

Questions for the Record for Damon Ray Leichty
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.

Nomination of Damon Ray Leichty
United States District Court for the Northern District of Indiana
Questions for the Record
Submitted November 20, 2018

QUESTIONS FROM SENATOR BOOKER

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

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

Racial bias is wrong, abhorrent, and antithetical to the rule of law and the core liberties protected by the United States Constitution. The unfortunate reality is that it continues to exist in the United States. I am aware of certain statistics on federal justice system demographics; and, although federal statistics may differ from certain state criminal justice systems, I am cognizant of studies that conclude that persons of color are disproportionately represented within the criminal justice system as a whole. I have no reason to dispute their findings. Suffice it to say that this issue must be studied and kept front of mind by any federal district judge, including me if confirmed, to ensure that laws are applied fairly and impartially, without regard to race. Bias, implicit or otherwise, must have no role in our courtrooms or justice system.

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

Yes, based on the findings of certain studies referenced in 1(a).

- c. Prior to your nomination, have you ever studied the issue of implicit racial bias in our criminal justice system? Please list what books, articles, or reports you have reviewed on this topic.

Prior to my nomination, I had studied the issue of implicit bias, but not specific to the criminal justice system.

2. According to a Pew Charitable Trusts fact sheet, in the 10 states with the largest declines in their incarceration rates, crime fell by an average of 14.4 percent.⁵ In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.⁶

- a. Do you believe there is a direct link between increases in a state's incarcerated population and decreased crime rates in that state? If you believe there is a direct link, please explain your views.

I generally am aware that others have studied incarceration and crime rates and have concluded that many factors contribute to fluctuations in crime rates, but I have not studied this issue.

- 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.

I generally am aware that others have studied incarceration and crime rates and have concluded that many factors contribute to fluctuations in crime rates, but I have not studied this issue.

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

Yes.

¹ Jonathan Rothwell, *How the War on Drugs Damages Black Social Mobility*, BROOKINGS INST. (Sept. 30, 2014), <https://www.brookings.edu/blog/social-mobility-memos/2014/09/30/how-the-war-on-drugs-damages-black-social-mobility>.

² *Id.*

³ Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, SENTENCING PROJECT (June 14, 2016), <http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons>.

⁴ *Id.*

⁵ Fact Sheet, *National Imprisonment and Crime Rates Continue To Fall*, PEW CHARITABLE TRUSTS (Dec. 29, 2016), <http://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2016/12/national-imprisonment-and-crime-rates-continue-to-fall>.

⁶ *Id.*

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

Racial discrimination is wrong, abhorrent, and antithetical to the rule of law and the core liberties protected by the United States Constitution. *Brown v. Board of Education*, 347 U.S. 483 (1954), is a landmark case of the United States Supreme Court, standing as precedent for more than six decades, which has helped protect against such racial discrimination. If confirmed, I will faithfully and impartially apply this law without hesitation as I would any current Supreme Court precedent.

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

No—the United States Supreme Court has said as much.

6. Has any official from the White House or the Department of Justice, or anyone else involved in your nomination or confirmation process, instructed or suggested that you not opine on whether any past Supreme Court decisions were correctly decided?

Prior to the hearing, I met with Department of Justice officials to prepare. No one told me what to say, and the answers I have given here and at the hearing are my own.

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

The United States Supreme Court has provided guidance on this issue. “The distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law. It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders. But once an alien enters the country, the legal circumstance changes, for 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 (2001) (citations omitted). I would faithfully and impartially apply this and all other laws of the United States and precedents of the United States Supreme Court and Seventh Circuit Court of Appeals. Aside from this observation of the law, it would be inappropriate for me to offer comment on the political debate referenced in this question. *See, e.g.*, Canon 3(A)(6), Code of Conduct for United States Judges.

⁷ 347 U.S. 483 (1954).

⁸ 163 U.S. 537 (1896).

⁹ Donald J. Trump (@realDonaldTrump), TWITTER (June 24, 2018, 8:02 A.M.), <https://twitter.com/realDonaldTrump/status/1010900865602019329>.

**Questions for the Record from Senator Kamala D. Harris
Submitted November 20, 2018
For the Nomination of**

Damon Ray Leichty, to the U.S. District Court for the Northern District of Indiana

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?

If confirmed, I would fairly and faithfully apply all controlling laws, rules, guidelines, and procedures, as construed by the Seventh Circuit Court of Appeals and the United States Supreme Court. This process would include careful review of the Presentence Investigation Report, applicable Sentencing Guidelines, the statutory factors set forth in 18 U.S.C. § 3553(a), the arguments and submissions of the parties, the individual defendant's allocution, as well as statements from any victims. I would impose a sentence that is "sufficient, but not greater than necessary" to achieve the sentencing purposes Congress established in 18 U.S.C. § 3553(a).

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

Such a determination of a fair and proportional sentence would require thoughtful adherence to the process in 1(a), and particularly 18 U.S.C. § 3553(a).

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

Appreciating that the Sentencing Guidelines are advisory under *United States v. Booker*, 543 U.S. 220 (2005), § 5K of the Guidelines contemplates departures under the various circumstances described there. One example of a departure includes an individual defendant's substantial assistance to the government in the investigation or prosecution of another person. Certain grounds for departure may require reasonable notice to the parties under Federal Rule of Criminal Procedure 32(h), if not identified as such in the Presentence Investigation Report or in a party's prehearing submission.

In addition, a sentencing judge may impose a sentence at variance with the Guidelines in accordance with 18 U.S.C. § 3553(a). A district judge "must give serious consideration to the extent of any departure from the Guidelines and must explain his conclusion that an unusually lenient or an unusually harsh sentence is appropriate in a particular case with sufficient justifications." *Gall v. United States*, 552 U.S. 38, 47 (2007). 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 set forth in 18 U.S.C. § 3553(a).

Furthermore, an individual defendant may qualify for the “safety valve” contained in 18 U.S.C. § 3553(f), which is applicable to certain types of drug offenses.

- 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?**

According to the United States Sentencing Commission, approximately one-quarter of all federal defendants are convicted of an offense that carries a mandatory minimum prison sentence. The power to institute mandatory minimum sentences rests with Congress under Article I of the United States Constitution. Sentencing judges must follow the law, including the statutory factors set forth in 18 U.S.C. § 3553(a), regardless of personal beliefs. That said, any sentence, after due regard for those factors, must be “sufficient, but not greater than necessary” to achieve the sentencing purposes Congress established in 18 U.S.C. § 3553(a). It would be inappropriate under the Canons and would compromise the appearance of my impartiality in future cases for me to comment further. *See, e.g.*, Canon 3(A)(6), Code of Conduct for United States Judges. If confirmed, I will fairly and faithfully apply all controlling laws, rules, guidelines, and procedures, as construed by the Seventh Circuit Court of Appeals and the United States Supreme Court.

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

Please see response to 1(d)(i).

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

Such an answer would require intimate knowledge and consideration of an individual defendant’s history and characteristics, among the other factors in 18 U.S.C. § 3553(a). The Presentence Investigation Reports that provide this information are confidential and sealed, so not available to the public to facilitate comment. Nor would comment be consistent with Canon 3(A)(6), Code of Conduct for United States Judges. Accordingly, please see response to 1(d)(i).

- iv. Former-Judge John Gleeson has criticized mandatory minimums in various opinions he has authored, and has taken proactive efforts to

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

remedy unjust sentences that result from mandatory minimums.² **If confirmed, and you are required to impose an unjust and disproportionate sentence, would you commit to taking proactive efforts to address the injustice, including:**

1. Describing the injustice in your opinions?

Yes. Although duty-bound as a sitting judge to apply the law (if confirmed), faced with the circumstances posed in this question, I would evaluate each case and consider taking any steps available to me consistent with the law and my ethical obligations to address an injustice.

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

Under Article II of the United States Constitution, decisions as to what charges to bring before a grand jury are committed to the authority and discretion of the Executive. Judges must be careful not to encroach upon this authority and the deference afforded prosecutors to make such decisions. Respecting the separation of powers, I would not be inclined in the first instance to have discussions of this nature, although extreme cases may justify appropriate comment so long as consistent with the law and my ethical obligations.

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. *See Harbison v. Bell*, 556 U.S. 180, 187 (2009) (Stevens, J.) (“Federal clemency is exclusively executive.”). As an exclusively executive function, I would not consider it appropriate to have these discussions.

- 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, in accordance with the law.

² See, e.g., “Citing Fairness, U.S. Judge Acts to Undo a Sentence He Was Forced to Impose,” NY Times, July 28, 2014, <https://www.nytimes.com/2014/07/29/nyregion/brooklyn-judge-acts-to-undo-long-sentence-for-francois-holloway-he-had-to-impose.html>

2. 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. For instance, a judge takes an oath to administer justice faithfully and impartially, and to do equal right to the poor and to the rich. 28 U.S.C. § 453.

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 am aware of studies that have identified racial disparities in the criminal justice system. Please see my responses to Senator Booker's questions for more detail in this regard. If confirmed, I would work to address any racial disparities through fair and impartial application of the law.

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 would conduct a process for recruitment of qualified minorities, women, and other underrepresented persons consistent with giving all persons serious and fair consideration for all positions.