

**Questions for the Record**  
**From Senator Mazie K. Hirono**  
**For Diane Gujarati, Eric Komitee, John L. Sinatra, Jr., Rachel P., Kovner, Lewis J. Liman,**  
**Mary Kay Vyskocil and Gary Brown**

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?**

Response: No.

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

Response: No.

2. In these hearings, when a Senator asks about a nominee's personal views on a topic, about their involvement in certain organizations or their decisions to advocate for certain points of view, they tell us that those parts of their records don't matter, that as judges they will simply "follow the law." But, cases are so infrequently decided by the direct application of legal precedent that at some point, as one nominee told us, "judging kicks in."

**Do you acknowledge that there will be times on the bench, that a judge does bring personal experiences and views to bear on their decisions?**

Response: I do not believe that the personal views that judges have on particular topics should determine the outcome of matters before those judges. The applicable law and applicable facts should drive decision-making. A judge's personal – and professional – experiences, however, can be useful to the extent those experiences contribute to the judge's ability to understand the facts and arguments presented to her.

3. A recent nominee before the Committee spoke about the importance of training to help judges identify their implicit biases.

- a. Would you agree that training on implicit bias is important for judges to have?**

Response: I believe that it is important for judges to treat people equally and fairly and to be vigilant about ensuring that improper bias – of any kind – does not infect the judges' work. I think that training that assists in that goal could be very worthwhile.

- b. Have you ever taken such training?**

Response: I have not taken formal training on implicit bias.

**c. If confirmed, do you commit to taking training on implicit bias?**

Response: I am interested in this topic and am willing to take training on implicit bias.

**Nomination of Diane Gujarati**  
**United States District Court for the Eastern District of New York**  
**Questions for the Record**  
**Submitted August 7, 2018**

**QUESTIONS FROM SENATOR BOOKER**

1. 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>1</sup> Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.<sup>2</sup> These shocking statistics are reflected in our nation's prisons and jails. Blacks are five times more likely than whites to be incarcerated in state prisons.<sup>3</sup> In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.<sup>4</sup>

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

Response: I have not researched or studied the issue of implicit racial bias in our criminal justice system and therefore cannot knowledgeably offer an opinion on the subject. I do believe, however, that racial bias continues to exist in our country and should have no place in our criminal justice system. If confirmed as a district judge, I will uphold my oath to "administer justice without respect to persons, and do equal right to the poor and to the rich" and to "faithfully and impartially discharge and perform" my duties. *See* 28 U.S.C. § 453.

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

Response: The statistics you cite suggest so. I have not, however, researched or studied this issue and therefore cannot knowledgeably offer an opinion on the subject.

- 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.

Response: As noted above in my response to 1(a), I have not studied the issue of implicit racial bias in our criminal justice system.

2. 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>5</sup> In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.<sup>6</sup>

- 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.

Response: I have not studied whether there is a direct link between increases in a state's incarcerated population and decreased crime rates in that state (and am not familiar with the fact sheet you cite) and therefore cannot knowledgeably offer an opinion on the subject.

- 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.

Response: I have not studied whether there is a direct link between decreases in a state's incarcerated population and decreased crime rates in that state and therefore cannot knowledgeably offer an opinion on the subject.

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<sup>1</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>2</sup> *Id.*

<sup>3</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>4</sup> *Id.*

<sup>5</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>6</sup> *Id.*

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

Response: Yes.

4. Do you believe that *Brown v. Board of Education*<sup>7</sup> was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

Response: I believe that the Code of Conduct for United States Judges prohibits me, as a federal judicial nominee, from expressing my personal view as to whether a particular Supreme Court case that has not been overruled was correctly decided. If I am confirmed, I will faithfully apply all applicable controlling precedent of the Supreme Court (and of the United States Court of Appeals for the Second Circuit), including a seminal case like *Brown v. Board of Education*.

5. Do you believe that *Plessy v. Ferguson*<sup>8</sup> was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

Response: As the Supreme Court recognized (*see Brown v. Board of Education*), *Plessy v. Ferguson* was not correctly decided.

6. 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?

Response: I received input – but not instructions – on this topic from a variety of people, including people referenced in your question. My statements at the August 1, 2018 hearing and my responses to your written questions are my own.

7. President Trump stated recently 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>9</sup> Do you believe that immigrants, regardless of status, are entitled to due process and fair adjudication of their claims?

Response: 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>7</sup> 347 U.S. 483 (1954).

<sup>8</sup> 163 U.S. 537 (1896).

<sup>9</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 August 8, 2018  
For the Nominations of**

Gary Brown, to the U.S. District Court for the Eastern District of New York

Diane Gujarati, to the U.S. District Court for the Eastern District of New York

Eric R. Komitee, to the U.S. District Court for the Eastern District of New York

Rachel P. Kovner, to the U.S. District Court for the Eastern District of New York

Lewis J. Liman, to the U.S. District Court for the Southern District of New York

John L. Sinatra, Jr., to the U.S. District Court for the Western District of New York

Mary Kay Vyskocil, to the U.S. District Court for the Southern District of New York

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?**

Response: If confirmed as a district judge, in sentencing a defendant, I would follow the requirements of the relevant statutes, Federal Rules of Criminal Procedure, and controlling precedent of the Supreme Court and the United States Court of Appeals for the Second Circuit. In so doing, I would carefully consider the Presentence Investigation Report prepared by the United States Probation Office; the written submissions and oral presentations of the prosecution and the defense (including of the defendant should the defendant choose to make any statements); and victim-related statements and information, as appropriate. I would consider each of the factors set forth in 18 U.S.C. § 3553(a) (including the applicable range under the United States Sentencing Guidelines) and would impose a sentence that was “sufficient, but not greater than necessary” to comply with the purposes set forth in 18 U.S.C. § 3553(a)(2). I would approach sentencing with diligence and thoughtfulness, recognizing the importance of the task.

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

Response: Please see my response to Question 1.a.

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

Response: The United States Sentencing Guidelines set forth various grounds for a “departure” from the otherwise applicable (advisory) Sentencing Guidelines range. I would consult the relevant provisions of the Sentencing Guidelines and would follow any controlling precedent of the Supreme Court and the United States Court of Appeals for the Second Circuit with respect to determining whether a departure under the Sentencing Guidelines was appropriate. In addition, I would consider whether any factors set forth in 18 U.S.C. § 3553(a) justify a “variance” from the applicable (advisory) Sentencing Guidelines range and would follow any controlling precedent on that issue as well.

**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?**

Response: As a federal judicial nominee, it would not be appropriate for me to comment on whether I believe that mandatory minimum sentences are more likely to deter certain types of crime than discretionary or indeterminate sentencing. If confirmed as a district judge, I would be bound to apply the applicable laws as enacted by Congress.

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

Response: As a federal judicial nominee, it would not be appropriate for me to comment on whether I believe that mandatory minimum sentences have provided for a more equitable criminal justice system. If confirmed as a district judge, I would be bound to apply the applicable laws as enacted by Congress.

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

Response: As a federal judicial nominee, it would not be appropriate for me to offer my opinion on whether a mandatory minimum sentence was unjustly applied to a defendant.

**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**

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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>

**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?**

Response: The power to legislate mandatory minimum sentences lies with Congress and the power to charge individuals with crimes carrying mandatory minimum sentences lies with the Executive Branch. Judges should take care not to encroach on matters that fall within the constitutional powers of Congress and the Executive Branch. If confirmed as a district judge, I would evaluate each case and would consider taking any steps available to me consistent with the law and my ethical obligations.

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

Response: Please see my response to 1.d.iv.1.

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

Response: Please see my response to 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?**

Response: If confirmed as a district judge, I would consider whether a sentence other than imprisonment is appropriate and warranted by the facts of the case and permitted by 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?**

Response: Yes. Federal judges are duty bound to “administer justice without respect to persons, and do equal right to the poor and to the rich” and to “faithfully and impartially discharge and perform” their duties. *See* 28 U.S.C. § 453.

- 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.**

Response: I have not researched or studied the issue of racial disparities in our criminal justice system and therefore cannot knowledgeably offer an opinion on the subject. I do believe, however, that racial bias continues to exist in our country and should have no place in our criminal justice system. If confirmed as a district judge, I will uphold my oath to “administer justice without respect to persons, and do equal right to the poor and to the rich” and to “faithfully and impartially discharge and perform” my duties. *See* 28 U.S.C. § 453.

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?**

Response: 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?**

Response: If confirmed as a district judge, I intend to make hiring decisions based on the qualifications of the applicants and to not improperly discriminate against anyone. Considering qualified applicants will necessarily include giving serious consideration to qualified minorities and women. In addition, I regularly encourage qualified minorities and women to pursue positions in public service and I expect to continue to do so in the future.

**Senate Judiciary Committee – Questions for the Record  
August 1, 2018**

Hearing entitled: “Nominations”

**Panel I**

**Questions for Richard Sullivan, to be United States Circuit Judge for the Second Circuit**

1. Can you name something that is constitutional that you think should be unconstitutional?
2. Why do you think it is okay for you to give your opinion about the death penalty?
  - a. If a death penalty case comes before you and you’ve already announced that you’re against the death penalty, doesn’t that violate your rule that you shouldn’t comment about constitutionality and unconstitutionality?
3. What does the ninth amendment mean?
  - a. What are those other rights in your opinion?
  - b. What’s a penumbra?
  - c. Are there other penumbras in the Constitution?
  - d. Can you see a penumbra?
  - e. Well if you can’t see it, how do you know it’s there?
  - f. What other penumbras are there in the Constitution?
4. A guy is walking down the street in a high crime area. We know statistically that it’s a high crime area, it’s not a subjective thing. It’s the middle of August and he’s wearing a really heavy coat and he’s got a big satchel with him. Every now and then he looks into a car.
  - a. Can the police stop and talk to him?
  - b. Is there reasonable suspicion?

**Panel II**

**Questions for Diane Gujarati, to be United States District Judge for the Eastern District of New York, and**

**Questions for Eric Ross Komitee, to be United States District Judge for the Eastern District of New York, and**

**Questions for John L. Sinatra, Jr., to be United States District Judge for the Western District of New York, and**

**Questions for Rachel P. Kovner, to be United States District Judge for the Eastern District of New York, and**

**Questions for Lewis J. Liman, to be United States District Judge for the Southern District of New York, and**

**Questions for Mary Kay Vyskocil, to be United States District Judge for the Southern District of New York:**

1. The following are yes or no answers.

- a. Do you believe that retribution is a legitimate purpose of our penal system?

Response: Yes.

18 U.S.C. § 3553(a)(2)(A) provides that a court, in determining the particular sentence to be imposed, shall consider the need for the sentence imposed “to reflect the seriousness of the offense, to promote respect for the law, and *to provide just punishment for the offense*” (emphasis added). However, “just punishment” is distinct from revenge.

- b. Do you believe that adult incest is protected by the Bill of Rights?

Response: No.

Adult incest has not been recognized as protected by the Bill of Rights under existing Supreme Court or Second Circuit precedent.

- c. If *Brown v Board of Education* were overruled and *Plessy v Ferguson* were reinstated, would you resign?

Response: No.

As I indicated at the August 1, 2018 hearing, there are many factors that I would want to consider before making a decision about whether to resign (if confirmed). I cannot in the context of an extremely unlikely (albeit troubling) hypothetical categorically state that I would resign.

- d. Do you believe that the US Constitution should be interpreted in the context of an ever-changing world?

Response: No.

As I noted during the August 1, 2018 hearing, the Constitution should be interpreted as written. Judges are, however, properly called upon to apply constitutional provisions to the circumstances of an ever-changing world. For example, as I noted during the hearing, courts are called upon to apply constitutional provisions in the context of new technology. As a district judge, I would faithfully apply controlling precedent on issues of constitutional interpretation and the application of constitutional provisions to current circumstances.

- e. Do you believe that the founder's original intent is most important thing in interpreting the Bill of Rights?

Response: No.

Interpretation should be based on the text. As a district judge, I would further be bound by any requirements imposed by the Supreme Court or the United States Court of Appeals for the Second Circuit.

- f. Do you believe that the founder's original intent in drafting the Bill of Rights should determine today how the constitution is interpreted?

Response: No.

Interpretation should be based on the text. As a district judge, I would further be bound by any requirements imposed by the Supreme Court or the United States Court of Appeals for the Second Circuit, including precedent interpreting Constitutional text based on original public meaning.

In answering these questions, I have provided yes/no answers as instructed. I have also provided limited additional information, consistent with the invitation of Senator Coons at the August 1, 2018 hearing.