judge is to apply those rules, fairly and equally, to the facts and parties before the court.

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

Generally, a judge should not consider the practical consequences of a particular ruling unless required to do so under law. For instance, the Federal Rules of Civil Procedure provide for issuance of a temporary restraining order when the Court determines that “specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition.” Fed. R. Civ. P. 65. In such instances, the court is required by law to consider the consequences of taking or not taking a particular action.

3. Federal Rule of Civil Procedure 56 provides that a court “shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact” in a case. Do you agree that determining whether there is a “genuine dispute as to any material fact” in a case requires a trial judge to make a subjective determination?

As the Supreme Court has explained, in determining whether a genuine dispute exists, “(t)here is no requirement that the trial judge make findings of fact. The inquiry performed is the threshold inquiry of determining whether there is the need for a trial—whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). Said otherwise, the inquiry requires an objective determination as to “whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” *Id.* at 251-52.

4. 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?

Empathy can play a role in the execution of the judge’s duties so long as it does not impact the judge’s interpretation and application of the law. For instance, the judge can be reasonably accommodating and take measures to make nervous victims and witnesses

more comfortable, recognizing that for most litigants, participating in the judicial system can be confusing and disconcerting.

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

My background has involved extensive interaction with people from all walks of life. I have strived to treat each person fairly, and with dignity, often under challenging circumstances. This experience should provide insight into how I would operate a courtroom and interact with litigants and other participants in cases. For instance, this commitment on my part is demonstrated by the letter of support submitted to the Senate Judiciary Committee by more than two dozen criminal defense attorneys, including the chief federal public defender for the Eastern District of Pennsylvania, against whom I have litigated cases as a prosecutor. In their letter supporting my nomination they stated:

“Mr. Gallagher has been fair and transparent in his dealings with us and is true to his word. Also, of great importance, he is collegial and accessible to defense counsel. Of course, we do not always agree, but he is always willing to listen, honestly and with an open mind, to the arguments and proposals we offer on behalf of our clients. Mr. Gallagher treats counsel and our clients with dignity and respect. Mr. Gallagher possesses an even and fair temperament and integrity in his dealings with counsel and their clients, which would no doubt be carried over and implemented by Mr. Gallagher as a judge.”

- 5. 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, it is not.

- 6. The Seventh Amendment ensures the right to a jury “in suits at common law.”
  - a. What role does the jury play in our constitutional system?

The Seventh Amendment protects the right to jury trial in civil cases as it existed at common law and it is a core principle of our American system of justice. *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 657 (1935); *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376 (1996). The Supreme Court has espoused the virtues of the right to trial by jury: “It is assumed that twelve men know more of the common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge.” *Sioux City & Pac. R.R. Co. v. Stout*, 657, 664 (1873). The Seventh Amendment has not been incorporated against the states. In criminal cases, trial by jury is a fundamental right guaranteed by the Sixth Amendment and incorporated against the states through the Fourteenth Amendment. See *Williams v. Florida*, 399 U.S. 78 (1970).

- b. Should the Seventh Amendment be a concern to judges when adjudicating issues related to the enforceability of mandatory pre-dispute arbitration clauses?

I have not encountered this issue in my practice as an attorney. If a matter came before me involving a tension between the enforcement of a pre-dispute arbitration clause and the Seventh Amendment, I would faithfully follow Supreme Court and Third Circuit precedent to resolve this issue.

- c. Should an individual's Seventh Amendment rights be a concern to judges when adjudicating issues surrounding the scope and application of the Federal Arbitration Act?

Please see my response to 6(b) above.

- 7. What deference do congressional fact-findings merit when they support legislation expanding or limiting individual rights?

If confirmed, I will follow Supreme Court and Third Circuit precedent to determine the appropriate level of deference to afford to congressional fact-finding in legislation expanding or limiting individual rights. I would examine the precedent in Supreme Court cases including, but not limited to, *City of Boerne v. Flores*, 521 U.S. 507 (1997), *United States v. Lopez*, 514 U.S. 549 (1995), and *Kimel v. Florida Board of Regents*, 528 U.S. 62, 81 (2000), as well as the authorities cited by the parties.

- 8. Earlier this year, the Federal Judiciary's Committee on the Codes of Conduct issued "Advisory Opinion 116: Participation in Educational Seminars Sponsored by Research Institutes, Think Tanks, Associations, Public Interest Groups, or Other Organizations Engaged in Public Policy Debates." I request that before you complete these questions you review that Advisory Opinion.

- a. Have you read Advisory Opinion #116?

Yes, I have.

- b. Prior to participating in any educational seminars covered by that opinion will you commit to doing the following?

- i. Determining whether the seminar or conference specifically targets judges or judicial employees.

In sum, Advisory Opinion #116 is concerned with the potential for an appearance of partiality on the part of federal judges who attend certain seminars or conferences. If confirmed, and while a nominee, I will abide by all of the Canons of the Code of Conduct for United States Judges, and I will be mindful of, and carefully consider, the recommendations set forth in Advisory Opinion #116.

- ii. Determining whether the seminar is supported by private or otherwise anonymous sources.

Please see my response to 8(b)(i) above.

- iii. Determining whether any of the funding sources for the seminar are engaged in litigation or political advocacy.

Please see my response to 8(b)(i) above.

- iv. Determining whether the seminar targets a narrow audience of incoming or current judicial employees or judges.

Please see my response to 8(b)(i) above.

- v. Determining whether the seminar is viewpoint-specific training program that will only benefit a specific constituency, as opposed to the legal system as a whole.

Please see my response to 8(b)(i) above.

- c. Do you commit to not participate in any educational program that might cause a neutral observer to question whether the sponsoring organization is trying to gain influence with participating judges?

Please see my response to 8(b)(i) above.

**Questions for the Record for John M. Gallagher**  
**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. According to your Senate Judiciary Questionnaire, you were a participant in two panel discussions titled “Sanctuary Cities and Their Impact on Community Safety” in 2018.

- a. What were the circumstances that led you to participate on each of these panels?**

In 2018, I was a participant in two legal panel discussions titled “Sanctuary Cities and Their Impact on Community Safety” at universities in Philadelphia. One panel was held at the University of Pennsylvania Law School and was organized by the University of Pennsylvania Law School American Inn of Court. The American Inns of Court is an association of lawyers, judges, and other legal professionals from all levels and backgrounds who share a passion for professional excellence. U.S. Supreme Court Chief Justice Warren Burger helped to found the American Inns of Court. The other panel was held at Temple University and was organized by the Osher Lifelong Learning Institute, an academic institute where people 50 years and older can attend classes.

The organizers of these panels invited a colleague of mine from the U.S. Attorney’s Office for the Eastern District of Pennsylvania and me to participate in the panels. Each panel consisted of a diverse group of attorneys and immigration rights advocates who discussed the issue of sanctuary cities based on their respective experiences.

- b. What views did you express with regard to the impact of so-called sanctuary cities on community safety during your participation on each of these panels?**

The attorneys and immigration rights advocates who participated on these panels discussed whether sanctuary cities pose a risk to public safety. The discussions acknowledged that this is a complex issue. On the one hand, the discussions noted that sanctuary city policies have resulted in the release of people with criminal records, some of whom have gone on to commit new crimes. There have been high profile examples of this occurring in Philadelphia. On the other hand, the discussions noted that there are strongly held concerns that involving local police in federal immigration enforcement deters victims and witnesses of crimes who are in the country illegally from coming forward to report crimes to the police. During the panel discussions, I explained that I



have seen both sides of this complex issue play out in my professional career in law enforcement.

3. 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. Based on my experience taking training on implicit bias, I believe there is value in judges taking such training.

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

Yes. I have taken training on implicit bias as a trainee in the New York City Police Academy and, more recently, as part of annual training offered by the Department of Justice. During my professional career, I have also developed policies and training to educate police officers on the harms and risks of judging people based on their race, such as a Philadelphia Police Department policy prohibiting racial profiling.

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

Yes.

**Nomination of John M. Gallagher**  
**United States District Court for the Eastern District of Pennsylvania**  
**Questions for the Record**  
**Submitted October 23, 2019**

**QUESTIONS FROM SENATOR BOOKER**

1. According to your Senate Judiciary Committee Questionnaire, while working as an advisor to the chiefs of police in Philadelphia and Miami you helped develop “a formal prohibition of racial profiling” and “new use of force policies.”<sup>1</sup>

- a. What did you learn in helping develop a formal prohibition of racial profiling?

My work helping to develop a formal prohibition of racial profiling reinforced my core belief that policing and law enforcement must be fair and even-handed, and not based on race. The development of this policy is one instance in which I have worked to improve the way we police in our free society.

- b. Why do you think it is important for law enforcement agencies to have racial profiling prohibitions?

Policies that demonstrate a commitment by police to apply the law equally and fairly strengthen the bonds between police and community, which enables the police to better perform their duty to protect and serve the public.

- c. Please describe the use of force policy you helped develop.

During my service with the Philadelphia and Miami police departments, I helped develop use of force policies that were intended to reduce the police use of force.

In Philadelphia, I helped develop use of force policies and training that emphasized the primary duty of police to protect and preserve life. These policies are summarized in a letter written to the Senate Judiciary Committee in support of my nomination. The letter is from Chuck Wexler, the executive director of the Police Executive Research Forum, an independent research organization that focuses on critical issues in policing. In his letter, Mr. Wexler explained:

“[Philadelphia Police Commissioner] Timoney and Gallagher also revamped the department's policy on officers' use of force, including a prohibition on shooting at moving vehicles and the elimination of the ‘blackjack’ as a tool for overcoming resistance - a weapon that figured in an inordinate number of citizen complaints and lawsuits. Gallagher also helped write a policy requiring police officers to intervene if they believe that a fellow officer is losing his composure. The policies against shooting at moving vehicles and creating a ‘duty to intervene,’ implemented by Gallagher and Timoney 20 years ago in Philadelphia, have been recognized as best practices in policing.”

In Miami, I helped develop use of force policies and training that changed the focus from when a police officer was legally authorized to use force to emphasizing the use of force only as a last resort when no other options are available. These policies and training proved successful. After they were implemented, the number of police firearm discharges in Miami was reduced to zero over a prolonged period of time.

- d. What did you learn in helping develop use of force policies?

My work helping to develop police use of force policies reinforced my belief that police officers must be given clear guidance on the use of force given the serious consequences that can result from the use of force. It also reinforced my belief that police officers are dedicated public servants who deserve policies, training and equipment that will keep them safe while they keep our communities safe.

- e. Why do you think it is important for law enforcement agencies to have use of force policies?

Police officers are an embodiment of the authority of government, and are often the most frequent contact between government and citizen. Their discretion to use force can have serious consequences for those involved in a use of force incident, but also to the relationship between police and the communities they serve.

During my service with the Miami Police Department, the Mayor of Miami was Manny Diaz. He has written a letter to the Senate Judiciary Committee in support of my nomination to the district court. His letter also expresses why I think it is important for law enforcement agencies to have use of force policies. In his letter, he stated:

"The most fundamental responsibility of government is to provide for the safety and security of its people. Successful policing involves more than just crime statistics; you must earn the trust of all residents through a professionally trained force governed by a clear set of rules, including the use of force that respects the dignity and rights of your residents. Chief Gallagher fully embraced that responsibility and helped implement the reforms that resulted in our becoming a model that other American cities sought to emulate."

2. In a 2008 newspaper article, you said that prosecuting drug cases lowered violent crime in Easton.<sup>2</sup> Separately, in 2017, at a law enforcement conference on the opioid epidemic, you said, "drug distribution is treated like a nonviolent offense. I think that's a fallacy; it's a violent crime."<sup>3</sup>

- a. What data did you rely on to conclude that violent crime was reduced in Easton after prosecuting drug cases?

In 2008, I helped successfully prosecute members of a drug trafficking

organization that included a drug dealer identified by the FBI as the primary supplier of cocaine to the city of Easton, Pennsylvania. The number of shootings and homicides in Easton decreased substantially following the arrest and prosecution of this drug trafficking organization. Easton police officers and city officials greatly credited the dismantling of this drug trafficking organization with the subsequent reduction in crime.

b. Why do you believe that drug distribution is a violent crime?

That statement was intended to convey that drug distribution, and disputes related to such distribution, often also involve violence. Sadly, that has been my experience during my law enforcement career. For instance, I helped successfully prosecute a violent Philadelphia drug trafficking organization for 12 murders, including the arson murder of two women and four children who were burned to death to avenge the testimony of a former associate of the organization. As a result, the leader of that drug trafficking organization was held accountable for more murders than any person in the history of Pennsylvania.

3. You previously argued for lowering the amount of heroin necessary to trigger a mandatory minimum sentence.<sup>4</sup> You said, “Under current federal laws, to get some teeth, to get a mandatory minimum sentence, you need 100 grams of heroin. That’s way too high.”<sup>5</sup>

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<sup>1</sup> SJQ at p. 23.

<sup>2</sup> Michael Buck, Drug Busts Making a Dent in Easton, EXPRESS-TIMES (Nov. 2, 2008) (SJQ Attachment 12(e) at p. 1523).

<sup>3</sup> Police Executive Research Forum, *The Unprecedented Opioid Epidemic: Police, Sheriffs, and Health Agencies Must Step Up Their Responsibilities* (2017) (SJQ Attachment 12(b) at p. 342).

<sup>4</sup> Police Executive Research Forum, *The Unprecedented Opioid Epidemic: Police, Sheriffs, and Health Agencies Must Step Up Their Responsibilities* (2017) (SJQ Attachment 12(b) at p. 267).

<sup>5</sup> *Id.*

- a. Based on this comment, it appears your support mandatory minimum sentences. Is that accurate?

Congress has established mandatory minimum sentences for certain federal crimes. As a federal prosecutor, these laws establishing mandatory minimum sentences have impacted my work, especially the prosecution of drug trafficking offenses. If confirmed, I will faithfully follow all applicable statutes and precedent regarding mandatory minimum sentences. As a judicial nominee, it would not be appropriate for me to express my personal opinion about mandatory minimum sentences because they are policy choices committed to the legislative branch. See Code of Conduct for United States Judges, Canons 2.A and 5.

- b. Why do you support mandatory minimum sentences?

Please see my response to Question 3(a) above.

- c. What evidence do you rely on to show that mandatory minimums deter crime? If not, why do you support mandatory minimum sentences?

Please see my response to Question 3(a) above.

4. According to your Senate Judiciary Committee Questionnaire, you participated in two panel discussions on sanctuary cities in 2018.<sup>6</sup> In the panel discussions did you take any positions on sanctuary jurisdiction policies? If so, what positions did you take?

In 2018, I was a participant in two legal panel discussions titled “Sanctuary Cities and Their Impact on Community Safety” at universities in Philadelphia.

One panel was held at the University of Pennsylvania Law School and was organized by the University of Pennsylvania Law School American Inn of Court. The American Inns of Court is an association of lawyers, judges, and other legal professionals from all levels and backgrounds who share a passion for professional excellence. U.S. Supreme Court Chief Justice Warren Burger helped to found the American Inns of Court. The other panel was held at Temple University and was organized by the Osher Lifelong Learning Institute, an academic institute where people 50 years and older can attend classes.

The organizers of these panels invited a colleague of mine from the U.S. Attorney’s Office for the Eastern District of Pennsylvania and me to participate in the panels. Each panel consisted of a diverse group of attorneys and immigration rights advocates who discussed the issue of sanctuary cities based on their respective experiences. The attorneys and immigration rights advocates who participated on these panels discussed whether sanctuary cities pose a risk to public safety. The discussions acknowledged that this is a complex issue. On the one hand, the discussions noted that sanctuary city policies have resulted in the release of people with criminal records, some of whom have gone on to commit new crimes. There have been high profile examples of this occurring in Philadelphia. On the other hand, the discussions noted that there are strongly held concerns that involving local police in federal immigration enforcement deters victims and witnesses of crimes who are in the country illegally from coming forward to report crimes to the police. During the

panel discussions, I explained that I have seen both sides of this complex issue play out in my professional career in law enforcement.

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

As a district court judge, my obligation would be to apply binding precedent, rather than to apply any specific interpretative method. To my understanding, an originalist approaches constitutional interpretation by looking first and foremost to the original public meaning of the words of the Constitution. The Supreme Court has indicated that looking to the original public meaning of the terms in the Constitution can be a legitimate method of analysis. For example, in *District of Columbia v. Heller*, 544 U.S. 570 (2008), the majority opinion by Justice Scalia and the dissenting opinion by Justice Stevens were each based on their respective understandings of the original public meaning of the Second Amendment.

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

As a district court judge, my obligation would to apply binding precedent, rather than to apply any specific interpretative method. To my understanding, a textualist approaches constitutional interpretation by looking first and foremost to the original public meaning of the words of the statute to be applied. The Supreme Court instructs that when “interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. . . . When the words of a statute are unambiguous, then, this first canon is also the last: ‘judicial inquiry is complete.’” *Connecticut National Bank v. Germain*, 503 U.S. 249, 253-54 (1992), quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981).

7. Legislative history refers to the record Congress produces during the process of passing a bill into law, such as detailed reports by congressional committees about a pending bill or statements by key congressional leaders while a law was being drafted. The basic idea is that by consulting these documents, a judge can get a clearer view about Congress’s intent. Most federal judges are willing to consider legislative history in analyzing a statute, and the Supreme Court continues to cite legislative history.

- a. If you are confirmed to serve on the federal bench, would you be willing to consult and cite legislative history?

The Supreme Court has held that it is appropriate for judges to consider legislative history when the text of a statute is ambiguous. However, when “interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. . . . When the words of a statute are unambiguous, then, this first canon is also the last: ‘judicial inquiry is complete.’” *Connecticut National Bank v. Germain*, 503 U.S. 249, 253-54 (1992), quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981).

- b. If you are confirmed to serve on the federal bench, your opinions would be subject to review by the Supreme Court. Most Supreme Court Justices are willing to consider legislative history. Isn't it reasonable for you, as a lower-court judge, to evaluate any relevant arguments about legislative history in a case that comes before you?

Please see my response to Question 7(a) above.

- 8. Do you believe that judicial restraint is an important value for a district judge to consider in deciding a case? If so, what do you understand judicial restraint to mean?

Yes, judicial restraint is an important trait for all judges. Judicial restraint means that a judge respects his or her limited role in applying the law as written, without regard to personal or policy preferences or preferred outcome.

- a. The Supreme Court's decision in *District of Columbia v. Heller* dramatically changed the Court's longstanding interpretation of the Second Amendment.<sup>7</sup> Was that decision guided by the principle of judicial restraint?

*Heller* is binding Supreme Court precedent. As a judicial nominee, it would not be appropriate for me to express my personal opinion or viewpoint on the correctness of the reasoning of *Heller*. If confirmed, I would faithfully apply *Heller* and all binding Supreme Court precedent.

- b. The Supreme Court's decision in *Citizens United v. FEC* opened the floodgates to big money in politics.<sup>8</sup> Was that decision guided by the principle of judicial restraint?

*Citizens United* is binding Supreme Court precedent. As a judicial nominee, it would not be appropriate for me to express my personal opinion or viewpoint on the correctness of the reasoning of *Citizens United*. If confirmed, I would faithfully apply *Citizens United* and all binding Supreme Court precedent.

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<sup>6</sup> SJQ at p. 7.

<sup>7</sup> 554 U.S. 570 (2008).

<sup>8</sup> 558 U.S. 310 (2010).

- c. The Supreme Court's decision in *Shelby County v. Holder* gutted Section 5 of the Voting Rights Act.<sup>9</sup> Was that decision guided by the principle of judicial restraint?

*Shelby County* is binding Supreme Court precedent. As a judicial nominee, it would not be appropriate for me to express my personal opinion or viewpoint on the correctness of the reasoning of *Shelby*. If confirmed, I would faithfully apply *Shelby County* and all binding Supreme Court precedent.

9. Since the Supreme Court's *Shelby County* decision in 2013, states across the country have adopted restrictive voting laws that make it harder for people to vote. From stringent voter ID laws to voter roll purges to the elimination of early voting, these laws disproportionately disenfranchise people in poor and minority communities. These laws are often passed under the guise of addressing purported widespread voter fraud. Study after study has demonstrated, however, that widespread voter fraud is a myth.<sup>10</sup> In fact, in-person voter fraud is so exceptionally rare that an American is more likely to be struck by lightning than to impersonate someone at the polls.<sup>11</sup>

- a. Do you believe that in-person voter fraud is a widespread problem in American elections?

This is not an issue which I have studied or litigated. I understand that there is currently pending litigation in several courts that may implicate this issue. Therefore, as a judicial nominee, I respectfully refrain from responding to this question pursuant to Canon 3(A)(6) of the Code of Conduct for United States Judges, which states that "[a] judge should not make public comment on the merits of a matter pending or impending in any court." See also Canons 2 and 5, Code of Conduct for United States Judges.

- b. In your assessment, do restrictive voter ID laws suppress the vote in poor and minority communities?

Please see my response to Question 9(a).

- c. Do you agree with the statement that voter ID laws are the twenty-first-century equivalent of poll taxes?

Please see my response to Question 9(a).

10. 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.<sup>12</sup> Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.<sup>13</sup> 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.<sup>14</sup> In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.<sup>15</sup>



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

I recognize there are racial inequalities in our criminal justice system. I am not familiar with the extent to which these disparities are the result of the potential for implicit bias. However, I have always carried out my duties fairly and mindful of the paramount need for ensuring equality under the law for all people.

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

Yes.

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<sup>9</sup> 570 U.S. 529 (2013).

<sup>10</sup> *Debunking the Voter Fraud Myth*, BRENNAN CTR. FOR JUSTICE (Jan. 31, 2017), <https://www.brennancenter.org/analysis/debunking-voter-fraud-myth>.

<sup>11</sup> *Id.*

<sup>12</sup> 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>.

<sup>13</sup> *Id.*

<sup>14</sup> 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>.

<sup>15</sup> *Id.*

- 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 had training on implicit bias, first as a trainee in the New York City Police Academy, and more recently as part of annual training offered by the Department of Justice. I have also developed policies and training that focus police officers on the harms and risks of judging people based on their race, such as the policy prohibiting racial profiling in the Philadelphia Police Department.

- 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.<sup>16</sup> Why do you think that is the case?

I am not familiar with this report but given this troubling conclusion, I would be interested in learning more from the Sentencing Commission.

- 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.<sup>17</sup> Why do you think that is the case?

I am not familiar with this study but given this troubling conclusion, I would be interested in learning more.

- f. What role do you think federal judges, who review difficult, complex criminal cases, can play in addressing implicit racial bias in our criminal justice system?

A judge should maintain the conscious humility necessary to honestly self-assess his or her own potential for implicit racial bias to ensure that they are carrying out the oath to treat all people equally and fairly under the law.

11. 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.<sup>18</sup> In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.<sup>19</sup>

- 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.

The potential relationship between reduction of incarceration rates and the decrease in crime is not an area in which I have any familiarity.

- 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 my response to Question 11(b) above.

12. 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.

13. Would you honor the request of a plaintiff, defendant, or witness in a case before you who is transgender to be referred to in accordance with that person's gender identity?

Yes.

14. Do you believe that *Brown v. Board of Education*<sup>20</sup> was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

Yes, *Brown v. Board of Education* was correctly decided. *Brown* is a landmark Supreme Court decision that overturned the abhorrent, false doctrine of separate but equal, and thereby reinforced the bedrock American principle of equal protection under law for all.

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<sup>16</sup> 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](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114_Demographics.pdf).

<sup>17</sup> Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1323 (2014)

<sup>18</sup> 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>.

<sup>19</sup> *Id.*

<sup>20</sup> 347 U.S. 483 (1954).

15. Do you believe that *Plessy v. Ferguson*<sup>21</sup> was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

No, *Plessy* produced the abhorrent doctrine of separate but equal. In *Brown v. Board of Education*, the Supreme Court correctly and unanimously ruled that *Plessy* was wrongly decided.

16. 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. These responses are my own.

17. 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.”<sup>22</sup> Do you agree with President Trump’s view that a judge’s race or ethnicity can be a basis for recusal or disqualification?

I cannot foresee any circumstances under which recusal of a judge from a case would be based on race or ethnicity. If confirmed, I will determine whether to recuse myself from a case based upon the standards set forth in 28 U.S.C. § 455, Canon 3 of the Code of Conduct of United States Judges, as well as any other applicable rules, opinions or ethical guidance. I will also listen objectively to arguments of the parties and, as necessary and appropriate, consult with judicial colleagues and ethics officials within the judicial system.

18. 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.”<sup>23</sup> Do you believe that immigrants, regardless of status, are entitled to due process and fair adjudication of their claims?

The Supreme Court has ruled that “the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.” *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). As a district court judge, I would make sure every litigant receives fair treatment under law.

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<sup>21</sup> 163 U.S. 537 (1896).

<sup>22</sup> 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>.

<sup>23</sup> 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 October 23, 2019  
For the Nomination of**

**John M. Gallagher, to the U.S. District Court for the Eastern District of Pennsylvania**

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?**

There is perhaps no more serious or somber duty of a judge than to determine the appropriate sentence for a criminal defendant. In sentencing any case, I will consider the applicable law, and the motions and arguments of the parties. I shall consider the advisory Sentencing Guidelines. As the Supreme Court has stated: "As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark." *Gall v. United States*, 552 U.S. 38, 49 (2007); *see also, Peugh v. United States*, 133 S. Ct. 2072, 2083 (2013)(same). I shall also consider the statutory sentencing factors set forth in 18 U.S.C. § 3553(a), and seek always to "impose a sentence sufficient, but not greater than necessary" to comply with that statutory directive. 18 U.S.C. § 3553(a).

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

Generally, I would follow the summary steps outlined in my response to 1(a) above. I would also avail myself of any pertinent guidance available from the U.S. Sentencing Commission to ensure a fair, proportional and individualized sentence.

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

The law provides authority for a sentencing judge to depart from the advisory sentencing guidelines and, separately, to grant a variance from the final calculated guidelines. The guidelines offer a non-exhaustive list of potential grounds for departure but, generally, a departure from the sentencing guidelines is appropriate in an "atypical case" where particular facts or circumstances place the case outside the "heartland" of cases of the type that informed the guidelines. *See* U.S.S.G. § 5K2.0(a)(2). In addition to requests for departure, the judge must also carefully consider requests for variance based on any reasons offered by the defendant.

- 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.<sup>1</sup>

i. **Do you agree with Judge Reeves?**

Congress has established mandatory minimum sentences for certain federal crimes. If confirmed, I will faithfully follow all applicable statutes and precedent. As a judicial nominee, it would not be appropriate for me to express my personal opinion about mandatory minimum sentences because they are policy choices committed to the legislative branch. See Code of Conduct for United States Judges, Canons 2.A and 5.

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.

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.

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.<sup>2</sup> **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?**

I do not believe it is appropriate for me to commit to doing so at this time. However, if confirmed, I will make a determination on a case-by-case basis of whether it would be appropriate to comment on a defendant's sentence.

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

To the extent applicable case law and ethical rules permit a judge to discuss charging policies with the U.S. Attorney or his or her executive staff, I would consider doing so under certain, limited

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

<sup>2</sup> 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>

circumstances where the policies undermine confidence in the justice system. However, these conversation, if appropriate, must be on general policy and not in regards to a particular case as “the court must not participate in [plea] discussions.” Federal Rule of Criminal Procedure 11(c)(1).

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

Please see my response to Question 1.d.iv.2.

- 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. I would consider all options, including alternatives to incarceration for first offenders not convicted of violent or otherwise serious offenses, in determining an appropriate sentence consistent with the purposes of sentencing as defined by Congress in 18 U.S.C. § 3553.

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.**

I have seen disturbing statistics indicating that black men are incarcerated in great disproportion to their representation in the population. The sentences imposed are also more severe for black men as compared to white men who have committed the same crimes. If I am confirmed to be a judge, I will continue to work tirelessly to ensure that our justice system operates fairly and equally under the law for all.

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?**

If confirmed, I intend to make staffing decisions on a case-by-case basis, and in doing so I will seek to recruit, and will seriously consider hiring, qualified minority and women applicants.