

**Nomination of Kea Whetzal Riggs
United States District Court for the District of New Mexico
Questions for the Record
Submitted July 3, 2019**

QUESTIONS FROM SENATOR BOOKER

1. During your time as a judge on New Mexico’s Fifth Judicial District Court since 2014, approximately 60 percent of the 5,200 cases over which you presided that have gone to verdict or judgment were criminal proceedings.¹

- a. How has this experience presiding over criminal cases shaped your view of how judges should address the rights of criminal defendants?

The experience has reinforced the fundamental recognition that the constitutional and statutory rights of criminal defendants, and all parties, must be zealously applied in order for the criminal justice system to operate as intended by the framers of the Constitution. If confirmed, I will fully and faithfully follow all Constitutional and statutory authority as well as Supreme Court and Tenth Circuit precedent.

- b. How has this experience presiding over criminal cases shaped your view of the role of plea bargaining in the criminal justice system?

There is a valid and appropriate role for plea bargaining in the criminal justice system.

2. You served as a self-employed, part-time special master and mediator from 2006 to 2012.² In response to a Questionnaire item about matters in which you “served as a mediator,” you did not identify any specific matters.³

- a. What types of matters did you handle in this capacity?

I mediated child custody issues.

- b. If you’re confirmed, how would this experience inform your approach to serving on the federal bench?

As a mediator you learn to listen very carefully and to identify underlying issues. Effective communication is essential to ensuring that each party is heard and due process is achieved.

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

No.

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

Yes, to the extent the term “textualist” means that I will follow the plain meaning of the Constitution or the statute at issue and that I will not substitute my personal views when reaching a decision.

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

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

A canon of statutory construction provides that legislative history may be considered when construing an ambiguous statute. I will employ the canons of statutory construction when appropriate to do so.

- b. If you are confirmed to serve on the federal bench, your opinions would be subject to review by the Supreme Court. Most Supreme Court Justices are willing to consider

¹ SJQ at 11.

² *Id.* at 25.

³ SJQ at 25-26.

legislative history. Isn't it reasonable for you, as a lower-court judge, to evaluate any relevant arguments about legislative history in a case that comes before you?

If confirmed, I will fully and faithfully follow all Supreme Court and Tenth Circuit precedent regarding the use of legislative history in interpreting a statute. See my response to Question 5(a) also.

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

I believe that judicial restraint is essential to the integrity of the rule of law. Judicial restraint is a practical philosophy in which a judge limits the exercise of power to that set forth in the Constitution and the law without allowing personal values or beliefs to enter decision-making. As a sitting judge and a judicial nominee, I do not believe it is appropriate to comment further. See Code of Conduct for United States Judges, Canons 2(A) and 5(C). If confirmed, I would fully and faithfully apply the law and Supreme Court and Tenth Circuit precedent.

- a. The Supreme Court's decision in *District of Columbia v. Heller* dramatically changed the Court's longstanding interpretation of the Second Amendment.⁴ Was that decision guided by the principle of judicial restraint?

Questions regarding the interpretation of the Second Amendment are the subject of pending or impending litigation. If confirmed, I will fully and faithfully apply Supreme Court and Tenth Circuit precedent. As a sitting judge and a judicial nominee, I do not believe it appropriate to comment further on a subject of current political debate, or a scenario, which is or may be the subject of pending or impending litigation. See Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

- b. The Supreme Court's decision in *Citizens United v. FEC* opened the floodgates to big money in politics.⁵ Was that decision guided by the principle of judicial restraint?

See my response to Question 6(a).

- c. The Supreme Court's decision in *Shelby County v. Holder* gutted Section 5 of the Voting Rights Act.⁶ Was that decision guided by the principle of judicial restraint?

See my response to Question 6(a).

7. Since the Supreme Court's *Shelby County* decision in 2013, states across the country have adopted restrictive voting laws that make it harder for people to vote. From stringent voter ID laws to voter roll purges to the elimination of early voting, these laws disproportionately disenfranchise people in poor and minority communities. These laws are often passed under the guise of addressing purported widespread voter fraud. Study after study has demonstrated, however, that widespread voter fraud is a myth.⁷ In fact, in-person voter fraud is so exceptionally rare that an American is more likely to be struck by lightning than to

impersonate someone at the polls.⁸

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

I have not had an opportunity to study this issue, However, I am aware that there is ongoing nationwide discussion and debate regarding voter fraud. As a sitting judge and a judicial nominee, it is inappropriate for me to comment further regarding this issue. As a lower court judge, I will fully and faithfully follow the law as well as Supreme Court and Tenth Circuit precedent. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

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

Questions regarding voter ID laws are the subject of pending or impending litigation. If confirmed, I will fully and faithfully apply the law as well as Supreme Court and Tenth Circuit precedent. As a sitting judge and a judicial nominee, I do not believe it appropriate to comment further on a subject of current political debate, or a scenario, which is or may be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

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

See my response to Question 7(b).

8. 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.⁹ Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.¹⁰ These

⁴ 554 U.S. 570 (2008).

⁵ 558 U.S. 310 (2010).

⁶ 570 U.S. 529 (2013).

⁷ *Debunking the Voter Fraud Myth*, BRENNAN CTR. FOR JUSTICE (Jan. 31, 2017), <https://www.brennancenter.org/analysis/debunking-voter-fraud-myth>.

⁸ *Id.*

⁹ 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>.

¹⁰ *Id.*

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.¹¹ In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.¹²

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

Yes. I believe studies have shown there to be implicit racial bias in our criminal justice system. Justice must be administered fairly and impartially without regard to race. If confirmed, I will do everything in my power to guard against racial bias.

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

Yes. I believe that studies have shown that people of color are disproportionately represented in our nation's jails and prisons. See my response to 8(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.

I have received training in recognizing and dealing with implicit racial bias at the National Judicial College and the New Mexico Judicial Conclave. If confirmed, I will do everything in my power to guard against racial bias. I will approach each case with mindfulness and awareness of the issue of implicit bias.

- d. According to a report by the United States Sentencing Commission, black men who commit the same crimes as white men receive federal prison sentences that are an average of 19.1 percent longer.¹³ Why do you think that is the case?

I am unfamiliar with the report, I have not studied this issue and am unable to offer an opinion. However, if confirmed, I will do everything in my power to fairly and faithfully apply the law equally to every individual who appears before me.

- e. According to an academic study, black men are 75 percent more likely than similarly situated white men to be charged with federal offenses that carry harsh mandatory minimum sentences.¹⁴ Why do you think that is the case?

I am unfamiliar with the academic study and am unable to offer an opinion on this matter. However, if confirmed, I will do everything in my power to fairly and faithfully apply the law equally to every individual who appears before me.

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

Federal judges have a duty to ensure that racial bias does not affect any aspect of our criminal justice system or our justice system.

9. 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.¹⁵ In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.¹⁶

- 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 am unfamiliar with the fact sheets, I have not studied this issue and am unable to offer an opinion.

¹¹ 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>.

¹² *Id.*

¹³ U.S. SENTENCING COMM'N, DEMOGRAPHIC DIFFERENCES IN SENTENCING: AN UPDATE TO THE 2012 *BOOKER* REPORT 2 (Nov. 2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114_Demographics.pdf.

¹⁴ Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1323 (2014)

¹⁵ 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>.

¹⁶ *Id.*

- 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 have not conducted any research on this issue. I am unable to offer an opinion.

10. 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.

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

Yes. I took an oath to treat every individual who comes before me with dignity and respect. I take that responsibility seriously.

12. Do you believe that *Brown v. Board of Education*¹⁷ was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

Brown v. Board of Education is a landmark decision in our history and a unanimous decision of the Supreme Court. In my research, the decision is accepted as being correctly decided regardless of judicial philosophy. The core findings in *Brown* are not being litigated and are unlikely to be litigated. With that limitation, yes. As a sitting judge and a judicial nominee, I believe that the Code of Conduct prohibits further comment. See Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C). If confirmed, I will fully and faithfully follow Supreme Court and Tenth Circuit precedent.

13. Do you believe that *Plessy v. Ferguson*¹⁸ was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

No. The Supreme Court overruled *Plessy v. Ferguson* in *Brown v. Board of Education*.

14. 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.

15. As a candidate in 2016, President Trump said that U.S. District Judge Gonzalo Curiel, who was born in Indiana to parents who had immigrated from Mexico, had "an absolute conflict" in presiding over civil fraud lawsuits against Trump University because he was "of Mexican heritage."¹⁹ Do you agree with President Trump's view that a judge's race or ethnicity can be a basis for recusal or disqualification?

The basis for a judge to recuse or disqualify is specifically set forth by statute, rules of procedure and canons of ethics. I will fully and faithfully follow all statutory authority and

Supreme Court and Tenth Circuit precedent. As a sitting judge and a judicial nominee, I do not believe it appropriate to comment further on a subject of current political debate, or a scenario, which is or may be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

16. 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.”²⁰ Do you believe that immigrants, regardless of status, are entitled to due process and fair adjudication of their claims?

Yes.

¹⁷ 347 U.S. 483 (1954).

¹⁸ 163 U.S. 537 (1896).

¹⁹ Brent Kendall, *Trump Says Judge’s Mexican Heritage Presents ‘Absolute Conflict,’* WALL ST. J. (June 3, 2016), <https://www.wsj.com/articles/donald-trump-keeps-up-attacks-on-judge-gonzalo-curiel-1464911442>.

²⁰ Donald J. Trump (@realDonaldTrump), TWITTER (June 24, 2018, 8:02 A.M.), <https://twitter.com/realDonaldTrump/status/1010900865602019329>.