

**Nomination of Peter D. Welte to the District of North Dakota  
Questions for the Record  
Submitted February 20, 2019**

**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 not 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 a concurring opinion? What about a dissent?**

A district court judge must apply all binding Supreme Court precedent in all decisions. If there is a concurring or dissenting opinion in a Supreme Court decision, the district court judge is required to apply the binding precedent of the Court in the decision of the district court.

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

I have not studied or considered that issue. I am aware that there is case law that holds that district courts are not bound by decisions on the same legal issue made by other district court judges. If confirmed, I would assiduously apply Supreme Court precedent to the particular facts of each case before me.

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

As an inferior court nominee, I believe it is inappropriate for me to opine on whether it is appropriate for the Supreme Court to overturn its own precedent.

2. In 2017, you wrote an article praising the Trump Administration for its plans to dismantle the EPA's "Waters of the United States" (WOTUS) rule, which aimed to protect sources of drinking water and wildlife habitats from pollution. You called the WOTUS rule "hostile" to farmers and an "onerous and curious" regulation. (*WOTUS injunction is unusual*, AGWEEK (Sep. 9, 2015); *WOTUS rollback is victory for agriculture*, AGWEEK (MAR. 6, 2017))

Your comments on the WOTUS rule echo similar comments you have made in opposition to environmental regulations adopted by and policies advanced by the Obama Administration. For instance, you wrote in a December 2016 piece that under President Obama, the "federal government has not been 'farmer friendly.'" (*Trump cabinet elections good news for N.D.?*, AGWEEK (Dec. 19, 2016)) And you claimed that the appointment of

then-Oklahoma Attorney General Scott Pruitt to head the EPA was “good news for farmers, and for North Dakota in general,” adding that Pruitt was “a leading advocate against the EPA’s activist agenda.” (*Id.*)

**a. Please specify how the EPA’s WOTUS rule was “hostile” to farmers.**

I wrote the above-referenced articles in my role as a private attorney. The Code of Conduct for United States Judges “is designed to provide guidance to judges and nominees for judicial office.” See Commentary to Canon 1. Canon 3(A)(6) dictates that a judge should not make public comment on the merits of a matter pending or impending in any court. The WOTUS rule is presently subject to pending litigation in federal courts. As such, it is inappropriate for me to answer this question.

**b. Please name any other federal environmental protections that you consider “onerous and curious.”**

Please see my response to Question 2.a.

**c. Please explain how the Obama Administration was not “farmer friendly.”**

Please see my response to Question 2.a.

**d. Please provide specific examples of “the EPA’s activist agenda.”**

Please see my response to Question 2.a.

**e. Please explain why you viewed Scott Pruitt as “good news for farmers.”**

Scott Pruitt had been publicly vocal in the political arena regarding reducing regulatory burdens upon farmers. I wrote the article in my role as a private attorney. My clients were often farmers. I was merely commenting that his public positions regarding reducing the regulatory burdens upon my clients was generally viewed by my clients as a positive development.

3. 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”?**

I believe that *Roe v. Wade* is a landmark decision of the United States Supreme Court, and is binding precedent. As a district judge, I would assiduously apply *Roe v. Wade*, and all binding Supreme Court precedent.

**b. Is it settled law?**

Yes. From the perspective of an inferior court, all binding Supreme Court precedent is settled law.

4. 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?**

Yes. From the perspective of an inferior court, all binding Supreme Court precedent is settled law.

5. 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 to an inferior court, it is inappropriate for me to offer personal opinions regarding Justice Stevens' dissent. If confirmed, I will assiduously apply *Heller*, and all other binding precedent of the Supreme Court.

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

The Code of Conduct for United States Judges "is designed to provide guidance to judges and nominees for judicial office." See Commentary to Canon 1. Canon 3(A)(6) dictates that a judge should not make public comment on the merits of a matter pending or impending in any court. Firearm regulation, and its constitutionality, is presently subject to pending litigation in the federal courts. As such, it is inappropriate for me to answer this question.

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

As a nominee to an inferior court, it is inappropriate for me to opine as to whether *Heller* departed from decades of Supreme Court precedent. If confirmed, I will assiduously apply *Heller*, and all other binding precedent of the Supreme Court.

6. 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?**

The Code of Conduct for United States Judges "is designed to provide guidance to judges and nominees for judicial office." See Commentary to Canon 1. Canon 3(A)(6) dictates that a judge should not make public comment on the merits of a matter pending or impending in any court. Litigation regarding the scope of *Citizens United* is presently subject to pending litigation in the federal courts. As such, it is inappropriate for me to answer this question.

**b. Do individuals have a First Amendment interest in not having their individual speech drowned out by wealthy corporations?**

Please see my answer to Question 6.a.

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

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 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?**

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”?**

I have none. If confirmed, I would apply binding Supreme Court precedent in any cases involving administrative law principles, or in any cases in which administrative law was the issue at hand.

8. You indicated on your Senate Questionnaire that you have been a member of the Federalist Society since 2017. The Federalist Society’s “About Us” webpage explains the purpose of the organization as follows: “Law 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.” It says 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. Could you please elaborate on the “form of orthodox liberal ideology which advocates a centralized and uniform society” that the Federalist Society claims dominates law schools?**

No. I am not familiar with that statement, nor do I adopt that as my personal opinion even though it is part of the Federalist Society’s “About Us” web page.

**b. How exactly does the Federalist Society seek to “reorder priorities within the legal system”?**

I am not familiar with that statement, and I do not adopt that as my own personal opinion, even though it is part of the Federalist Society’s “About Us” web page.

**c. What “traditional values” does the Federalist society seek to place a premium on?**

Please see my answer to Question 8.b.

**d. Have you had any contact with anyone at the Federalist Society about your possible nomination to any federal court?**

I do not know who is and who is not a member of the Federalist Society. I may have had conversations with persons who may have been members of the Federalist Society, but I have had no formal contacts with representatives of the Federalist Society.

**e. You indicated on your Questionnaire that you joined the Federalist Society in 2017, 20 years after you began practicing law. Why did you decide to join the Federalist Society in 2017?**

North Dakota did not have a chapter of the Federalist Society until 2017. I saw the Federal Society as an opportunity to meet lawyers from across the state, and as an opportunity to fulfill some my Continuing Legal Education obligations.

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

The goal of statutory analysis is to give effect to the legislative intent behind the statute's enactment. Under Eighth Circuit law, if a statute is ambiguous, a court may examine legislative history as a tool for determining legislative intent. *See Estate of Farnam v. Comm'r*, 583 F.3d 581, 584 (8th Cir. 2009).

10. 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.

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

On February 20, 2019, I was provided with these questions. I reviewed the questions, researched the answers where necessary, and drafted answers to the questions. Consistent with the nomination and confirmation process, I reviewed my answers with the Department of Justice. Where appropriate, I revised my answers and submitted my final answers to the DOJ.

**Nomination of Peter David Welte to the  
United States District Court for the District of North Dakota  
Questions for the Record  
Submitted February 20, 2019  
QUESTIONS FROM SENATOR WHITEHOUSE**

1. Why did you join the Federalist Society in 2017?

North Dakota did not have a chapter of the Federalist Society until 2017. I saw the Federal Society as an opportunity to meet lawyers from across the state, and as an opportunity to fulfill some of my Continuing Legal Education obligations.

2. Did anyone communicate to you that you would have a better chance at being nominated for a district court judgeship if you joined the Federalist Society?

No.

3. Do you think it is appropriate for judges to actively maintain membership in a group with a stated ideological agenda?

If confirmed, I would evaluate my continuing membership in any group under the Canons of Judicial Conduct and all other applicable laws.

4. If confirmed, do you plan to remain an active participant in the Federalist Society?

In my experience, the Federalist Society in North Dakota is an organization that provides Continuing Legal Education and networking opportunities. Because of those (sometimes rare) opportunities in my rural state, I plan to remain active in the Federalist Society. However, I will reexamine my membership in the future if circumstances require it.

5. Have you had contacts with representatives of the Federalist Society in preparation for your confirmation hearing?

I do not know who is and who is not a member of the Federalist Society. I may have had conversations with persons who may have been members of the Federalist Society, but I have had no formal contacts with representatives of the Federalist Society.

6. In your writings you have been hostile to EPA regulations and criticized the EPA's "activist agenda." How can you assure members of Congress and the public that you will be an impartial judge if environmental regulations are challenged in your court?

My writings criticize a very narrow subset of EPA regulations related to the Waters of

the United States Rule, particularly the portion of the Rule that applies to prairie potholes (a very important issue in North Dakota). My writings were not hostile to environmental regulations generally. If confirmed, I will treat EPA and all other litigants that come before me fairly and impartially as required by the Oath of Office, 28 U.S.C. § 453. My rulings will be dictated by the law, and not by my prior writings or personal beliefs.

7. What do you understand to be the holding of *Chevron U.S.A Inc. v. Natural Resources Defense Council, Inc.*? As a district judge, would you be bound by that decision? When, if ever, would it be appropriate for you to disregard that decision?

In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Supreme Court explained how courts should treat an agency's interpretation of an ambiguous statute that requires the agency to take some action. Courts should defer to an agency's interpretation of such statutes unless it is unreasonable. If confirmed, I will faithfully apply *Chevron*, and all other precedent.

8. Is it ever appropriate for judges to raise issues not directly presented by the litigants? When?

Yes, it is sometimes appropriate. For example, "federal courts are obligated to raise the issue of subject-matter jurisdiction sua sponte." See *Crawford v. F. Hoffman-La Roche Ltd.*, 267 F.3d 760, 764 n.2 (8th Cir. 2001).

9. If confirmed, what weight would you give to Supreme Court dicta in reaching your decisions?

I would follow the approach of the Eighth Circuit. In the Eighth Circuit, "courts should afford deference and respect to Supreme Court dicta, particularly where . . . it is consistent with longstanding Supreme Court precedent." *In re Pre-Filled Propane Tank Antitrust Litig.*, 860 F.3d 1059, 1064 (8th Cir. 2017).

10. 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. I agree with the Chief Justice that a judge should follow the law, and not let personal beliefs dictate the outcome of a case.

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

It is a good for a judge to understand the consequences of a particular ruling, but the ruling's outcome should be dictated by precedent.

- 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?

When Rule 56 is properly applied a judge is not making a subjective determination. Instead, a judge must make an objective determination of whether there are genuine issues of material fact based on the record materials the parties put before the court. Subjective determinations are reserved for the trier of fact during trial.

11. 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?

I agree with Justice Sotomayor that a judge benefits from having a sense of empathy, but a judge's decisions should be based on the law.

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

A judge should not let his or her personal life experiences (good or bad) affect the outcome of the judicial decision-making process.

- c. Do you believe you can empathize with “a young teenage mom,” or understand what it is like to be “poor or African-American or gay or disabled or old”? If so, which life experiences lead you to that sense of empathy? Will you bring those life experiences to bear in exercising your judicial role?

I believe I can empathize with persons in circumstances different from my own, but I also recognize that I will never be able to fully understand what it is like to walk in their shoes. I have experience as both a criminal defense attorney and as a prosecutor. In those roles, I have empathized with those accused of crimes and with victims of crime. I will bring those experiences with me to the bench.

12. 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.

**Questions for the Record for Peter David Welte  
From Senator Mazie K. Hirono**

1. As part of my responsibility as a member of the Senate Judiciary Committee and to ensure the fitness of nominees, I am asking nominees to answer the following two questions:

**a. Since you became a legal adult, have you ever made unwanted requests for sexual favors, or committed any verbal or physical harassment or assault of a sexual nature?**

No.

**b. Have you ever faced discipline, or entered into a settlement related to this kind of conduct?**

No.

2. You have written numerous statements criticizing the Environmental Protection Agency's (EPA) regulations under the Obama administration and praising the EPA's efforts under the Trump administration. For example, you described Donald Trump's Executive Order to roll back the Waters of the U.S. (WOTUS) Rule as a "a profound victory for farmers" that will "begin[] what surely will be a dialing back of federal authority and federal jurisdiction."

**a. EPA's website notes that "[t]he mission of EPA is to protect human health and the environment." How is your statement – that the "dialing back" of EPA authority is a "profound victory for farmers" – consistent with the role of the Environmental Protection Agency?**

My statements were directed at certain provisions of the WOTUS Rule. Namely, the WOTUS rule's proposal for a categorical bright-line approach for prairie potholes. A more flexible case-by-case approach to prairie potholes still would have allowed EPA to fulfill its mission, while also being fair to farmers.

**b. If confirmed, will you recuse yourself from specific EPA regulations that you have directly criticized or deregulatory efforts you have praised?**

If confirmed, I would evaluate any circumstances potentially calling for recusal with reference to 28 U.S.C. § 455, Canon 3 of the Code of Conduct for United States Judges, and any and all other applicable laws, rules, and practices governing such circumstances.

**Nomination of Peter D. Welte**  
**United States District Court for the District of North Dakota**  
**Questions for the Record**  
**Submitted February 20, 2019**

1. In 2014, a number of Grand Forks County employees requested County Commissioners to include marriage equality in the county policy manual.<sup>1</sup> According to an article, you “assured commissioners they were within their rights to define marriage however they wanted to.”<sup>2</sup> Ultimately, the employees’ request to add marriage equality to the county policy manual was tabled.<sup>3</sup>

a. In providing advice and counsel to the County Commissioners, did you ever provide your opinion on same-sex marriage?

No. Other than the legal advice rendered, as mentioned in the above-referenced article, to the best of my recollection I did not provide any opinion on same-sex marriage.

b. Do you believe it is wrong to fire someone because of their sexual orientation or gender identity?

I believe that the Code of Conduct for United States Judges prohibits me, as a federal judicial nominee, from expressing a view on matters that might come before me were I to be confirmed. The subject matter you reference falls within that prohibition.

2. Do you consider yourself a textualist? If so, why?

No. I do not adhere to any particular means of constitutional or statutory interpretation.

a. What role do you believe legislative intent and legislative history should play in statutory interpretation?

The goal of statutory analysis is to give effect to the legislative intent behind the statute’s enactment. Under Eighth Circuit law, if a statute is ambiguous, a court may examine legislative history as a tool for determining legislative intent. *See Estate of Farnam v. Comm’r*, 583 F.3d 581, 584 (8th Cir. 2009).

3. Do you consider yourself an originalist? If so, why?

No. I do not adhere to any particular means of constitutional or statutory interpretation.

4. When campaigning for Grand Forks County State’s Attorney in 2002, you expressed interest in expanding prosecution for drug-related offenses, specifically for methamphetamine cases. However, you also expressed interest in drug diversion programs.<sup>4</sup>

a. Please explain your rationale for wanting to expand the prosecution of individuals of

drug-related offenses?

In the early 2000's, methamphetamine manufacturing and methamphetamine trafficking had dramatically increased in rural North Dakota. Effective prosecution of methamphetamine-related crimes requires communication between law enforcement agencies—federal, state, and local—and also dedication of personnel within the prosecutor's office. My rationale was that increasing communication and devoting resources to the methamphetamine problem would produce positive results in the prosecution of these crimes.

- b. Do you believe your prosecutorial efforts helped decrease drug use in Grand Forks County?
  - i. What statistics can you cite to support your conclusion?

I do believe my efforts did enhance law enforcement results in drug related criminal prosecutions.

It is, I believe, nearly impossible to statistically quantify whether drug use decreased in Grand Forks County during my tenure as Grand Forks County State's Attorney. The North Dakota Attorney General does keep certain crime statistics, and those statistics do indicate an increase in drug crime arrests in Grand Forks County between 2002—the year I was first elected—and 2014—my last full year in office. In 2002, the Grand Forks Police Department and the Grand Forks County Sheriff's Department had a combined 90 arrests for drug abuse violations. In 2014 those same two law enforcement agencies had a combined 163 arrests.

- c. What role do you think drug diversion should play in the prosecution of drug-related offenses?

I believe that drug diversion programs can be effective in providing treatment to defendants who are willing to invest in the treatment of their addiction.

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<sup>1</sup> Anne Burlison, *Grand Forks County defers decision on same-sex marriage*, GRAND FORKS HERALD (Jul. 18, 2014) (SJQ Attachment 12(c) at p. 410).

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

<sup>3</sup> *Id.*

<sup>4</sup> Xiao Zhang, *Welte ready for the job new GF County State's Attorney Wants to Improve Communications*, GRAND FORKS HERALD (Nov. 14, 2002) (SJQ Attachment 12(e) at 1378).

5. 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.<sup>5</sup> Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.<sup>6</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>7</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>8</sup>

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

I have not studied the issue, and therefore I cannot comment.

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

Please see my answer to Question 5(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.

No. I am aware of the issue of implicit racial bias, but I have not studied the issue.

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.<sup>9</sup> Why do you think that is the case?

I have not studied the issue and therefore do not have sufficient knowledge or expertise to offer an informed view on the question.

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.<sup>10</sup> Why do you think that is the case?

I have not studied the issue and therefore do not have sufficient knowledge or expertise to offer an informed view on the question.

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?

I have not studied the issue and therefore do not have sufficient knowledge or expertise to offer an informed view on the question.

6. 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.<sup>11</sup> In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.<sup>12</sup>

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<sup>5</sup> 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>.

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

<sup>7</sup> 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>.

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

<sup>9</sup> 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](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114_Demographics.pdf).

<sup>10</sup> Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1323 (2014)

<sup>11</sup> 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>.

<sup>12</sup> *Id.*

- 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 the issue and therefore do not have sufficient knowledge or expertise to offer an informed view on the question.

- 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 studied the issue and therefore do not have sufficient knowledge or expertise to offer an informed view on the question.

7. 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.

8. Do you believe that *Brown v. Board of Education*<sup>13</sup> 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 United States Supreme Court precedent binding on all lower courts. If confirmed, I will faithfully apply *Brown* and all other such precedent.

9. Do you believe that *Plessy v. Ferguson*<sup>14</sup> was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

As the Supreme Court recognized in *Brown v. Board of Education*, 347 U.S. 483 (1954), *Plessy v. Ferguson* was not correctly decided and is no longer precedent.

10. 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.

11. 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."<sup>15</sup> Do you believe that immigrants, regardless of status, are entitled to due process and fair adjudication of their claims?

I believe that the Code of Conduct for United States Judges prohibits me, as a federal judicial nominee, from expressing a view on matters that might come before me were I to be confirmed. The subject matter you reference falls within that prohibition.

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<sup>13</sup> 347 U.S. 483 (1954).

<sup>14</sup> 163 U.S. 537 (1896).

<sup>15</sup> 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 February 20, 2018**  
**For the Nomination of**  
**Peter Welte, to the U.S. District Court for the District of North Dakota**

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?**

I would study Federal Rule of Criminal Procedure 32 and 18 U.S.C. § 3553. I would direct that the defendant report to the probation officer for a presentence investigation and the preparation of a presentence report. I would make certain that the defendant and his/her attorney have an opportunity to object to the presentence report. I would review the presentence report, any objections to the presentence report, and the recommendations of the probation office with respect to a sentence. I would permit both defense counsel and the Government to submit briefs or other submissions with respect to sentencing and to address the court at sentencing, and the defendant would also be given an opportunity to address the court. I would provide any victims the opportunity to address the court. I may also permit the parties to submit evidence at sentencing. I would then study the materials presented, take into account the applicable Sentencing Guidelines, and impose a sentence sufficient but not greater than necessary to comply with the purposes of sentencing as set forth in 18 U.S.C. § 3553(a). I may also review reports, information and statistics provided by the United States Sentencing Commission.

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

I would apply the factors set forth by statute, guidelines, and case law, including nature and circumstances of the offense; the history and characteristics of the defendant; and the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, to provide just punishment for the offense, to afford adequate deterrence to criminal conduct, to protect the public from further crimes of the defendant, and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

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

Under Supreme Court precedent, the Sentencing Guidelines are advisory, and not binding on trial judges. *See, e.g., United States v. Booker*, 543 U.S. 220, 246 (2005). Part K of Section 5 of the Sentencing Guidelines lists the specific

circumstances under which a trial judge may depart from the advisory Guidelines range. Additionally, a judge may, consistent with the factors set out in 18 U.S.C. § 3553, adjust either up or down from the advisory Guidelines range. If confirmed, I would carefully consider all such authorities and factors, as well as the positions of the parties, before deciding whether a departure was 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.<sup>1</sup>

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

I have not studied the issue and therefore cannot knowledgeably offer an opinion on the statement.

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

Please see 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 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?**

If confirmed, I would be obligated to follow the law, as enacted by Congress.

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

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

<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>

Charging decisions are vested in the Executive Branch.

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

This issue is not one I have studied or formed an opinion on. The clemency power is generally entrusted to the Executive branch.

- 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, to the extent such an alternative is consistent with the 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, and does so by faithfully and impartially apply the law regardless of his or her personal beliefs.

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

I have not studied the issue and therefore cannot provide a meaningful response.

3. If confirmed as a federal judge, you will be in a position to hire staff and law clerks.

- a. **Do you believe it is important to have a diverse staff and law clerks?**

Yes.

- b. **Would you commit to executing a plan to ensure that qualified minorities and women are given serious consideration for positions of power and/or supervisory positions?**

I will ensure applicants are treated fairly and equitably in the hiring process, and without any discrimination on the basis of race, sex, sexual orientation, or religion.