

**Nomination of Karin Immergut to the United States District Court for the District of  
Oregon  
Questions for the Record  
October 31, 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 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 an opinion?**

District court judges are bound to follow Supreme Court precedent. Although I have not studied this issue, my personal opinion is that a district court judge should generally not question Supreme Court precedent in an opinion.

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

Because a district court is bound by Supreme Court precedent, as a nominee for the district court, I believe it would be inappropriate for me to express an opinion as to when it would be appropriate for the Supreme Court to overturn its own precedent.

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”?**

I am not familiar with the concepts of “super-stare decisis” or “super-precedent” but agree that *Roe v. Wade* is binding and long-standing Supreme Court precedent, which I will faithfully follow as I am required to do if confirmed to the district court.

**b. Is it settled law?**

Yes.

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?**

Yes.

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?**

If confirmed, I will faithfully follow all Supreme Court and Ninth Circuit precedent. I believe it would be improper for me to comment on the majority or dissent in any Supreme Court case, including *District of Columbia v. Heller*, as it is a violation of the Code of Conduct for United States Judges "to make public comment on the merits of a matter pending or impending in any court." See Canon 3(A)(6).

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

The Supreme Court in *Heller* expressly stated that "the right secured by the Second Amendment is 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." 554 U.S. 570, 626–27 (2008). As stated in response to Question 4(a), it would be improper for me to comment on a matter that could be the subject of pending or impending litigation.

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

I believe that the issue of whether *Heller* departs from longstanding precedent is the subject of debate by legal scholars, commentators, and the majority and dissenting opinions in the case itself. For the reasons stated in my answer to Question 4(a), I do not believe that it would be appropriate for me to comment on this subject.

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?**

Respectfully, I cannot comment on the merits of Supreme Court precedent. If confirmed, I am bound by Supreme Court precedent and Ninth Circuit precedent, and will follow those, regardless of any personal opinions I might have on the subject. *See* Canon 3(A)(6).

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

Please see answer to Question 5a above. Further, this question seems to call for me to publicly state a political opinion, which also would violate the Code of Conduct for United States Judges. *See* Canon 5.

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

This question seeks an opinion on an issue that could come before me in an impending case, or may be a matter in litigation elsewhere. Accordingly, it would be improper for me to answer this question. Please see my answer to Question 5(a).

6. In notes for a 2004 speech about the Patriot Act—which you provided to the Committee—you wrote that “no recent law has inspired so many firm opinions – pro and con (mostly con) based on misinformation.” In the internet age, Americans are rightfully concerned about their privacy. Earlier this year, I introduced an amendment to the reauthorization of Section 702 of the *Foreign Intelligence Surveillance Act* – along with Senators Mike Lee, Kamala Harris, and Patrick Leahy – that would require a warrant in order to access the contents of Americans' phone calls and emails that are incidentally collected by the program.

**Do you believe that the government may access the contents of Americans' phone calls and emails without a warrant under the Fourth Amendment?**

As a judicial nominee, it would be inappropriate for me to comment on legal matters that might come before me if I am confirmed.

7. The Office of Independent Counsel Ken Starr has been described as “notoriously leaky” because of how often its attorneys spoke to the press about the investigations into President Clinton and First Lady Hillary Clinton. (Josh Gerstein, *'Brett was involved'*:

*Inside Supreme Court nominee's work for Bill Clinton probe*, Politico (July 22, 2018)). *The Oregonian* reported that "although the president's lawyers complained that Starr's office leaked information about the investigation, Immergut said she doesn't know where it came from, just that it wasn't from her." (David R. Anderson, *Yes, She Saw 'The Dress,' But, No, Don't Ask Details*, *The Oregonian* (Nov. 10, 1998)).

- a. In what circumstances were attorneys in the Office of Independent Counsel Ken Starr permitted to provide non-public information about the investigation with the press, outside organizations, or other individuals? Please provide specific examples.**

I was a line prosecutor in Office of Independent Counsel investigation and I never spoke to the press, outside organizations, or other individuals about non-public information related to the investigation. I do not know whether anyone else provided such information, or under what circumstances anyone else might have been permitted to do so.

- b. Are you aware of any instances of known or suspected unauthorized disclosures of the Independent Counsel's investigation to the press, outside organizations, or other individuals? If so, provide details of each of those instances.**

I am not aware of any instances of known or suspected unauthorized disclosures of the Independent Counsel's investigation to the press, outside organizations, or other individuals.

8. In Ken Starr's 2018 book, he described the creation of the Starr Report, noting: "Why all this salacious detail? The female prosecutors, Mary Anne Wirth and Karin Immergut, who had worked most closely with Monica, insisted we had to include these explicit details." (Ken Starr, *Contempt: A Memoir of the Clinton Investigation* at p. 228 (2018)).

- a. Please describe your role in drafting the Starr Report.**

My best recollection is that I had no role in drafting the Independent Counsel's Referral to Congress other than to check the accuracy of some the facts in the referral related to Ms. Lewinsky. I was not an author of the report.

- b. Did you argue for including explicit details in the Report? Why?**

I do not recall that I personally "insisted" on including the explicit detail about the President's sexual contacts with Ms. Lewinsky in the referral. I do recall there were group discussions about whether to do so, and ultimately it was Ken Starr's decision to make. I did feel it was important during the course of the investigation to ask Ms. Lewinsky very detailed information about those contacts because the perjury allegation was dependent on the details of the President's testimony.

9. 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?**

I do not recall being asked about my views about administrative law.

- 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 no particular views on administrative law other than that I will faithfully apply all precedent on this subject from the Supreme Court and Ninth Circuit.

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

I have never had any discussions with anyone about loyalty to the President.

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

I received these questions by email from the Office of Legal Policy on October 31, 2018. I reviewed the questions, personally drafted answers, and then emailed draft answers back to the Office of Legal Policy with a request for their feedback. I then finalized my answers and submitted them to the Office of Legal Policy for transmittal to the Committee.

**Nomination of Karin Johanna Immergut to be  
United States District Judge for the District of Oregon  
Questions for the Record  
October 31, 2018**

**QUESTIONS FROM SENATOR BLUMENTHAL**

In 1998, you joined Independent Counsel Ken Starr's investigation of President Clinton. In an interview you told The Oregonian you disagreed with people who claimed the investigation was simply about the president's private life. You said the investigation was about lying and obstruction. And even though the Senate voted against removing President Clinton from office, you said you trusted the political process.

**1. Do you still believe that it is important for presidents to be held accountable for obstruction of justice?**

Yes.

The Starr investigation was accused of leaking grand jury information to the press. You have said that you did not leak the information.

**1. Do you know who on the investigative team was leaking information to the press? If so, who was it?**

I have no knowledge of anyone from the Office of Independent Counsel leaking grand jury information to the press. I personally did not leak any such information to the press.

**2. Would the leaks of grand jury information disqualify such an individual from serving in the federal judiciary?**

The determination of what factors would disqualify a judicial nominee from serving in the federal judiciary is within the judgment of the President and the Senate, and the determination of what factors would disqualify a sitting judge from continuing to serve is within the judgment of Congress. As a judicial nominee, it would not be appropriate for me to opine on how the political branches should exercise that judgment.

In 2007, while serving as a U.S. Attorney for Oregon, you addressed the Bush Administration's decision to fire several U.S. Attorney's in a speech. You said:

I appreciate that we can be fired for any reason or no reason. In my view, what is particularly troubling about the media frenzy surrounding the events is what may be a developing perception that the work we do at the department of justice is politically driven. Again in my view, based on my own experience both in Oregon and as an AUSA in Los Angeles, nothing could be farther from the truth. The reputation and integrity of the Department and our system of justice requires that we make our prosecution decisions without any political influence.

The apolitical conduct of our justice system is part of what secures the rule of law in America. Unfortunately, the separation of politics from the administration of justice is under attack in this moment. The President has taken to criticizing and delegitimizing judges and judicial decisions.

**1. Do you think it was appropriate for President Trump to suggest that Justice Ginsburg’s “mind is shot” and demand for her resignation?**

As a judicial nominee, Canon 5 of the Code of Conduct for United States Judges prohibits me from engaging in political activity, such as commenting on the appropriateness of the President’s statements.

**2. Do you agree with President Trump that Justice Ginsburg is an incompetent judge?**

Please see my answer to Question 1.

**3. Do you think it was appropriate for President Trump to suggest that Judge Gonzalo Curiel could not be impartial because of the judge’s “Mexican heritage?”**

Please see my answer to Question 1.

**4. Do you think it was appropriate for President Trump to suggest he is getting “railroaded by the legal system” and that judges “should be ashamed?”**

Please see my answer to Question 1.

**5. Do you think it was appropriate for President Trump to label Judge James Robart a “so-called judge” after he ruled to temporarily block enforcement of the President’s travel ban?**

Please see my answer to Question 1.

I am concerned about public faith in the judiciary’s impartiality and integrity. Please address the following question in light of our nation’s constitution, laws, and code of conduct for the judiciary.

**1. Do you believe that a sitting judge or justice who is shown to have committed perjury or substantially misled the Senate Judiciary Committee about the truth of a matter should continue to serve on the bench?**

The determination of what factors disqualify a sitting judge or justice from continuing to serve in the federal judiciary is within the exclusive judgment of Congress. That is a political determination about which I cannot comment.

There have been recent reports that the Heritage Foundation was planning to run a secret clerkship training program. I am generally concerned about growing attempts by outside groups to buy influence in the judiciary.

- 1. Other than your law school, please list all people and organizations that provided you with any training relating to your service as a federal law clerk. Please include a description of the content of the training that was provided.**

I did not serve as a federal law clerk.

- 2. Do you believe it is appropriate for sitting judges to participate in trainings designed to help law clerks with a particular ideological perspective advance their beliefs within the judiciary?**

I am not familiar with such trainings. I believe that a judge must be independent and open minded and, if confirmed, I intend to hire law clerks who understand the importance of these concepts.

- 3. Please list all meetings, conferences or events affiliated with the Federalist Society in which you have participated.**

None.

The Fourteenth Amendment states: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States." This has long been understood to mean that children of undocumented immigrants born in the United States are United States citizens. Given that this is a settled issue of constitutional law, previous nominees have been willing to speak on this issue.

- 1. Do either *United States v. Wong Kim Ark* and *Plyler v. Doe* help answer the question of whether the children of undocumented immigrants are entitled to birthright citizenship? If so, please explain how.**

I have not come across this issue in my 30 years as a lawyer and state court judge. Furthermore, it is both a highly charged political issue as well as an issue that could arise before me as a federal judge. Both as a judicial nominee, as well as a current state court judge, the Code of Conduct for United States Judges and the Oregon Code of Conduct prohibit judges from commenting on pending and impending matters in any court. Furthermore, these rules do not allow judges to comment publicly about political issues, as such comments would raise questions about the judge's bias, independence, and impartiality.

- 2. *Wong Kim Ark* is a precedent that is over 100 years old. *Plyler v. Doe* is over 35 years old. How would you apply the principles of stare decisis to these cases?**

I intend to faithfully apply Supreme Court precedent and Ninth Circuit precedent.



**3. Do you agree that the Fourteenth Amendment guarantees birthright citizenship to children of undocumented immigrants who are born in the United States?**

I have not studied this issue, and it concerns a matter that could come before me as a judge. Accordingly, I cannot comment on how I might adjudicate the issue because that would jeopardize my impartiality as a judge.

Questions for the Record for Karin J. Immergut  
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.

**Nomination of Karin J. Immergut  
United States District Court for the District of  
Oregon Questions for the Record  
Submitted October 31, 2018**

**QUESTIONS FROM SENATOR BOOKER**

1. As you no doubt noticed, one side of the dais at your October 24 hearing before the Senate Judiciary Committee was empty, and no Ranking Member was present. The Senate was on a month-long recess, and this hearing was held on that date over the objection of every member of the minority on this Committee.

- a. Do you think it was appropriate for the Committee to hold a nominations hearing while the Senate was in recess before an election, *and* without the minority's consent—which the Committee has never done before?

As a judicial nominee, I do not believe that it is appropriate for me to comment on the Senate's hearing schedule or related procedures. The decision whether and when to hold hearings lies uniquely with the Senate. I was notified that my hearing had been scheduled for a particular date and time, and I appeared as requested.

- b. Do you think this unprecedented hearing was consistent with the Senate's constitutional duty under Article II, Section 2 to provide advice and consent on the President's nominees?

Please see answer to Question 1(a).

- c. At the October 24 hearing, you received a total of 3 questions (and a short follow-up) from a single Senator. Your entire live questioning lasted just over 3 minutes. Do you think that is appropriate and consistent with the Senate's constitutional duty under Article II, Section 2 to provide advice and consent on the President's nominees?

Please see answer to Question 1(a).

- d. Did you indicate any objection to anyone in the Administration or on the majority side of the Committee about the scheduling of your confirmation hearing?

I had no role in scheduling my hearing. I was told when and where to appear, and did so. I did not voice an objection about the hearing date to anyone.

2. In a 2009 speech before the United States Sentencing Commission about the federal sentencing system after the Supreme Court's decision in *United States v. Booker*,<sup>1</sup> you

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<sup>1</sup> 543 U.S. 220, 264 (2005)

said: “For the most part, there is no seamless flow from guideline computation to the reasonableness analysis undertaken under [18 U.S.C. §] 3553(a). Instead, in cases in which the judge makes a significant variance, the guidelines are properly calculated and then sidelined during the court’s consideration of the statutory factors. When judges consider a sentence under the statute, the proceeding often becomes one that resembles a pre-guideline sentencing where there was an upper range, sometimes a lower range, and a vast sea of discretion in between.”<sup>2</sup>

- a. Do you still maintain that federal judges have a “vast sea of discretion” in sentencing defendants?

In 2009, when Eric Holder became the United States Attorney General, I was asked by the Department of Justice to testify on behalf of the Department before the United States Sentencing Commission about federal sentencing policy. Portions of my testimony were prepared by representatives at the Department of Justice, and portions were prepared by me and my staff at the U.S. Attorney’s Office in the District of Oregon, and were approved by the Department of Justice. To the best of my recollection, the purpose of the testimony was to provide a sense of what the new administration was working on with respect to federal sentencing policy and to provide input to the Sentencing Commission about how judges in the region were applying the Federal Sentencing Guidelines after the Supreme Court’s decision in *United States v Booker*, 543 U.S. 220 (2005), which determined that the Guidelines were advisory rather than mandatory. I have not been involved in federal sentencing policy for the last nine years, so I cannot comment on the current experience in the courts with regard to federal sentencing. Based on my own experience and that of my office nine years ago, I believed that post-*Booker*, judges had more discretion in sentencing in cases where there was no mandatory minimum sentence.

- b. Given the substantial leeway that you described federal judges as having under the federal sentencing system, how would you approach determining defendants’ sentences in cases that come before you if you are confirmed?

I would follow the rules and procedures required by the relevant statutes, governing case law, the Sentencing Guidelines, and the Federal Rules of Criminal Procedure. Specifically, I would carefully review the Presentence Investigation Report and written materials submitted by the parties. I would examine those materials and consult with the presentence officer. I would review the applicable sentencing guidelines and the case law interpreting and applying those guidelines, consider the factors set forth in 18 U.S.C. § 3553(a), listen with an open mind to the arguments of the attorneys, to any victim, and to the defendant if he or she chooses to make a statement. I would also consider any information collected by the Federal Sentencing Commission about sentences received by similarly situated defendants in other cases.

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<sup>2</sup> Statement of Karin J. Immergut, U.S. Att’y, Before the U.S. Sentencing Comm’n, Regional Hearing on the State of Federal Sentencing 12-13 (May 27, 2009), [https://www.ussc.gov/sites/default/files/pdf/amendment- process/public-hearings-and-meetings/20090527-28/Immergut\\_testimony.pdf](https://www.ussc.gov/sites/default/files/pdf/amendment- process/public-hearings-and-meetings/20090527-28/Immergut_testimony.pdf).

In practical terms, based on my review of all the facts and arguments, I would calculate the advisory guideline range under the Sentencing Guidelines and determine whether a departure from the Guidelines is appropriate. I would also consider the objectives of sentencing as set forth by Congress in 18 U.S.C. § 3553(a), which directs federal courts to “impose a sentence sufficient, but not greater than necessary” to comply with the purposes of sentencing.

- c. How would a federal district judge go about trying to ensure the “seamless flow” you described between the federal guidelines and the statutory factors?

I believe I was referring in my testimony to a concern on the part of U.S. Attorneys’ offices in the region that there appeared to be a lack of connection between the sentencing guidelines calculation and the actual sentence imposed, which seemed to result in significant sentencing disparities among defendants sentenced for similar crimes with similar backgrounds. I believe that, at the time of my testimony nine years ago, the Department of Justice was concerned about such sentencing disparities. Lack of consistency in sentencing practices can affect the public’s perception of the fairness of our system. It also provides a level of uncertainty to defendants and victims with regard to what sentence a defendant is likely to receive. I believe I was stating that faithfully using the Guidelines as a reference point for sentencing would help ensure the “seamless flow” between the Guidelines and the statutory factors. If confirmed, I would also consider information collected by the Federal Sentencing Commission about sentences received by similarly situated defendants.

3. In the same speech, you also said: “[T]he number of inmates in federal prisons, state prisons, or local jails has quadrupled since 1980, reaching over 2.2 million today. The burgeoning federal prison population strains our existing resources and limits the numbers of qualified prisoners who can receive the drug treatment and other services they need while in prison. . . . All of this—jurisprudential changes, differences in prosecutorial practices, differences in judicial philosophies, a very large federal prison population, and more—lead us to the conclusion that a thorough and comprehensive review of federal sentencing and corrections policies, with an eye toward possible reform, is long overdue.”<sup>3</sup>

- a. What do you think are the leading causes of the massive increase in the federal prison population in recent decades?

I have not studied this issue closely so I cannot comment.

- b. If confirmed as a federal district court judge, how would you view your role in seeking to reform federal sentencing policies?

I do not believe it is within the role of a judge to seek to reform federal sentencing policies. Creating and reforming laws and policies is within the

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<sup>3</sup> *Id.* at 2-3.

exclusive power of Congress and the Executive branch.

4. In that speech, given while you were the U.S. Attorney, you also said that your office's "reliance upon binding . . . plea agreements and charging mandatory statutory minimum sentences (where applicable) has increased since *Booker*."<sup>4</sup> In addition, you reported: "Drug cases and the significant sentences driven by drug quantity determination have always been a point of concern for judges in our district. The Chief of my drug unit reports that variances of at least 2-levels are now the norm."<sup>5</sup>

- a. Especially in light of your recognition in that same speech about the burgeoning federal prison population and the strain on federal resources, why did you think that seeking more mandatory-minimum sentences for drug crimes was the right policy for your office?

In the context of the testimony I provided nine years ago, I was describing challenges that AUSAs, defendants, and victims faced in a post-*Booker* sentencing scheme, and the tools that were being employed by AUSAs to ensure more uniformity and certainty in sentencing defendants for similar crimes of all kinds under similar circumstances. As I testified, "our reliance upon binding 11(c)(1)(C) plea agreements and charging mandatory minimum sentences has increased." The examples I noted were in cases of child pornography and gun cases. I was not advocating for seeking more mandatory minimums for drug crimes.

- b. In retrospect, do you still think that was the right approach for your office to pursue?

I have not studied this issue closely so I cannot comment.

5. You served in the Office of Independent Counsel Ken Starr for five months in late 1998 to work on "the Lewinsky Investigation of President Clinton."<sup>6</sup> In that capacity, you were "responsible for interviewing and conducting grand jury inquiries of witnesses, including Monica Lewinsky."<sup>7</sup>

- a. In retrospect, do you have any specific regrets about the course of that investigation?

I was hired by Ken Starr almost five months after Attorney General Reno sought to expand the OIC's authority to investigate whether Monica Lewinsky or others suborned perjury, obstructed justice, or intimidated witnesses in connection with the civil sexual harassment case in *Jones v Clinton*. The Special Division of the United States Court of Appeals for the District of Columbia Circuit granted Attorney General Reno's petition to expand the jurisdiction of the Independent Counsel to include the Lewinsky matter. I was hired to work as a line prosecutor to determine whether there were facts to support or refute those allegations. I accepted this position because I felt

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<sup>4</sup> *Id.* at 11.

<sup>5</sup> *Id.* at 10.

<sup>6</sup> SJQ at 66.

<sup>7</sup> *Id.*

I was a neutral, experienced, thoughtful, and fair-minded prosecutor, and could serve my country by applying a fair and balanced approach to gathering the facts. Beyond trying to determine the facts, I cannot comment about the “course of that investigation,” only about my specific role. I was not involved in deciding whether there should be an investigation in the first instance, or what should be done with the investigation once the facts were collected.

- b. In retrospect, do you have any specific regrets about your role or any recommendations you made during your time in that office?

My job as a line prosecutor in this OIC investigation was to collect the facts that were relevant to the allegations that the Independent Counsel had been assigned to investigate. In performing that role, I tried to be open-minded and impartial, as has always been my practice as a prosecutor. I was not responsible for making decisions about what to do with the evidence once collected, such as whether to present a referral to Congress. I believe that I performed my prosecutorial duties in a fair, neutral, and balanced way.

6. 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>8</sup> Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.<sup>9</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>10</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>11</sup>

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

Yes.

- 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.

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<sup>8</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>9</sup> *Id.*

<sup>10</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>11</sup> *Id.*

In Portland, Oregon, where I serve on the state trial court bench, all of the judges have been encouraged to attend implicit bias training and take the Harvard Implicit Bias Test. I have attended such trainings, and I have taken the Harvard Implicit Bias Test.

7. 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>12</sup> In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.<sup>13</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.

I am not sufficiently familiar with the studies on this to comment one way or another.

- 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 am not sufficiently familiar with the studies on this to comment one way or another.

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

I believe diversity in the judicial branch is important to public confidence in the judicial system.

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

I will faithfully apply the Supreme Court's decision in *Brown*, as well as all Supreme Court precedent and Ninth Circuit precedent. I believe that racial segregation is abhorrent and represents a tragic chapter in our Nation's history. However, as a nominee to the district court, and as a sitting state court judge, I believe that it would be improper for me to publicly disclose my personal views about any particular Supreme Court opinions, as it is a violation of the Code of Conduct for United States Judges "to make public comment on the merits of a matter pending or impending in any court." See Canon 3(A)(6); see also Oregon Code of Judicial Conduct Rule 3.3 ("A judge shall not take any

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<sup>12</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>13</sup> *Id.*

<sup>14</sup> 347 U.S. 483 (1954).



action or make any comment that a reasonable person would expect to impair the fairness of a matter pending or impending in any Oregon court.”).

10. Do you believe that *Plessy v. Ferguson*<sup>15</sup> was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

The Supreme Court found that *Plessy* was wrongly decided and in *Brown* renounced the “separate but equal” doctrine. I will faithfully and without reservation apply *Brown*.

11. 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?

Prior to my confirmation hearing I met with attorneys from the Department of Justice Office of Legal Policy and discussed what questions I might be asked. All of my answers are my own.

12. 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>16</sup> Do you believe that immigrants, regardless of status, are entitled to due process and fair adjudication of their claims?

I will faithfully apply precedent of the Supreme Court and Ninth Circuit in any immigration cases. This issue is currently a matter of significant public and political controversy and may be the subject of further litigation in the future. I believe that it would violate the Code of Conduct for United States Judges Canon 3 and 5 to make any public comment on this topic.

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<sup>15</sup> 163 U.S. 537 (1896).

<sup>16</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 October 31, 2018  
For the Nomination of**

**Karin Johanna Immergut, to the U.S. District Court for the District of Oregon**

1. In 1998, you took a four-month leave of absence from the Multnomah County District Attorney's Office to serve as Associate Independent Counsel for the Office of Independent Counsel Kenneth Starr. It has been reported that you served as the main questioner of Monica Lewinsky in two days of grand jury testimony and a deposition. In Kenneth Starr's book, *Contempt: A Memoir of the Clinton Investigation*, he wrote that you, as well as other female prosecutors, "insisted" that explicit details about Monica Lewinsky be published.

- a. **What were your duties and responsibilities during the Starr investigation?**

I was hired by Ken Starr almost five months after Attorney General Reno sought to expand the OIC's authority to investigate whether Monica Lewinsky or others suborned perjury, obstructed justice, or intimidated witnesses in connection with the civil sexual harassment case in *Jones v. Clinton*. The Special Division of the United States Court of Appeals for the District of Columbia Circuit granted Attorney General Reno's petition to expand the jurisdiction of the Independent Counsel to include the Lewinsky matter. I was hired to work as a line prosecutor to determine whether there were facts to support or refute those allegations.

- b. **How were your duties and responsibilities assigned to you?**

Initially, I was not assigned to any particular witnesses or duties. One of the senior attorneys told me to familiarize myself with all of the prior interviews and grand jury witness transcripts. As I became more familiar with all of the facts in the underlying investigation, I was asked to help prepare some proposed grand jury questions for some of the witnesses. When Ms. Lewinsky agreed to cooperate with the Office of Independent Counsel, I was asked to be one of the team of prosecutors debriefing her. As I was involved in the debriefings, I was asked to participate in questioning Ms. Lewinsky before the grand jury and take her deposition.

- c. **What role did you play in questioning Ms. Lewinsky during her grand jury testimony and depositions?**

I was one of the lawyers questioning Ms. Lewinsky in the grand jury and at her deposition.

- d. **Is Kenneth Starr's assertion—that you "insisted" that explicit details about Monica Lewinsky be published—correct? If yes, why did you insist on the publication of these details?**

I do not recall that I personally “insisted” that explicit details of the sexual encounters between the President and Ms. Lewinsky be included in the referral to Congress. I was a line prosecutor and did not have a supervisory role in the investigation. I do recall there were group discussions about how much detail was critical to provide in the referral to demonstrate why the Independent Counsel felt a referral to Congress was warranted with respect to the perjury allegation. I believe after deliberation as a group, the consensus was that there needed to be sufficient detail to support an allegation of perjury, and ultimately it was Ken Starr’s decision to make. I did feel it was important during the course of the investigation to ask Ms. Lewinsky very detailed information about those contacts because we were trying to determine whether or not the President had committed perjury when U.S. District Judge Susan Webber Wright ordered him to testify truthfully at a deposition under oath in the *Jones* sexual harassment lawsuit about whether he had had sexual relations with other employees. In the *Jones* litigation, the term “sexual relations” was defined, and the President, under oath, denied having “sexual relations” with Ms. Lewinsky, who had been an intern and then an employee. Because the perjury allegation was dependent on the details of the President’s testimony, it was critical to understand the details of those contacts. Again, my job was to determine the facts. Exactly what would be done with all of the facts was not up to me.

2. District court judges have great discretion when it comes to sentencing defendants. In considering your nomination, it is important that we understand your views on sentencing, while appreciating that each case must be evaluated on its specific facts and circumstances.

- a. **What is the process you would follow before you sentenced a defendant?**

I would follow the process, rules, and procedures required by the relevant statutes, binding case law, the Sentencing Guidelines, and the Federal Rules of Criminal Procedure. Specifically, I would carefully review the Presentence Investigation Report and written materials submitted by the parties. I would examine those materials and consult with the presentence officer. I would review the applicable sentencing guidelines and the case law interpreting and applying those guidelines, consider the factors set forth in 18 U.S.C. § 3553(a) as well as departure factors discussed in the guidelines, listen with an open mind to the arguments of the attorneys, to any victim, and to the defendant if he or she chooses to make a statement. I would also consider any information collected by the Federal Sentencing Commission about sentences received by similarly situated defendants in other cases. In accordance with 18 U.S.C. § 3553(a), I would strive to “impose a sentence sufficient, but not greater than necessary” to comply with the purposes of sentencing.

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

I would follow the process described in my answer to Question 2(a) above. In addition, I believe the breadth of my experience in state and federal courts gives me an enhanced perspective about what is fair to defendants, and what is likely to protect the community in the future. I have served as a federal prosecutor for 14 years, a state court prosecutor for almost 5 years, a criminal defense attorney while in private practice, and as a state court trial judge handling criminal and civil matters for over 9 years. I handle many criminal judicial settlement conferences as a judge, almost always at the request of defense attorneys. I have spent the last two years as one of two judges running my court's drug diversion court and meeting routinely with drug addicted defendants. I have presided over more than 150 criminal trials and sentenced hundreds of defendants for a wide variety of crimes. Through these experiences, I believe I have a good sense of what is a fair and proportional sentence under a variety of circumstances.

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

The sentencing guidelines are advisory and not binding on district court judges. *United States v. Booker*, 543 U.S. 220 (2005). The sentencing guidelines include appropriate grounds to depart from the sentencing guideline range. The factors enumerated in 18 U.S.C. § 3553(a) may also warrant departures from the guideline range.

**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 seen any definitive studies on whether mandatory minimums more effectively deter crime than other sentencing schemes, so I am not in a position to comment on this issue.

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

Mandatory minimum statutes are created by Congress and can only be changed by Congress. I believe the equity of such statutes is a political issue and it would therefore be inappropriate for me to publicly state an opinion. *See* Canon 5, Code of Conduct for United States Judges.

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

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<sup>1</sup> Judge Danny C. Reeves, Responses to Senators' Questions for the Record, <https://www.judiciary.senate.gov/imo/media/doc/Reeves%20Responses%20to%20QFRs1.pdf>.

Please see my answer to Question 2(d)(ii).

- iv. Former-Judge John Gleeson has criticized mandatory minimums in various opinions he has authored, and he 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:**

i. **Describing the injustice in your opinions?**

Legislation such as mandatory minimums is exclusively within Congress' authority. Charging defendants under mandatory minimum statutes is exclusively within the power of the Executive Branch. I believe it is generally improper for the court to weigh in on the exercise of those exclusive functions. Nevertheless, in unique circumstances of extreme injustice, it may be appropriate.

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

The power to charge individuals with crimes under mandatory minimum statutes is exclusively within the power of Executive Branch, and judges should be careful not to encroach upon that authority. On the other hand, I maintain a very positive relationship with both the U.S. Attorney's Office and the Federal Public Defender in Oregon and feel that there could be a situation in which I felt it was important to discuss charging policies generally, without discussing a particular case, but only if I could do so while complying with applicable laws and ethics rules.

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

The power to grant clemency is vested exclusively with the Executive Branch and judges should be careful not to encroach on that independent authority. Nevertheless, there could be a unique circumstance in which I might consider discussing clemency with the U.S. Attorney's Office for a sentenced defendant, but only if I could do so while complying with applicable laws and ethics rules.

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<sup>2</sup> See, e.g., Stephanie Clifford, *Citing Fairness, U.S. Judge Acts to Undo a Sentence He Was Forced to Impose*, N.Y. 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>.

- e. 28 U.S.C. § 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. When I served as U.S. Attorney for Oregon, I, along with the Federal Public Defender and the Chief Judge, started the first Federal Re-entry Program in Oregon as an alternative to prison for convicted offenders whose crimes were driven largely by drug addiction. In state court, I have been involved with an intensive probation supervision program to supervise offenders in the community instead of prison. I am also one of two judges responsible for supervising our drug diversion court for the past two years, which focuses on treatment, rather than custody.

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. Judges are the face of our judicial system. The public’s confidence in our democracy depends up whether judges treat all who come before us fairly, impartially, and with dignity and respect.

- 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.**

I am aware of studies both in Oregon and nationally that discuss the overrepresentation of minorities in our criminal justice system.

1. 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.