

**Questions for the Record from Senator Kamala D. Harris
Submitted February 21, 2018
For the Nominations of**

Colm Felix Connolly, to be a judge on the United States District Court for the District of Delaware

Maryellen Noreika, to be a judge on the United States District Court for the District of Delaware

William Frederic Jung, to be a judge on the United States District Court for the Middle District of Florida

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?

The Eleventh Circuit, applying its own and Supreme Court precedent, has set forth a clear and set procedure for sentencings. The process begins with the preparation of a Pre-Sentence Report, with input and objections from both sides, and the computation of an advisory Guidelines level. Then, after notice and in open court: parties are allowed to give a full and complete allocution; the probation office and any victims are allowed input; disputed issues are resolved; variance, downward departures, and the factors set out in 18 U.S.C. § 3553(a) are considered; and a sentence is announced. I have participated in this procedure many times as a prosecutor and a defense lawyer. I will closely follow this process, and any further guidance from superior courts or Congress, as a U.S. District Judge.

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

I would determine what constitutes a fair and proportional sentence by following the process described above. In doing so, I would ensure that I am hewing close to 18 USC § 3553(a).

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

The Guidelines are advisory only, but § 5K of the Guidelines contemplates a “within-Guidelines departure” and I would consult these provisions when considering such a departure.

Additionally, the sentencing judge may consider imposing a sentence outside of the advisory Guidelines range itself. Such a variance is appropriate, and necessary, when the always-controlling factors set forth in 18 USC § 3553(a) compel one. (That Section requires a sentence “sufficient *but not greater than* necessary to comply with” various statutory factors.) The findings made under that Statute and the case law interpreting it—which encompass a broad range of factors and considerations—control the appropriateness and extent of any variance.

Any departure or variance is not appropriate, however, without giving each party notice and an opportunity to be heard.

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

i. Do you agree with Judge Reeves?

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

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

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

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

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

iv. Former-Judge John Gleeson has previously criticized mandatory minimums in various opinions he has authored, and has taken proactive efforts to remedy unjust sentences that result from

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?

Yes. Although as a sitting judge duty-bound to apply the law, I would be careful not to encroach upon the purview of Congress to make such policy determinations.

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

Decisions as to what charges to bring before a grand jury are committed to the authority and discretion of the Executive, pursuant to Article II of the U.S. Constitution, and judges must be careful not to encroach upon this authority and the deference afforded prosecutors to make such decisions. In extreme cases, however, I believe doing so could be appropriate.

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

Federal clemency is exclusively a function of the Executive. *Harbison v. Bell*, 556 U.S. 180, 187 (2009)(Stevens, J.). A sitting district judge contacting the United States Attorney about clemency would have to do so with substantial deference to the Executive's authority and discretion over clemency matters.

e. 28 U.S.C. Section 994(j) directs that alternatives to incarceration are "generally appropriate for first offenders not convicted of a violent or otherwise serious offense." If confirmed as a judge, would you commit to taking into account alternatives to incarceration?

Yes.

2. Judges are one of the cornerstones of our justice system. If confirmed, you will be in a position to decide whether individuals receive fairness, justice, and due process.

a. Does a judge have a role in ensuring that our justice system is a fair and equitable one?

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>

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. This is a template for my conduct that I will follow without fail were I to be confirmed.

- 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.**

Please see my response to Question 1.b of Senator Booker.

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

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

Yes.

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

If confirmed I intend to conduct a program for recruitment of minority and underrepresented persons. *All* persons should be given serious and fair consideration for any and all positions.