

**Nomination of Carl Nichols to the United States District Court for the  
District of Columbia  
Questions for the Record  
August 29, 2018**

**QUESTIONS FROM SENATOR FEINSTEIN**

1. 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 lower courts to depart from Supreme Court precedent.

**b. Do you believe it is proper for a district court judge to question Supreme Court precedent in an opinion?**

District court judges are bound to follow Supreme Court precedent. It would generally be proper for a district court judge to question Supreme Court precedent in an opinion only in those limited circumstances in which that precedent has been overruled by a subsequent decision of the Supreme Court or abrogated by statute.

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

District court judges are not generally bound to follow prior decisions by other judges of the same district court. *See generally Threadgill v. Armstrong World Indus.*, 928 F.2d 1366, 1371 (3d Cir. 1991) (collecting cases).

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

The Supreme Court determines when it is appropriate to overturn its precedent, and as a nominee to a lower federal court, it would be inappropriate for me to offer my opinion regarding the circumstances in which it would be appropriate for the Supreme Court to overturn its precedent.

2. 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”?**

However characterized, all Supreme Court precedents, including *Roe v. Wade*, are binding on the lower federal courts. If I am confirmed, it will be my duty as a federal judge to apply *Roe v. Wade* fully, faithfully, and objectively.

**b. Is it settled law?**

Like all other decisions of the Supreme Court, *Roe v. Wade* is binding precedent.

3. 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?**

Like all other decision of the Supreme Court, *Obergefell v. Hodges* is binding precedent; if confirmed, I will apply it fully, faithfully, and objectively.

4. 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?**

As a nominee for a federal district court, I do not believe it would be appropriate for me to comment on whether I personally agree with particular Supreme Court opinions (including dissents), especially on matters that might come before me. Like all Supreme Court precedents, *Heller* is binding on the lower federal courts, and if I am confirmed, it will be my duty as a federal judge to apply *Heller* fully, faithfully, and objectively.

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

As a nominee for a federal district court, I do not believe it would be appropriate for me to comment on the implications of *Heller*, but I do note that the Court’s decision states that “[n]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.” *District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008).

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

Before the decision in *Heller*, there was limited Supreme Court precedent concerning whether the Second Amendment confers an individual right to keep and bear arms. The majority and dissenting opinions in *Heller* reflected a disagreement regarding the implications and relevance of those precedents. See 554 U.S. at 618-26; *id.* at 673-79 (Stevens, J., dissenting).

5. According to your Senate Judiciary Questionnaire, as part of your selection process, you interviewed with officials from the White House Counsel's Office and from the Justice Department's Office of Legal Policy. You did not, however, interview with the District of Columbia's representative in the House, Rep. Eleanor Holmes Norton, even though previous Presidents have extended Rep. Norton "senatorial courtesy" and consulted with her before making selections to fill vacancies on the United States District Court for the District of Columbia.

In addition, as you may know, federal law generally requires federal district court judges to live in the district to which they have been appointed. But the District Court for the District of Columbia is one of the few exceptions. (28 U.S.C. § 134)

**a. Do you presently reside in the District of Columbia?**

Yes. I have resided in the District of Columbia since 2009.

**b. If confirmed, do you plan to live in the District of Columbia during your tenure as a federal district judge for the District of Columbia?**

Yes.

**c. At any point during your selection process, did anyone in the White House Counsel's Office or the Justice Department's Office of Legal Policy suggest that you interview with Rep. Norton?**

Following my nomination, I requested a meeting with Rep. Norton. On August 28, 2018, I met with Rep. Norton.

6. In 2012, you represented on appeal two pharmacies and their owners who challenged an Illinois regulation requiring pharmacies to dispense, or aid in the dispensing of, all medications approved by the United States Food and Drug Administration, including emergency contraception. The pharmacies and their owners objected to the law on religious grounds, claiming that the law would force them to engage in actions that go against their religion and, as such, violated a number of statutes and constitutional provisions, including the Illinois Health Care Right of Conscience Act. A trial court agreed, and you successfully defended that trial court decision on appeal. According to your Senate Judiciary

Questionnaire, you spent more than 250 pro bono hours on the case. (*Morr-Fitz, Inc. v. Quinn*, 976 N.E. 2d 1160 (Ill. App. 4th 2012))

**a. How did you come to represent these pharmacies and their owners?**

My law firm represented the plaintiffs in this litigation beginning in 2005—almost five years before I joined the firm in January 2010. In December 2011, following the departures from the firm of two former colleagues who had devoted the most time to the litigation (including during the successful trial and several prior appeals), I began working on this matter.

**b. Apart from your work on this case, have you represented any other parties — pro bono or paid — in any cases relating to religious liberty, contraceptive access, or women’s reproductive rights more generally?**

Yes. As reflected in my response to question 16(e) on the Questionnaire for Judicial Nominees, I represented Agudath Israel of America in filing an amicus brief in support of the petition for certiorari in *Stormans, Inc. d/b/a Ralph’s Thriftway v. Wiesman*, No. 15-682, 2016 WL 463421 (Jan. 6, 2016) (certiorari stage). The question presented by that petition for certiorari was:

“Congress and all fifty states have long protected the right of health care professionals to decline to participate in the taking of human life. Petitioners are a family-owned pharmacy and two pharmacists who cannot sell abortifacient drugs without violating their religious beliefs. Instead, they refer customers to one of dozens of nearby pharmacies that sell those drugs. No customer in Washington has ever been denied timely access to any drug due to religiously motivated referral.

Nevertheless, in 2007, Washington became the only state to make Petitioners' religious conduct illegal. It did so over the objections of its own Pharmacy Commission, against the recommendation of the American Pharmacists Association and the Washington Pharmacy Association, and despite its own stipulation that Petitioners' conduct “do[es] not pose a threat to timely access to lawfully prescribed medications.” After a twelve-day trial, the district court held that the new regulations violate the Free Exercise Clause because they intentionally target religious conduct, have been enforced only against religious conduct, and exempt identical conduct when done for “an almost unlimited variety of secular reasons.” The Ninth Circuit reversed.

The question presented is:

Whether a law prohibiting religiously motivated conduct violates the Free Exercise Clause when it exempts the same conduct when done for a host of secular reasons, has been enforced only against religious conduct, and has a history showing an intent to target religion.”

The Supreme Court denied the petition for certiorari on June 28, 2016. *See Stormans, Inc. v. Wiesman*, 136 S.Ct. 2433.

I also represented the American Family Association in a lawsuit brought to enjoin then-Governor of Texas Rick Perry from participating in an August 6, 2011 event at Reliant Stadium in Houston commemorating the Day of Prayer in Texas declared by Governor Perry. *Staley v. Perry*, No. 11-cv-2585, 2011 WL 9191696 (S.D.Tex.). The American Family Association was the event’s sponsor and moved to intervene in the suit as a defendant. On July 28, 2011, Judge Gray Miller denied a motion to preliminarily enjoin Governor Perry’s participation in the event.

I do not recall having worked on any other matter relating to religious liberty, contraceptive access, or women’s reproductive rights.

**c. If so, who did you represent and what was the nature of the case.**

Please see my answer to Question 6(b).

**d. What is the proper balance between a business owner’s constitutional rights and a customer’s constitutional rights? When should the business owner’s constitutional rights prevail over the customer’s, and vice versa?**

I do not believe it would be appropriate for me to offer an opinion as to a matter that might come before me if I am confirmed. If I am confirmed, I will adhere to all precedent of the Supreme Court and D.C. Circuit.

7. In 2008, while serving in the Justice Department, you served as lead counsel in defending Harriet Miers, former White House Counsel, and Joshua Bolten, former White House Chief of Staff, in a lawsuit brought by the House Committee on the Judiciary. The Committee sought enforcement of a congressional subpoena and to require that the defendants appear before the Committee to testify regarding an investigation into the forced resignation of nine United States Attorneys on improper political grounds. You argued in relevant part that the separation of powers principle confers absolute immunity upon the President and that subjecting the President — or the President’s close personal advisers — to compelled congressional process would threaten the independence of the Executive Branch in violation of that principle. (*See Memorandum of Points and Authorities in Support of Defendants’ Motion to Dismiss, Committee on the Judiciary v. Miers*, 558 F. Supp. 2d 53 (2008))

**a. What do you believe to be the limits to the President’s assertion of either executive privilege or immunity from congressional process?**

I do not believe it would be appropriate for me to offer an opinion as to a matter that might come before me if I am confirmed. If I am confirmed, I will adhere to all precedent of the Supreme Court and D.C. Circuit, including regarding separation of powers questions.

**b. How does requiring senior advisers to the President to testify before Congress “threaten the independence of the Executive Branch”?**

I do not believe it would be appropriate for me to offer an opinion as to a matter that might come before me if I am confirmed. If I am confirmed, I will adhere to all precedent of the Supreme Court and D.C. Circuit, including regarding separation of powers questions.

8. According to your Senate Questionnaire, you were a member of the Federalist Society from 2003 to 2008 and again from 2018 to the present. The Federalist Society’s “About Us” webpage, states that, “[l]aw schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society. While some members of the academic community have dissented from these views, by and large they are taught simultaneously with (and indeed as if they were) the law.” The same page states that the Federalist Society seeks to “reorder[] priorities within the legal system to place a premium on individual liberty, traditional values, and the rule of law. It also requires restoring the recognition of the importance of these norms among lawyers, judges, law students and professors. In working to achieve these goals, the Society has created a conservative and libertarian intellectual network that extends to all levels of the legal community.”

**a. Please elaborate on the “form of orthodox liberal ideology which advocates a centralized and uniform society” that the Federalist Society claims dominates law schools.**

I do not know what the Federalist Society means by this statement. In addition, since my graduation from law school in 1996, I have had limited experiences at law schools (typically involving recruiting for my law firm), and thus do not feel qualified to comment on the extent to which particular ideologies might be viewed as dominating law schools.

**b. As a member of the Federalist Society, explain how exactly the organization seeks to “reorder priorities within the legal system.”**

I do not know what the Federalist Society means by this statement. In my experience, the Federalist Society is a group of lawyers interested in discussing important legal issues. While its members are generally lawyers who identify

themselves as conservatives or libertarians, the Federal Society is open to anyone regardless of political or legal views.

- c. As a member of the Federalist Society, explain what “traditional values” you understand the organization places a premium on.**

I do not know what the Federalist Society means by this statement. In my experience, the Federalist Society does not take positions on specific legal or policy issues.

- d. Why did you let your membership in the Federalist Society lapse in 2008?**

I was not aware until I was completing my Senate Judiciary Questionnaire earlier this year that I had let my membership in the Federalist Society lapse in 2008. When I realized that my membership had lapsed, I rejoined the Society.

- e. Why did you rejoin the Federalist Society in 2018?**

Please see the response to question 8(d).

9. On February 22, 2018, when speaking to the Conservative Political Action Conference (CPAC), 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?**

My interview with officials from the White House and the Department of Justice in January 2018 covered a number of topics. To the best of my recollection, we discussed some general questions regarding administrative law, including in the context of my work at the United States Department of Justice and in private practice. I do not recall the details of all of the questions and answers, including who posed the questions.

- 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?**

Not to my knowledge.

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

As a result of my work in private practice and at the United States Department of Justice, I am familiar with many areas of administrative law—a vast topic that would be extremely difficult to summarize in a cogent manner. Even if it were possible for me to summarize my views on administrative law, it would not be appropriate for me to do so as a judicial nominee because administrative law matters are litigated often in the District Court for the District of Columbia. As in all other areas of the law, if I am confirmed, I will be bound by the Supreme Court’s (and D.C. Circuit’s) administrative law decisions and would apply them fully, faithfully, and objectively.

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

The Supreme Court and D.C. Circuit have decided many cases involving questions of statutory interpretation, and as a lower court judge, I would apply those decisions fully, faithfully, and objectively. In general, if the meaning of a statute is ambiguous from its text and context, and if the canons of statutory construction do not resolve that ambiguity, courts have looked to legislative history to attempt to resolve such ambiguity.

**11. 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.

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

I received these questions on August 29, 2018. I reviewed the questions, drafted answers to all of the questions presented to me, solicited comments from members of DOJ’s Office of Legal Policy working on my nomination, and revised my draft answers as I thought appropriate. Each of the answers is my own.



**Nomination of  
Carl J. Nichols, to be United States District Judge for the District of Columbia**

**Submitted August 29, 2018**

**QUESTIONS FROM SENATOR WHITEHOUSE**

All judicial nominees listed above are directed to answer each of the following questions:

1. 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?

Yes; under our constitutional framework, a judge’s role is to interpret the law, rather than to make it.

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

A judge should take into consideration the practical consequences of a particular ruling when the governing law requires it. Beyond that, the political branches are in the best position to consider the practical consequences of the law.

2. During Justice Sotomayor’s confirmation proceedings, President Obama expressed his view that a judge benefits from having a sense of empathy.
  - a. What role, if any, should empathy play in a judge’s decision-making process?

All human beings, including judges, should strive in their personal lives to have empathy for all persons. In addition, certain legal contexts require a judge to consider a party’s personal history and characteristics. *See, e.g.*, 18 U.S.C. § 3553(a)(1) (court should consider history and characteristics of criminal defendant at time of sentencing); 18 U.S.C. § 3552. Ultimately, however, each judge is required to “faithfully and impartially discharge and perform all the duties incumbent upon [the judge],” and to “administer justice without respect to persons, and do equal right to the poor and to the rich.” 28 U.S.C. § 453. As Justice Kagan said during her 2010 testimony before this Committee, “I think it’s law all the way down. When a case comes before the court, parties come before the court, the question is not do you like this party or do you like that party, do you favor this cause or do you favor that cause. The question is—and this is true of constitutional law and it’s true of statutory law—the question is what the law requires.” *Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong., S. Hrg. 111-1044, at 103 (2010).

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

Please see the response to question 2(a). In addition, the term “personal life experience” can include legal education, training, and work experience, and each judge applies those experiences in deciding matters before him or her.

3. 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.

4. What assurance can you provide this Committee and the American people that you would, as a federal judge, equally uphold the interests of the “little guy,” specifically litigants who do not have the same kind of resources to spend on their legal representation as large corporations?

Please see the response to question 2(a). If confirmed, I will “faithfully and impartially discharge and perform all the duties incumbent upon [me],” and “will administer justice without respect to persons, and do equal right to the poor and to the rich.” 28 U.S.C. § 453.

5. Do you believe that discrimination (in voting access, housing, employment, etc.) against minorities—including racial, religious, and LGBT minorities—exists today? If so, what role would its existence play in your job as a federal judge?

I regret that discrimination against minorities continues to exist today. As a district court judge, I would do everything possible to avoid unlawful discrimination in the administration of justice.

Senator Mazie Hirono  
Questions for the Record for Carl J. Nichols

1. During your time in the Department of Justice you advanced an expansive view of executive powers. For example, you argued that separation of powers allowed Harriett Miers and Josh Bolten to ignore a congressional subpoena. You also argued that the state secrets privilege should allow the executive branch to hide aspects of its rendition and warrantless wiretap programs. We rely on the courts to stand as a check on presidential overreach.

- a. Do you still hold these expansive views of executive powers?

As a litigator representing the Executive Branch in those cases, I vigorously defended my clients' interests and the policy decisions made by other, more senior Executive Branch employees, but was not responsible for those policy decisions. If I am confirmed, I will not be a litigator representing a party, but a judge whose obligation is to decide cases fairly, based on existing law and relevant precedent. In that role, I will adhere to all precedent of the Supreme Court and D.C. Circuit, including cases involving the President's Article II powers, and will apply those precedents faithfully and objectively.

- b. If confirmed, how will you act as a check against President Trump—or a future president—when the president acts beyond his constitutional powers?

If I am confirmed, I will adhere to all precedent of the Supreme Court and D.C. Circuit, including cases involving the President's Article II powers, and will apply those precedents fully, faithfully, and objectively.

2. You were a member of the Federalist Society from 2003 to 2008. You then rejoined the Federalist Society earlier this year.

- a. Did you rejoin the Federalist Society before or after you were nominated to be a district court judge?

In completing my Senate Judiciary Questionnaire earlier this year, I realized that I had let my membership in the Federalist Society lapse in 2008. When I realized that my membership had lapsed, I rejoined the Society.

- b. Why did you rejoin the Federalist Society?

Please see the response to question 2(a).

**Nomination of Carl J. Nichols**  
**United States District Court for the District of Columbia**  
**Questions for the Record**  
**Submitted August 29, 2018**

**QUESTIONS FROM SENATOR BOOKER**

1. According to a Brookings Institute study, African Americans and whites use drugs at similar rates, yet blacks are 3.6 times more likely to be arrested for selling drugs and 2.5 times more likely to be arrested for possessing drugs than their white peers.<sup>1</sup> Notably, the same study found that whites are actually *more likely* to sell drugs than blacks.<sup>2</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>3</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>4</sup>

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

I believe racial bias exists in America and remains a very real and important challenge for our country. I also believe that the criminal justice system is susceptible to implicit racial bias, and I believe there likely are instances where it has affected the criminal justice system. If confirmed, I would guard against invidious discrimination of any kind, explicit or implicit, in my courtroom.

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

Yes.

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

I had not studied implicit racial bias in depth prior to my nomination, but I am aware that the issue has been the focus of numerous scholarly studies, and I have read various articles in the popular press regarding the issue. In addition, as a partner in my law firm, I have attended trainings on implicit bias.

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

<sup>2</sup> *Id.*

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

<sup>4</sup> *Id.* at 8.

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

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

I have not studied or reached any conclusion about the statistical link between incarceration and crime rates.

- b. Do you believe there is a direct link between decreases of a state's incarcerated population and decreased crime rates in that state? If you do not believe there is a direct link, please explain your views.

I have not studied or reached any conclusion about the statistical link between incarceration and crime rates.

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

Yes.

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

- a. Do those statistics alarm you?

Those statistics, along with credible studies about which I am aware, sadly and regrettably reflect disparities and biases in our criminal justice system (and our society as a whole). *See, e.g.,* John Gramlich, *The gap between the number of blacks and whites in prison is shrinking*, *FactTank: News in the Numbers*, Pew Research Center (January 12, 2018); William A. Galston, *Criminal Justice Reform: Issues and Options for the Next President*, Brookings Institute (Oct. 14, 2016), <https://www.brookings.edu/research/criminal-justice-reform-issues-andoptions-for-the-next-president/>.

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<sup>5</sup> THE PEW CHARITABLE TRUSTS, NATIONAL IMPRISONMENT AND CRIME RATES CONTINUE TO FALL 1 (Dec. 2016), available at [http://www.pewtrusts.org/~media/assets/2016/12/national\\_imprisonment\\_and\\_crime\\_rates\\_continue\\_to\\_fall\\_web.pdf](http://www.pewtrusts.org/~media/assets/2016/12/national_imprisonment_and_crime_rates_continue_to_fall_web.pdf).

<sup>6</sup> *Id.*

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

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

I do not believe that it would be appropriate for me, as a judicial nominee, to provide an opinion regarding a matter that might come before me if confirmed. If I am confirmed, I will adhere to all precedent of the Supreme Court and D.C. Circuit, including decisions regarding the Eighth Amendment, and will apply those precedents fully, faithfully, and objectively.

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

If confirmed, I will “faithfully and impartially discharge and perform all the duties incumbent upon [me],” and “will administer justice without respect to persons, and do equal right to the poor and to the rich.” 28 U.S.C. § 453. As Justice Kagan put it, “[w]hen a case comes before the court, parties come before the court, the question is not do you like this party or do you like that party, do you favor this cause or do you favor that cause. The question is—and this is true of constitutional law and it’s true of statutory law—the question is what the law requires.” Beyond that, I do not believe it would be appropriate as a judicial nominee to provide an opinion regarding a matter that might come before me if confirmed.

**Questions for the Record from Senator Kamala D. Harris**  
**Submitted August 29, 2018**  
**For the Nominations of**

Carl Nichols, to the U.S. District Court for the District of Columbia

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?**

In general, before sentencing a defendant, I would direct that the probation officer conduct a presentence investigation and prepare a presentence report; ensure that the defendant and his or her attorney have an opportunity to object to that report; review that report, any objections to it, and the probation office's sentencing recommendations; permit briefing and oral argument regarding sentencing issues; provide any victims the opportunity to address the court; permit the defendant to address the court; study the materials presented; consider the relevant Sentencing Guidelines; and impose a sentence complying with the purposes of sentencing as set forth 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?**

I would apply the procedures identified in response to question 1(b) in all cases, seeking to reach a fair, proportional, appropriate, and lawful sentence based on the factors and procedures made relevant by applicable statutes, guidelines, and case law.

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

Pursuant to binding Supreme Court precedent, *see, e.g., United States v. Booker*, 543 U.S. 220, 246 (2005), the Sentencing Guidelines are advisory and are not binding on trial judges. In addition, Part K of Chapter 5 of the Sentencing Guidelines lists the circumstances under which the Guidelines permit a trial judge to depart from an advisory Guidelines range. A judge may also impose a non-Guidelines sentence when warranted based on the factors set out in 18 U.S.C. § 3553.

**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>**

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

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

Whether and to what extent certain sentencing practices provide appropriate levels of deterrence is a political and policy question reserved to the political branches of Government. If confirmed, I would follow all relevant Supreme Court and D.C. Circuit precedent, and I would ensure that every sentence I impose is fair and reasonable in light of the factors set out in 18 U.S.C. § 3553.

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

Please see my answer 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 answer 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?**

In the event that a law required a sentence that was unjust and disproportionate, I would follow the law and impose the sentence, but identify the injustice in my opinion, as appropriate.

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

Charging decisions are vested in the Executive Branch. In the event that I considered a charging policy or decision to be unjust, I would consider—consistent with applicable rules, precedent, and ethical guidance—reaching out to the U.S. Attorney’s Office, addressing the issue in an opinion, or taking other steps to call attention to the policy or decision.

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<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>



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

The clemency power is generally entrusted to the Executive Branch. I would not rule out, however, calling attention to features of a case that might make consideration of clemency warranted.

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

Yes, as permitted by applicable law.

- 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 that there are racial disparities in our criminal justice system? If so, please provide specific examples. If not, please explain why not.**

Yes, my understanding is that there are racial disparities in our criminal justice system, including in sentencing.

- 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?**

Yes.