

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?**

No.

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

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?

I do acknowledge that judging real-world cases is not an algorithmic exercise. There will frequently be instances in which the court is called upon to interpret ambiguous language in a statute, regulation, precedent or contract, or where the precise application of binding authority to a given set of facts is not immediately apparent. I also recognize that judges are human, and subject to all of the intellectual limitations and biases that all human beings are. At the same time, I believe it is the core duty of federal judges to set aside their personal views, experiences, preconceived notions and biases to the maximum extent possible in every case, and to decide cases based on a neutral application of law to fact. I also believe that, even if there is not a mathematically precise answer to every case, there is always a *best* answer, and if I am fortunate enough to be confirmed, I commit to seek that answer in every case without fear or favor to any party, and based on the promise of equal justice under law.

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?**

I am still learning about implicit bias and its operation. I do believe that it is a core function of the district judge to guard against the intrusion of any bias whatsoever into

the judicial process, and that racial bias deserves special focus in this regard. Judges should, accordingly, take steps to be aware of any tools that could enhance objectivity and neutrality and mitigate the potential effects of bias, and pursue those tools wherever appropriate.

b. Have you ever taken such training?

I have not taken formal training in implicit bias. I have, however, done some reading on the topic, and expect to continue to do so. Prior to my nomination, I read articles in the popular press, including in the *Smithsonian* magazine; a series in the *Atlantic* magazine in 2017; and other pieces, the sources of which I can no longer recall. Since the nomination, I have begun to wade deeper into the subject, starting with Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 *UCLA L. Rev.* 1124 (2012), and I recently began reading Rachel Godsil and Hao Yang (Carl) Jiang, *Prosecuting Fairly: Addressing the Challenges of Implicit Bias, Racial Anxiety, and Stereotype Threat*, CDAAC Prosecutor's Brief (Vol. 40, No. 2, Winter 2018).

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

As noted above, I will continue to read and think about this topic, given its importance. If training on implicit bias were offered to federal judges by competent personnel, I would expect to participate.

Nomination of Eric Ross Komitee
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.¹ Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.² 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.³ In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.⁴

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

I do believe that racial bias, implicit and explicit, continues to exist in our country despite decades of well-meaning efforts to eradicate it, and that the judiciary is not immune. The job of a federal judge is to administer justice fairly for all people. To this end, the judge must work affirmatively to stem the effects of any biases on the part of jurors, advocates, or even the court itself.

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

I do, based on the statistics cited above and other statistics I generally recall having seen.

- c. Prior to your nomination, have you ever studied the issue of implicit racial bias in our criminal justice system? Please list what books, articles, or reports you have reviewed on this topic.

I have read a number of articles on the subject of implicit bias, and expect to continue doing so. Prior to my nomination, I read articles in the popular press, including in the *Smithsonian* magazine; a series in the *Atlantic* magazine in 2017; and other pieces, the sources of which I can no longer recall. Since the nomination, I have begun to wade deeper into the subject, starting with Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. Rev. 1124 (2012), and I recently began reading Rachel Godsil and Hao Yang (Carl) Jiang, *Prosecuting Fairly: Addressing the Challenges of Implicit Bias, Racial Anxiety, and Stereotype Threat*, CDAA Prosecutor's Brief (Vol. 40, No. 2, Winter 2018).

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.⁵ In the 10 states that

saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.⁶

- 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 had occasion to study this topic. I believe that variations in crime rates are influenced by a variety of factors, and it can be difficult to isolate the precise effect of any single variable.

- 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.

Please see my response to Question 2(a) above. As I indicate, this is not a subject I have studied.

¹ 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>.

² *Id.*

³ 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>.

⁴ *Id.*

⁵ 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>.

⁶ *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.

I do.

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

As I indicated during the hearing, I believe it would be inappropriate for me, as a district court nominee, to opine on the correctness of any binding Supreme Court precedent that I would be duty-bound to apply – even a case as iconic, and critical to this nation’s history, as *Brown*. I base that belief on my reading of Canon 2(A) of the Code of Conduct for United States Judges (“A judge should . . . act at all times in a manner that promotes public confidence in the . . . impartiality of the judiciary.”), Canon 3(A)(6) (“A judge should not make public comment on the merits of a matter pending or impending in any court.”), and interpretations thereof. *See, e.g.*, Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States, Senate Judiciary Committee, Testimony of Elena Kagan, June 30, 2010 (“I’ve pretty consistently said [throughout the hearing] that I don’t want to . . . grade, or give a thumbs-up or a thumbs-down on particular Supreme Court cases.”).

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

I believe that *Plessy v. Ferguson* was wrongly decided, as the Court recognized in *Brown*, and will forever constitute a stain on this nation’s jurisprudential history. I offer this opinion freely because, unlike *Brown*, I would not be called upon to interpret, apply or enforce the holding of *Plessy* as a district court judge.

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?

Like all nominees, I met with personnel from the White House and Department of Justice in connection with the nomination and hearing preparation. No one instructed me not to opine on whether Supreme Court cases were rightly decided or asked for any assurance that I agreed or disagreed with any specific case. My answers 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.”⁹ Do you believe that immigrants, regardless of status, are entitled to due process and fair adjudication of their claims?

I do believe that all litigants in the United States courts, including all immigrants, are entitled to all process due to them under the law and Constitution, and to a fair

adjudication of their claims.

⁷ 347 U.S. 483 (1954).

⁸ 163 U.S. 537 (1896).

⁹ 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?

Prior to sentencing a defendant, I would carefully re-read the charging document. If the defendant was convicted at trial, I would re-familiarize myself with key testimony; if convicted pursuant to a guilty plea, I would re-review the allocution and, where appropriate, any offer of proof by the government. I would then carefully read the Pre-Sentence Investigation report and the sentencing submissions made by the government, by and on behalf of the defendant, and by any victim(s) who chose to weigh in.

I would then review the guidelines calculations in the plea agreement (if any) and the Pre-Sentence report and come to an independent view on the proper application of the Guidelines to the facts of the offense and the defendant's criminal history. *See Gall v. United States*, 552 U.S. 38 (2007) (district court should calculate the applicable Guidelines range in all sentencing proceedings, and "to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark"). I would also consider whether the case was "outside the heartland" contemplated by the Sentencing Commission for the given offense, and a departure from the Guidelines range was therefore appropriate under Section 5K2.0. Before departing from the standard guideline range, I would give reasonable notice to the parties of the potential grounds for the contemplated departure under Fed. R. Crim. P. 32(h), and an opportunity to be heard.

At the sentencing hearing itself, I would ensure that the attorneys for both sides had a full and fair opportunity to confront and debate the relevant issues, and that the defendant and any victims present have a fair opportunity to be heard in accordance with the law. If necessary or appropriate, I would conduct a *Fatico* hearing to hear evidence on disputed questions of fact. *United States v. Fatico*, 603 F.2d 1053 (2d Cir. 1979); *see also* Fed. R. Crim. P. 32(i)(2).

I would then consider comprehensively the factors enumerated in 18 U.S.C. § 3553(a) in the light of all of the information described above, and the range of sentencing options appropriate to the given case. I would also consider questions of restitution and forfeiture and, where appropriate, alternatives to incarceration and/or educational or vocational training, medical care, and other potentially appropriate correctional treatment, as set forth in the statute.

Section 4.01 of the Benchbook for U.S. District Court Judges provides procedural guidance on criminal sentencing as well, and I expect it will be a useful tool in sentencing proceedings.

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

If fortunate enough to be confirmed, I would generally plan to rely on the process described above. I would also plan to step back periodically and look at the sentencing decisions I had made, thinking about any patterns that might emerge and comparing the data on my sentencing to that of other judges in the district and/or circuit.

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

In deciding whether to depart from the calculated Guidelines range, I would look to the Guidelines themselves, as well as binding precedent from the Supreme Court and Second Circuit. The Guidelines state that the sentencing court may depart from the applicable range if it finds the existence of an “aggravating or mitigating circumstance” that is “of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission.” U.S.S.G. § 5K2.0. I would also necessarily consider the factors enumerated in 18 U.S.C. § 3553(a). In the event I determined that a departure might be appropriate, I would, as set forth above in response to Question 1.a., provide the advance notice required by the Federal Rules of Criminal Procedure.

d. Judge Danny Reeves of the Eastern District of Kentucky – who also serves on the U.S. Sentencing Commission – has stated that he believes mandatory minimum sentences are more likely to deter certain types of crime than

discretionary or indeterminate sentencing.¹

i. Do you agree with Judge Reeves?

I have not had the opportunity to study this empirical question. The enactment of statutory mandatory minimum sentencing provisions is a matter committed to the legislature under our Constitution, and as a judicial nominee I should, under the Code of Conduct for United States Judges, withhold comment on political matters. I will, of course, faithfully follow the Constitution and laws applicable to sentencing, and all Supreme Court and Second Circuit precedent on the subject of mandatory minimums.

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

Please see my response above to Question 1.d.1., above.

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

I do not have specific instances close to hand. I am aware, however, that judges in the Eastern District of New York and elsewhere have raised questions from time to time about the application of mandatory minimum sentences to specific cases.

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.² If confirmed, and you are required to impose an unjust and disproportionate sentence, would you commit to taking proactive efforts to address the injustice, including:

1. Describing the injustice in your opinions?

I practiced before Judge Gleeson for years in the Eastern District of New York and hold him in high esteem. If I were fortunate enough to be confirmed, I would consider describing injustice of the type you raise in an opinion in an appropriate case.

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

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

² See, e.g., “Citing Fairness, U.S. Judge Acts to Undo a Sentence He Was Forced to Impose,” NY Times, July 28, 2014, <https://www.nytimes.com/2014/07/29/nyregion/brooklyn-judge-acts-to-undo-long-sentence-for-francois-holloway-he-had-to-impose.html>

Charging decisions are committed to the Executive Branch. Recognizing this, I would nonetheless consider having conversations of the type described in extra-ordinary circumstances, if it were possible to do so under applicable law, precedent and ethics rules.

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

Please see my response to Question 1.d.iv.2, above.

- 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, in appropriate cases.

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. This is, in my view, at the very heart of the job description of a federal judge.

- 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.**

Although I have not made an empirical study of the issue, I am aware of statistics from a variety of sources, including the U.S. Sentencing Commission, showing racial disparities in the rate of incarceration and the length of sentence imposed. If I am confirmed, I will work tirelessly to prevent any such disparities in cases that come before me. Among other things, I would periodically review my decisions for any irrational or inappropriate patterns, especially with regard to racial disparities in sentencing.

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

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

Yes.

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

supervisory positions?

I have not yet formulated a hiring plan, but I do commit to considering applicants of all backgrounds, including minority and female applicants.

**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?

Yes. I hesitated to answer “yes” or “no” to this question at the hearing because the word “retribution” can, in some usage, contain a connotation of “seeking vengeance.” With the understanding that “retribution” is being used roughly synonymous with “punishment,” the answer to this question is clearly yes. *See, e.g., Black’s Law Dictionary* 1511 (10th ed. 2014) (defining retribution as “Punishment imposed for a serious offense; requital”); *Webster’s New International Dictionary* 1940 (3rd ed. 1971) (“the dispensing or receiving of reward or punishment according to the deserts of the individual . . .”). Just punishment is properly a core component of the federal sentencing scheme. *See* 18 U.S.C. § 3553(a)(2)(A) (“The 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).

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

No. And I am aware of no precedent from any federal court that would establish such protection. Were this issue to come before me as a district judge, I would of course fully and fairly consider the arguments of the parties before rendering judgment.

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

I don’t know. As I indicated at the hearing, I do not know exactly how I would respond to such a scenario. *Brown* is such a bedrock decision in our Constitutional landscape that it is impossible to comprehend it being overruled.

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

Yes. The text of constitutional provisions may have well-established meaning, but the task of judges is to apply those provisions to the world as it changes – for example, by interpreting the Fourth Amendment in the context of new technologies that were unimaginable at the time of the founding.

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

No. Interpretation of the Constitution should start with the text itself. The original public meaning of the text – *i.e.*, the objective meaning it would have held for competent users of the language at the time – is a critical tool, and might align in most cases with the founders' "intent." It cannot be said, however, that such original meaning will always be the "most important thing" in a district court's efforts to interpret and apply the constitution in a particular case. If, for example, a district judge assesses the original meaning of the Constitution to require one interpretation, but Supreme Court or Second Circuit precedent directly on point would dictate a different interpretation, then the district judge would be duty-bound to apply precedent.

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

No, for the reasons stated in response to Question 1.e., above.