

**Nomination of J. Nicholas Ranjan to the United States District Court for the Western
District of Pennsylvania
Questions for the Record
November 20, 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 an inferior court to depart from Supreme Court precedent. The Supreme Court has made clear “it is this Court’s prerogative alone to overrule one of its precedents.” *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997).

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

A district judge should always apply Supreme Court precedent that controls, and should not question Supreme Court precedent in an opinion. *See Energy & Env’t Legal Inst. v. Epel*, 793 F.3d 1169, 1170 (10th Cir. 2015) (“But as an inferior court we take Supreme Court precedent as we find it.”). There may, however, be circumstances in which a district judge may mention gaps in the law or circuit conflicts regarding proper application of a Supreme Court precedent, in order to raise the issue generally for further appellate guidance. The Supreme Court has observed that this lower court practice might “facilitate” its review of a confusing issue. *See Eberhart v. United States*, 546 U.S. 12, 19–20 (2005).

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

The Supreme Court has highlighted factors that it considers in determining whether to overturn one of its own precedents. For example, in *Janus v. Am. Fed’n. of State, Cty., & Mun. Employees, Council 31*, 138 S.Ct. 2448, 2478–79 (2018), the Supreme Court noted that it considers the “quality of [the case’s] reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision.” Any decision to overturn Supreme Court precedent is for the Supreme Court alone to decide, as the Supreme Court has reserved to itself the prerogative of deciding when to overturn its own precedents. *See, e.g., Lawrence v. Texas*, 539 U.S. 558, 577–579 (2003). As a nominee to a lower federal court, I cannot opine on when that prerogative is appropriately exercised.

2. When Chief Justice Roberts was before the Committee for his nomination, Senator Specter referred to the history and precedent of the *Roe* case law as “super-stare decisis.” One text book on the law of judicial precedent, co-authored by Justice 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”? “superprecedent”?

From the perspective of a district judge, all Supreme Court decisions are binding and must be followed. The core holding of *Roe* has been upheld in cases including *Casey* and *Hellerstedt*. If confirmed, I will faithfully apply *Roe*, *Casey*, *Hellerstedt*, and all other Supreme Court precedent.

b. Is it settled law?

Please see my answer to question 2(a).

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?**

Obergefell is binding Supreme Court precedent. If confirmed, I will faithfully apply *Obergefell* and all Supreme Court precedent.

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?

Given the nature of my practice, I have not studied *Heller* in any detail. Additionally, it would be inappropriate for me to comment on my personal opinions of Justice Stevens’s dissent in *Heller* (or on my personal views of the majority opinion). I would faithfully apply *Heller*.

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

The Supreme Court in *Heller* specifically noted that the rights secured by the Second Amendment are not “unlimited” and that “nothing 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). The Court “also recognize[d] another important limitation on the right to keep and carry arms”—namely, “that the sorts of weapons protected were those in common use at the time.” *Id.* at 627 (internal quotation marks omitted).

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

Please see my answer to question 4(a).

5. 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*, 558 U.S. 310, 342 (2010), the Supreme Court stated that “First Amendment protection extends to corporations.” Determining whether, and in what contexts, First Amendment protection might vary depending on whether the speaker is an individual or a corporation would require an examination of *Citizens United* and other 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?

Individuals have many rights protected by the First Amendment, and there may be a scenario where an individual’s First Amendment speech rights may come into conflict or be suppressed by another individual, group, corporation, or state actor. Under those circumstances, I would have to review all relevant Supreme Court and Third Circuit precedent to determine how to resolve such an issue.

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

In *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), the Supreme Court held that certain for-profit corporations may assert claims under the

Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb et seq., but it did not consider whether such corporations may assert claims under the Free Exercise Clause of the First Amendment. If confronted with that question, I would have to review *Hobby Lobby* and all other relevant Supreme Court and Third Circuit precedent.

6. In your time at K&L Gates, a significant portion of your practice has involved energy law, and has included representation of large oil and gas and industrial clients such as Chevron U.S.A. and the Crane Company.

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

While I have practiced in the area of energy law, my practice has never concerned any matters concerning climate change, and I have never studied any scientific literature concerning the causes of climate change. My understanding is that there is litigation pending throughout the country that has been brought against energy and industrial companies, alleging that they have contributed to climate change. I have had no involvement in any of that litigation. And because that litigation is pending and similar lawsuits could be brought, I cannot offer comments or opinions on this litigation. *See* Code of Conduct for United States Judges, Canon 3(A)(6).

b. What other factors contribute to climate change?

Please see my answer to question 6(a).

7. 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 difference 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.

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.

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

Given the nature of my practice, I have not had occasion to study administrative law in detail. And as a nominee to a lower federal court, I cannot properly provide personal opinions about areas of the law. That is particularly true for matters that could come before me as a judge. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed, I will approach any administrative law case in the same manner that I would approach all other cases, guided by all applicable Supreme Court and Third Circuit precedent.

8. 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 at outside groups — about loyalty to President Trump? If so, please elaborate.

No.

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

My process in answering these questions was as follows: (i) I read the questions carefully; (ii) I conducted some limited research and review of my own background; (iii) I drafted answers to each of these questions; (iv) I solicited feedback on my answers from members of the Office of Legal Policy at the United States Department of Justice; and (v) finally, I revised my answers in light of that feedback.

My answers to the questions are my own.

Questions for the Record for J. Nicholas Ranjan
From Senator Mazie 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. You became a member of the U.S. Chamber of Commerce Litigation Center in 2016. This organization is an affiliate of the U.S. Chamber of Commerce that “fights for business at every level of the U.S. judicial system, on virtually every issue affecting business.” If you are confirmed as a district court judge, you will regularly preside over cases in which business interests are pitted against other interests, including the interests of individual consumers.

- a. In view of your membership in the U.S. Chamber of Commerce Litigation Center, please explain why a party who comes before you with a claim adverse to a business would have confidence that you will treat them fairly, if you are confirmed.

I have served on a subcommittee for the U.S. Chamber of Commerce Litigation Center since 2016, advising the Chamber on possible *amicus curiae* involvement in certain appeals in state courts. In my experience, the Chamber sought to file *amicus* briefs in appeals in order to ensure that governing precedent was followed and that the law was applied equally and fairly to all litigants.

To any parties that might come before me as a judge, I would inform them that as a private practitioner, I have represented or counseled clients of all kinds. By way of example, this has included providing counsel to the following clients: individuals and family-owned businesses in disputes against corporations, indigent criminal defendants in disputes against the United States and Commonwealth of Pennsylvania related to assertions that their convictions or sentences were unlawful, prison inmates in claims against the Department of Corrections for civil rights violations, homeless shelters and outreach facilities in claims against local government authorities for violation of their constitutional rights, and women who were victims of physical abuse in obtaining protection-from-abuse orders against their abusers.

I would also inform litigants who come before me that the role of a judge is different than that of an advocate, and that as a judge, I intend to approach every case with an open mind, guided by an adherence to Supreme Court and Third Circuit precedent.

- b. If confirmed, will you recuse yourself from all cases in which the U.S. Chamber of Commerce has taken a position?

If confirmed, I will make the decision to recuse myself based on the specific case before me. That is, I will evaluate any real or potential conflict, or relationship that could give rise to the appearance of conflict, on a case by case basis and determine appropriate action with the advice of parties and their counsel, including recusal where necessary. I would also refer to 28 U.S.C. § 455, Canon 3 of the Code of Conduct for United States Judges, as well as any other applicable canons, rules, and statutes. In cases involving non-governmental corporate entities, I would review and rely on the corporate disclosure statements submitted by the parties pursuant to Federal Rule of Civil Procedure 7.1, and request supplemental disclosures if those statements are insufficient in assisting me in identifying potential conflicts of interest. If a litigant raises a conflict of interest, I would ask the parties to submit their positions as to the potential conflict and the controlling law and then I would make a timely decision on the merits.

Nomination of J. Nicholas Ranjan
United States District Court for the Western District of Pennsylvania
Questions for the Record
Submitted November 20, 2018

QUESTIONS FROM SENATOR BOOKER

1. In 2003, you wrote a piece for the *Michigan Law Review* about the legacy of Justice Clarence Thomas.¹ You wrote that Justice Thomas's biographer, Andrew Peyton Thomas, "provides the evidence for making a compelling case that Justice Thomas has been entirely politicized in perception."² You added that "[h]istory will unlikely remember Thomas as a fiercely independent legal theorist and a courageous moral agent, as Peyton Thomas describes Thomas's potential legacy," but rather that "Thomas unfortunately may well be remembered in the colorful and politicized language of his detractors."³ And you concluded that "only time will tell if the process will run to completion and Thomas can be viewed as purely a judicial figure and not as a political one." Has your assessment of Justice Thomas's legacy changed in any way during the last 15 years? If so, please explain.

The article that I wrote was a book review, where I commented on the findings and conclusions of an author who had written a biography about Justice Thomas. One conclusion that I drew from the biography was that some people perceived Justice Thomas as similar to how one perceives a political figure. I wrote this book review in 2003, based on the critiques of Justice Thomas existing at or before that time. Since then, while I have read opinions authored by Justice Thomas, I have not had any occasion to read articles, books, or news stories discussing the perception of Justice Thomas, and thus I cannot comment on his perception or legacy as it stands today.

2. 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.⁴ Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.⁵ 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.⁶ In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.⁷
 - a. Do you believe there is implicit racial bias in our criminal justice system?

Yes. Unfortunately, racial bias continues to exist in our country, both in explicit and implicit forms. The criminal justice system is not immune.
 - 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.

Yes. I have reviewed numerous articles and websites that have discussed implicit racial bias in the criminal justice system. I cannot recall which specific articles or websites that I have reviewed on this topic. I recall reading articles in the Washington Post and Wall Street Journal, as well as articles on the websites for the Innocence Project and the Sentencing Project. To the best of my recollection, I may have read the article cited in footnote 6 below.

Additionally, I have read books that have discussed criminal justice or cognitive biases more broadly; to the best of my recollection, some of those books touched on implicit racial bias in the criminal justice system. For example, I have read some or all of the following books: *Locking Up Our Own: Crime and Punishment in Black America* by James Forman, Jr.; *The Righteous Mind: Why Good People Are Divided by Politics and Religion* by Johnathan Haidt; *Thinking, Fast and Slow* by Daniel Kahneman; and *The Undoing Project* by Michael Lewis.

¹ Jagan Nicholas Ranjan, *The Politicization of Clarence Thomas*, 101 MICH. L. REV. 2084 (2003)

² *Id.* at 2102.

³ *Id.* at 2101.

⁴ 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>.

⁵ *Id.*

⁶ 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>.

⁷ *Id.*

3. 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.⁸ In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.⁹

- 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 have not studied this issue. Therefore, I do not have enough information on the topic to know whether there is a direct link between incarceration and crime rates.

- 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 3(a).

4. 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. I have been an advocate for diversity and inclusion in the legal field for many years, and believe that the judiciary is well-served by reflecting diversity of all kinds.

5. Do you believe that *Brown v. Board of Education*¹⁰ was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

If confirmed, I will faithfully apply the Supreme Court's decision in *Brown*, as well as all binding Supreme Court precedent and Third Circuit precedent. However, as a nominee to the district court, I believe that it would be improper for me to publicly disclose my personal views about any particular binding Supreme Court opinions, even one as seminal as *Brown*. This is so because I believe it is important to preserve my impartiality regarding not only that decision, but all binding Supreme Court decisions. I would cite the standard for judicial nominees that Justice Ruth Bader Ginsburg set forth during her Supreme Court confirmation hearing in 1993 when she said she would provide "no hints, no forecasts, no previews" of how she would decide questions that may come before the Supreme Court. Based on this standard, there is a long tradition of judicial nominees not discussing their personal views of the merits of Supreme Court precedent.

6. Do you believe that *Plessy v. Ferguson*¹¹ was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

The Supreme Court has held that *Plessy* was wrongly decided when it overruled that decision in *Brown*. If confirmed, I would faithfully apply all binding Supreme Court precedent, including *Brown*. Please also see my response to question 5.

7. 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. In advance of my testimony, I met with officials from the Office of Legal Policy with the Department of Justice. They instructed me to answer all questions truthfully. All answers that I have provided are my own.

8. 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.”¹² Do you believe that immigrants, regardless of status, are entitled to due process and fair adjudication of their claims?

The Supreme Court has held that immigrants, including undocumented immigrants, possess due process rights protected by the U.S. Constitution. *See Plyler v. Doe*, 457 U.S. 202, 210 (1982) (“Indeed, we have clearly held that the Fifth Amendment protects aliens whose presence in this country is unlawful from invidious discrimination by the Federal Government.”). My understanding is that the scope of those due process rights in the face of potential executive action by the current administration is an issue that is impending, and thus it would be inappropriate for me to comment on that specific issue. *See* Canon 3(a)(6), Code of Conduct for United States Judges.

⁸ 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>.

⁹ *Id.*

¹⁰ 347 U.S. 483 (1954).

¹¹ 163 U.S. 537 (1896).

¹² 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

Jagan Nicholas Ranjan, to the U.S. District Court for the Western District of Pennsylvania

1. In 2003, you wrote an article for the *Michigan Law Review*, which advocated for a new conceptualization of Justice Clarence Thomas. In the article, you described Justice Thomas's comments about an alleged "high-tech lynching" during his Supreme Court confirmation hearings as an act of "political shrewdness."

- a. **Do you believe it is appropriate for judges to take politically calculated actions? Why or why not?**

The article that I wrote was a book review, where I commented on the findings and conclusions of an author who had written a biography about Justice Thomas. One of the comments I made in the book review was that, based on the information provided in the biography, some people may have perceived Justice Thomas as making statements during his confirmation hearings that could be construed as being politicized.

With respect to the role of judges generally, judges should adhere to the guidelines and limitations on political activity as set forth in the Code of Conduct for United States Judges, Canon 5, as well as any decisions or guidance interpreting that canon. If confirmed, I would adhere to these guidelines and limitations.

2. 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 *United States v. Gunter*, 462 F.3d 237 (3d Cir. 2006), the Third Circuit set forth a three-step process that district courts must follow in sentencing a defendant. In proceeding through the three steps, the Third Circuit has stated: "(1) Courts must continue to calculate a defendant's Guidelines sentence precisely as they would have before *Booker*. (2) In doing so, they must formally rule on the motions of both parties and state on the record whether they are granting a departure and how that departure affects the Guidelines calculation, and take into account our Circuit's pre-*Booker* case law, which continues to have advisory force. (3) Finally, they are required to exercise their discretion by considering the relevant § 3553(a) factors in setting the sentence they impose regardless whether it varies from the sentence calculated under the Guidelines." *Id.* at 247 (all internals omitted). If confirmed, I would follow this process.

Additionally, as part of this process, I would identify any statutory sentencing considerations and requirements, and review relevant information, such as the indictment, pre-sentence investigation report, sentencing memoranda, and statements by the defendant and victims. In accordance with 18 U.S.C. § 3553(a), I would seek to “impose a sentence sufficient, but not greater than necessary” to comply with the purposes of sentencing.

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

I would rely on the process that I outlined in my response to question 2(a). In order to better educate myself on the range of typical sentences for certain offenses and offender characteristics, I intend to study the resources published by the United States Sentencing Commission, including the Commission’s annual sourcebook of federal sentencing statistics, which provides descriptive statistics on the application of the federal sentencing guidelines and provides selected sentencing data.

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

The Guidelines list various grounds that may justify a departure. *See* Guidelines, Chapter 5, Part K. A departure may also be appropriate when there are aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines and where necessary ensure that the sentence is “sufficient, but not greater than necessary.” *See* 18 U.S.C. § 3553(a)(2), (b)(1); Guidelines, §5K2.0(a).

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 not studied the deterrent effect of mandatory minimum sentences, and thus am not in a position to agree or disagree with Judge Reeves. Additionally, because the wisdom of mandatory minimum sentences is a policy matter within the purview of Congress, it would not be appropriate for me, as a judicial nominee, to comment on the issue. *See* Code of Conduct for United States Judges, Canon 5,

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

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

Please see my response to question 2(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 2(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.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?

In some cases, including in a situation where a judge is explaining his or her sentence to a criminal defendant at the sentencing hearing, it may be appropriate for the judge to explain that the sentence imposed was a result of a statutorily-mandated sentence, outside of the judge's control or discretion as to what the judge believes is a "sufficient, but not greater than necessary" sentence. However, when offering such an explanation, the judge must be mindful that the establishment of mandatory minimum sentences is a policy matter within the purview of Congress and that the judge's role is to follow the law, not to say what the law ought to be.

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

I would not reach out to prosecutors to discuss their charging policies. As the Supreme Court has made clear, prosecuting criminal offenders is an executive function while sentencing is a shared power. *See Mistretta v. United States*, 488 U.S. 361, 390 (1989). However, in the context of deciding to accept or reject a plea agreement under Federal Rule of Criminal Procedure 11, a court "may reject a plea agreement because it calls for a sentence that is too lenient or too harsh or because it unduly limits the court's sentencing discretion." *See United States v. O'Neill*, 437 F.3d 654, 663 (7th Cir. 2006). In the context of making the decision to accept or reject a plea agreement, it may be appropriate to comment on the charges brought against the defendant to the

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>

extent that that is relevant to the plea-acceptance decision.

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

Please see my response to question 2(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. In fact, the Sentencing Commission has reported that the “majority of federal penal statutes do not require a term of imprisonment and, instead, authorize either a term of probation or a term of imprisonment.” *See* United States Sentencing Commission, *Federal Sentencing: The Basics* (Nov. 2018). If confirmed, I would follow the law, including considering alternatives to incarceration.

3. 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. *See, e.g.*, Canon 1, Code of Conduct for United States Judges (“An independent and honorable judiciary is indispensable to justice in our society. A judge should maintain and enforce high standards of conduct and should personally observe those standards, so that the integrity and independence of the judiciary may be preserved.”).

- 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.**

Yes. I have read news articles that have reported the findings of studies showing how ethnic minorities in America, relative to white Americans, are more likely to be arrested, more likely to be convicted, and more likely to face harsher sentences.

4. 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. I have spent a considerable part of my career devoted to building and working with diverse teams, including engaging them in an inclusive manner. Studies have shown that diverse teams outperform non-diverse ones; as such, I

believe it is wise for a judge to strive to create a diverse team of staff and law clerks. *See* David Rock & Heidi Grant, *Why Diverse Teams Are Smarter*, HARVARD BUSINESS REVIEW, Nov. 4, 2016 (“In recent years a body of research has revealed another, more nuanced benefit of workplace diversity: nonhomogenous teams are simply smarter. Working with people who are different from you may challenge your brain to overcome its stale ways of thinking and sharpen its performance.”).

- 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. Please see my answer to question 4(a).