

**Nomination of James R. Sweeney to the
United States District Court
For the Southern District of Indiana
Questions for the Record
Submitted January 17, 2018**

QUESTIONS FROM SENATOR WHITEHOUSE

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. Just as an umpire or referee should fairly and impartially enforce the rules, so, too, a judge should provide the litigants a level playing field, where the judge applies the rules fairly and faithfully as a neutral arbiter.

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

Generally, none. Judges are duty bound to apply the law, including all relevant precedent to the facts of a case. There are certain occasions, however, where practical consequences are part of the legal analysis. For example, one of the prongs of a preliminary injunction analysis requires weighing the harm of imposing the injunction.

- c. Federal Rule of Civil Procedure 56 provides that a court “shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact” in a case. Do you agree that determining whether there is a “genuine dispute as to any material fact” in a case requires a judge to make a subjective determination?

No. The controlling Supreme Court precedent instructs that determining whether there is a genuine issue of material fact is an objective analysis.

2. During Justice Sotomayor’s confirmation proceedings, President Obama expressed his view that a judge benefits from having a sense of empathy, for instance “to recognize what it’s like to be a young teenage mom, the empathy to understand what it's like to be poor or African-American or gay or disabled or old.”
 - a. What role, if any, should empathy play in a judge’s decision-making process?

Continuing with Justice Roberts’ metaphor, a judge needs to make the calls fairly and impartially, with fidelity to the controlling precedent. That’s not to say, however, that a judge cannot show empathy while making such unbiased calls.

- 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 above. In addition, when sitting as a fact finder, a judge's life experience can be an aid in understanding and weighing the evidence.

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?
 - a. In civil litigation, well-resourced parties commonly employ "paper blizzard" tactics to overwhelm their adversaries or force settlements through burdensome discovery demands, pretrial motions, and the like. Do you believe these tactics are acceptable? Or are they problematic? If they are problematic, what can and should a judge do to prevent them?

Judges have tools to control and remedy any abuses in discovery and/or motions practice. For example, in addition to case management plans and local rules, Federal Rule of Civil Procedure 26 now provides that discovery must be proportional. Local programs may also permit a judge to appoint counsel for indigent or pro se litigants to assist in navigating the discovery process.

Questions for the Record for James R. Sweeney II

Senator Mazie K. Hirono

As I mentioned at the hearing, as part of my responsibility as a member of the Senate Judiciary Committee and to ensure the fitness of nominees for a lifetime appointment to the federal bench, 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.

**Questions for the Record from Senator Kamala D. Harris
Submitted January 17, 2018**

For the Nominations of:

Barry W. Ashe, to be United States District Judge for the Eastern District of Louisiana

Howard C. Nielson, Jr., to be United States District Judge for the District of Utah

James R. Sweeney II, to be United States District Judge for the Southern 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 I am confirmed to be a United States District Court Judge, I would fairly and faithfully apply all controlling laws, rules, guidelines and procedures, as construed by the Seventh Circuit and the Supreme Court, to arrive at a fair and just sentence. This process would include review of the Presentence Investigation Report and the advisory Sentencing Guidelines and any arguments from the litigants and/or victims relating thereto.

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

Please see the response to question 1.a. The controlling statutes, rules and guidelines have been well-developed by Congress and construed by the Supreme Court and the Seventh Circuit to guide a federal judge in determining what constitutes a fair and proportional sentence.

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

Judges should look to the relevant federal statutes, the Sentencing Guidelines, and the precedent construing same, to determine when a departure would be appropriate.

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?

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

This seems to be policy matter that is primarily the province of the legislative branch. If confirmed as a United States District Judge, I would fairly and faithfully apply all controlling laws, rules, guidelines and procedures, as construed by the Seventh Circuit and the Supreme Court, to arrive at a fair and just sentence.

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

This seems to be policy matter that is primarily the province of the legislative branch. If confirmed as a United States District Judge, I would fairly and faithfully apply all controlling laws, rules, guidelines and procedures, as construed by the Seventh Circuit and the Supreme Court, to arrive at a fair and just sentence.

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

A mandatory minimum sentence is a policy matter that is primarily the province of the legislative branch, and whether to charge a defendant under a certain statute that carries a mandatory minimum sentence is primarily the province of the executive branch. I am hesitant to identify any particular circumstances, because my role, if confirmed as a United States District Judge, would be to fairly and faithfully apply all controlling laws and precedents, including those that call for the imposition of a mandatory minimum sentence.

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

Mandatory minimums implicate policy matters that are primarily the province of the legislative branch, subject to judicial review for constitutionality. However, if confirmed as a United States District Judge and faced with the circumstances you pose, I would consider taking proactive efforts available to me under the controlling laws, rules, guidelines and procedures, as construed by the Seventh Circuit and the Supreme Court.

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

Please see response to question 1.d.iv.1.

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

Please see response to Question 1.d.iv.1.

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?

If confirmed as a United States District Judge, I would fairly and faithfully apply all controlling laws, rules, guidelines and procedures, as construed by the Seventh Circuit and the Supreme Court, to arrive at a fair and just sentence, including alternatives to incarceration if appropriate.

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?

Absolutely.

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.

My uninformed opinion is that disparities exist in our criminal justice system. As noted in the response to question 2.a, a judge has a role in ensuring that the system is fair and equitable. If confirmed as a United States District Judge, I would seek to protect the rights of all criminal defendants, regardless of race, to receive a fair trial and lawful sentence.

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.