

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?

A District Court judge, like every other human being, is susceptible to having his personal experiences and views bear on his decisions. Consistent with the Code of Conduct for United States Judges, however, the judge must always be sensitive to not letting those personal experiences and views impact the judge's decisions, and must decide cases based on the law and facts without regard to the judge's personal opinions or beliefs.

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?**

It has been important to me to take training on implicit bias.

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

Yes. As a partner at my law firm, I have participated in numerous implicit bias trainings and related trainings, and believe these trainings were important and valuable.

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

I am hesitant to make firm commitments of any kind in the context of consideration of my nomination. However, I have found such training valuable in the past and I currently plan to take it in the future if appropriate training is made available.

Nomination of Lewis J. Liman
United States District Court for the Southern 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 believe racial bias exists in America and remains a very real and important challenge for our country and many individuals and institutions. The criminal justice system in the United States, like many other institutions, is susceptible to implicit bias and racial discrimination, and I have no doubt that there are instances where it infects the justice system, as it does other systems. If confirmed, I would view it as my duty under the Code of Conduct for United States Judges to guard against invidious discrimination of any kind in my courtroom.

- 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.

While I have not studied implicit racial bias in depth, I am aware that the issue has been the focus of numerous scholarly studies and broader reporting in the popular press. As an attorney at my law firm, I have attended trainings on implicit bias. Prior to my nomination, I read "The New Jim Crow" by Michelle Alexander, which explores, among other topics, the issue of implicit racial bias.

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 studied or reached any conclusion about the statistical relationship between incarceration and crime rates.

- b. Do you believe there is a direct link between decreases in a state's incarcerated population and decreased crime rates in that state? If you do not believe there is a direct link, please explain your views.

I have not studied or reached any conclusion about the statistical relationship between incarceration and crime rates.

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.

Yes.

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 a District Court nominee, it would not be appropriate for me to express an opinion on the correctness (or incorrectness) of any particular Supreme Court precedent that would be binding on me. If confirmed, I will be in a position to apply and interpret all binding Supreme Court decisions, both those I agree with and those I might have decided differently. I believe that to give a thumbs up or thumbs down now, and in this context, to any particular decision, could have the effect of denigrating public confidence in the impartiality of the judiciary generally and risks undermining public confidence that I would be able to be impartial in a case where I was required to give a fair and impartial interpretation, and my best interpretation, of such a decision. See Code of Judicial Conduct for United States Judges, Canon 1, 2, 3(a)(6). However, I started my career at the NAACP Legal Defense and Educational Fund Inc., which successfully litigated *Brown v. Board of Education* for the plaintiffs in *Brown*; I have had the honor during my career of serving as a director of the Lawyers Committee for Civil Rights Under Law which is committed to combatting racial discrimination; and, consistent with the answers of other nominees, I can say that I do not believe that racial segregation in schools is constitutional.

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.

No. The Supreme Court in *Brown v. Board of Education* has explicitly rejected the doctrine of “separate but equal” established in *Plessy v. Ferguson*, 163 U.S. 537 (1896).

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?

Prior to the hearing, I met with officials from the Department of Justice to prepare. During the course of that preparation, we discussed questions I might receive and how I might respond. In every instance, however, the answers were my own and no one told me what to say.

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?

The Supreme Court has held that once an alien has entered the United States, he or she is guaranteed due process of law under the Fifth and Fourteenth Amendment, regardless of whether the alien is here lawfully. For example, in *Plyler v. Doe*, the Court stated, “Whatever his status under the immigration laws, an alien is surely a ‘person’ in any ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as ‘persons’ guaranteed due process of law by the Fifth and Fourteenth Amendments.” 457 U.S. 202, 210 (1982) (internal citations omitted); *see also Zadvydas v. Davis*, 533 U.S. 678, 679 (2001) (noting that “[o]nce an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all persons within the United States, including aliens, whether their presence is lawful, unlawful, temporary, or permanent.”). I do not believe it appropriate to comment further with respect to any case that might be pending or impending in any court. Code of Conduct for United States Judges Canon 3A(6).

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?

As a general matter, before sentencing a defendant I would do the following: I would direct that the defendant report to the probation officer for a presentence investigation and the preparation of a presentence report, and would also ensure that the defendant and her attorney have an opportunity to object to the presentence report. I would review the presentence report, any objections to the presentence report, and the recommendations of the probation office with respect to a sentence. I would permit both defense counsel and the Government to submit briefs or other submissions with respect to sentencing and to address the court at sentencing. I would provide any victims the opportunity to address the court, and would also provide the defendant with an opportunity to address the court. If appropriate, I may also permit the parties to submit evidence at sentencing. I would then study the materials presented, take into account the applicable Sentencing Guidelines, and impose a sentence sufficient but not greater than necessary to comply with the purposes of sentencing as set forth in 18 U.S.C. § 3553(a). On an as-needed basis, it would be my hope to take advantage of reports, information and statistics provided by the United States Sentencing Commission.

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

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

I would follow any applicable decisions by the Supreme Court and the Second Circuit, and would also consider the kinds of sentences available and the sentencing range established by the United States Sentencing Commission, pertinent policy statements of the United States Sentencing Commission, the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct, and the need to provide restitution to any victims of the offense. I would listen to the Government, to the defendant, and to defense counsel, and try to reach a fair, proportional, appropriate, and lawful sentence based on the above factors and process.

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

Under Supreme Court precedent, the Sentencing Guidelines are not binding on trial judges. They are advisory. *See, e.g., United States v. Booker*, 543 U.S. 220, 246 (2005). Part K of Section 5 of the Sentencing Guidelines lists the specific circumstances under which a trial judge may depart from the advisory Guidelines range. Additionally, a judge may, consistent with the factors set out in 18 U.S.C. § 3553, vary either up or down from the advisory Guidelines range. If confirmed, I would carefully consider all such authorities and factors, as well as the positions of the parties, before deciding whether a departure was appropriate.

d. Judge Danny Reeves of the Eastern District of Kentucky – who also serves on the U.S. Sentencing Commission – has stated that he believes mandatory minimum sentences are more likely to deter certain types of crime than discretionary or indeterminate sentencing.¹

i. Do you agree with Judge Reeves?

The question of which sentencing practices best deter certain types of crime is a political question reserved to other branches of Government. If confirmed, I would follow all relevant United States Supreme Court and Second Circuit precedent on criminal sentencing, and I would ensure that every sentence I impose is fair and reasonable in light of the factors set out in 18 U.S.C. § 3553.

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

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

Please see my answer to Question 1(d)(i).

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

During my time as a federal prosecutor, there were instances in which I thought that the mandatory minimum was appropriate and there were also instances when I thought it was greater than necessary to serve the purposes of sentencing. For example, in *United States v. Garcia*, set forth in my Senate Judicial Questionnaire, the mandatory minimum sentences appropriately resulted in the defendants – who imported over 3000 pounds of cocaine wholesale for sale on the streets of New York – serving very lengthy terms in prison. There were other occasions in which the mandatory minimum sentence might have been greater than I would have sought in the absence of a congressionally-required mandatory minimum sentence -- whether because the defendant was a first-time offender, or a minor participant, or had tried unsuccessfully to cooperate, or all of the above circumstances. However, in all cases I sought (and the trial judge imposed) the sentence required by law including the mandatory minimum.

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?

If a law or guideline resulted in a sentence that was unjust and disproportionate, I would identify the injustice in my opinions, when appropriate.

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

This issue is not one I have studied or formed an opinion on. Charging decisions are generally entrusted to the Executive branch. If a law or guideline required me to impose an unjust and disproportionate sentence, I would address the issue, if appropriate,

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>

in an opinion. Other steps I would take, if any, would depend on the facts, the circumstances, the applicable law and case law, and ethical rules including the Code of Conduct for United States Judges.

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

This issue is not one I have studied or formed an opinion on. The clemency power is generally entrusted to the Executive branch. Please see also my answer to Question 1(d)(i)(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, as permitted by applicable law.

2. Judges are one of the cornerstones of our justice system. If confirmed, you will be in a position to decide whether individuals receive fairness, justice, and due process.

- a. **Does a judge have a role in ensuring that our justice system is a fair and equitable one?**

Yes. *See, e.g.*, Code of Conduct for United States Judges, Commentary to Canon 4 (“As a judicial officer and a person specially learned in the law, a judge is in a unique position to contribute to the law, the legal system, and the administration of justice, including revising substantive and procedural law and improving criminal and juvenile justice.”).

- 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.**

Yes, there are racial disparities in the United States criminal justice system. While I have not studied the issue in depth, I am aware of reports that discuss racial disparities demonstrated by numerous statistical trends in the United States criminal justice system. *See, e.g.*, John Gramlich, *The gap between the number of blacks and whites in prison is shrinking*, FactTank: News in the Numbers, Pew Research Center (January 12, 2018); William A. Galston, *Criminal Justice Reform: Issues and Options for the Next President*, Brookings Institute (Oct. 14, 2016), <https://www.brookings.edu/research/criminal-justice-reform-issues-and-options-for-the-next-president/>. There is also an unfortunate perception that racial disparities infect our criminal justice system. If I am confirmed, I would take seriously the words of Judge Edward Weinfeld, one of the greatest judges in the

history of the Southern District of New York: “A cardinal principle of our system of justice is that not only must there be the reality of a fair trial and impartiality in accordance with due process but also the appearance of a fair trial and impartiality. In sum, in the words of Mr. Justice Frankfurter, ‘justice must satisfy the appearance of justice.’” *United States v. Ferguson*, 550 F. Supp. 1256 (S.D.N.Y. 1982)

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

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

Yes.

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

Yes.

U.S. Senate Committee on the Judiciary
Hearing on “Nominations”
August 1, 2018
Questions for the Record
Senator Ben Sasse

Questions for Lewis J. Liman

1. You have written that there are “numerous instances” where the original meaning of the Constitution “cannot be retrieved or is indeterminate.” Can you articulate roughly what percentage of the Constitution has an indeterminate original meaning? Which specific provisions?

Respectfully, the question is premised on a misunderstanding of what I wrote. The language at issue is drawn from a book review I published in 1994 in the *New York Law Journal*. In that article, I did not convey the personal view that there are numerous instances where the original meaning of the Constitution cannot be retrieved or is indeterminate. Rather, I described the author’s argument that there are “numerous instances where the original intent [of the Constitution] cannot be retrieved or is indeterminate.” I have not studied the precise issues raised in the question nor do I recall the answers (if any) given by the author. Some of the provisions of the Constitution are clear, while others (such as the Due Process Clause) are less clear and require interpretation. In every instance, as a District Court judge in the Southern District of New York, I would be bound by the decisions of the United States Supreme Court and the Second Circuit, which it would be my duty to apply fairly and faithfully without regard to my personal views.

2. You have written that “capacious constitutional language” might grant courts the authority “to . . . give[] meaning” to particular provisions. Assuming there is no on-point binding precedent, do you believe Article III of the Constitution authorizes a federal judge to apply the provisions of the Constitution differently than how the meaning of those provisions were reasonably understood at the time of their ratification?

Respectfully, the question is premised on a misunderstanding of what I wrote. The quoted language is drawn from the same 1994 book review. In that review, I did not express a personal opinion that “capacious constitutional language might grant courts the authority “to . . . give[] meaning” to particular provisions of the Constitution. The quoted language refers to the views of some scholars that “given the capacious constitutional language, . . . the framers intended those provisions to be given meaning as they are applied to different cases”; I stated that those views were “plausible.” I do believe that the meaning of the Constitution is elucidated by its application to the facts in different cases. As a District Court judge in the Southern District of New York, confronted with a case where there was no directly on-point precedent, I would endeavor to render a decision reflecting my best judgment as to how the Second Circuit and the Supreme Court would decide the case, based on – among other considerations – the relevant

precedents of those courts, the language of the Constitution, and the original intent of those provisions at the time of ratification, as expressed in the text of those provisions.

**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.

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

No.

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

Yes. If my duty to follow precedent as a District Court judge required me to uphold racial segregation in public schools, I would resign.

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

Yes.

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

No. I think the language of the Bill of Rights (as opposed to the subjective intent of individual founders) and the binding decisions of the Second Circuit and United States Supreme Court interpreting it would be the most important things for me in interpreting the Bill of Rights in a case before me as a United States District Court judge.

- 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. Please see my answer above to question 1(e).