

**Nomination of Karen Spencer Marston to the United States District Court for the
Eastern District of Pennsylvania
Questions for the Record
Submitted August 18, 2019**

QUESTIONS FROM SENATOR FEINSTEIN

1. Please respond with your views on the proper application of precedent by judges.

a. When, if ever, is it appropriate for lower courts to depart from Supreme Court precedent?

It is never appropriate for a lower court to depart from binding Supreme Court precedent.

b. Do you believe it is proper for a district court judge to question Supreme Court precedent in a concurring opinion? What about a dissent?

No. A district court judge is required to faithfully apply all binding Supreme Court precedent in all decisions. A district court judge does not author concurrent or dissenting opinions. There may be a rare circumstance in which a district court judge may mention a gap in the law or circuit conflicts regarding proper application of a Supreme Court precedent, in order to raise the issue generally for further appellate guidance, however, such circumstances where this would be proper would be few and far between. *See Eberhard v. United States*, 546 U.S. 12, 19-20 (2005).

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

District courts are bound by precedents of the Supreme Court and the Circuit Court where the district court sits but not by decisions of the other district courts. As such, a district court does not create precedent. However, under the principle of the rule of law, a district court judge should render similar decisions when faced with similar facts. Obviously if the Third Circuit or the Supreme Court overrules a district court's decision, the district court must faithfully apply that precedent when ruling in a subsequent case involving the same issue.

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

The Supreme Court has made clear that "[o]verruling precedent is never a small matter." *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015). Adhering to prior precedent, while not an "inexorable command," constitutes "the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the

actual and perceived integrity of the judicial process.” *Payne v. Tenn.*, 501 U.S. 808, 827 (1991). The Supreme Court has identified factors that the Supreme Court considers in determining whether to overturn its own precedent. *See Janus v. Am. Fed’n of State, Cty., & Mun. Employees, Council 31*, 138 S. Ct. 2448, 2478-79 (2018). Any decision to overturn Supreme Court precedent is for the Supreme Court alone to decide.

2. When Chief Justice Roberts was before the Committee for his nomination, Senator Specter referred to the history and precedent of *Roe v. Wade* as “super-stare decisis.” A text book on the law of judicial precedent, co-authored by Justice Neil Gorsuch, refers to *Roe v. Wade* as a “super-precedent” because it has survived more than three dozen attempts to overturn it. (The Law of Judicial Precedent, Thomas West, p. 802 (2016).) The book explains that “superprecedent” is “precedent that defines the law and its requirements so effectively that it prevents divergent holdings in later legal decisions on similar facts or induces disputants to settle their claims without litigation.” (The Law of Judicial Precedent, Thomas West, p. 802 (2016))

a. Do you agree that *Roe v. Wade* is “super-stare decisis”? Do you agree it is “superprecedent”?

All Supreme Court precedent, including *Roe v. Wade*, is binding on all lower courts and must be faithfully applied. For a district court judge, it does not matter how a binding Supreme Court precedent is labeled, because each one must be followed faithfully.

b. Is it settled law?

Yes. *Roe v. Wade* is binding Supreme Court precedent and is therefore settled for inferior courts. If confirmed, I will faithfully apply all binding Supreme Court and Third Circuit precedent, including *Roe v. Wade*.

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. *Obergefell* is binding Supreme Court precedent and is therefore settled for inferior courts. If confirmed, I will faithfully apply all binding Supreme Court and Third Circuit precedent, including *Obergefell*.

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?

The majority's opinion is binding precedent of the Supreme Court and I would follow it, as I would follow all precedent of the Supreme Court. As a judicial nominee, it would not be appropriate for me to express my personal view on Justice Stevens' dissent in *Heller* or any other justice's opinion in *Heller*. If confirmed, I will faithfully apply the precedent established by the Supreme Court in *Heller*.

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

In *Heller*, the Supreme Court noted that "the right secured by the Second Amendment is not unlimited." 554 U.S. 570, 626 (2008). Further, the Supreme Court stated that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms in sensitive places such as schools and government buildings." *Id.* at 626-37.

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

I have not had the opportunity to study *Heller* and the prior case law in this area in depth. I understand that the Supreme Court stated in *Heller* that "nothing in our precedents forecloses our adoption of the original understanding of the Second Amendment" and that the question presented was "judicially unresolved." *Id.* at 625. As a nominee to a lower court, I am bound by the Supreme Court's own reading of its precedent.

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?

In *Citizens United v. FEC*, 558 U.S. 310, 342 (2010), the Supreme Court stated that "First Amendment protection extends to corporations." As a judicial nominee, it would not be appropriate for me to express an opinion about whether a corporation's First Amendment rights are equal to individuals' First Amendment rights. If the resolution of a case or controversy presented to me as a district court judge requires this analysis, I would examine all relevant Supreme Court and Third Circuit precedent.

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

The protection of individual speech under the First Amendment is an important issue, and the subject of numerous Supreme Court and Third Circuit Court of Appeals opinions. As a judicial nominee, it would not be appropriate for me to indicate how I would resolve a potential conflict between the First Amendment rights of an individual and a corporation. I would, however, analyze the issue by relying upon on relevant Supreme Court and Third Circuit precedent.

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

The Supreme Court held in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014), that a closely held for-profit corporation has rights under the Religious Freedom Restoration Act of 1993, however, the Court also noted the limits of its holding, *see, e.g. id.* at 2759-2760. If confirmed, I will faithfully apply *Hobby Lobby*, and all of the Supreme Court precedents. The existence and scope of corporations' religious freedom rights is the subject of pending or impending litigation, therefore Canon 3(A)(6) of the Code of Conduct for United States Judges makes it inappropriate for me to comment further.

6. You indicated on your Senate Questionnaire that you have been a member of the Federalist Society since 2019. The Federalist Society's "About Us" webpage explains the purpose of the organization as follows: "Law schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society. While some members of the academic community have dissented from these views, by and large they are taught simultaneously with (and indeed as if they were) the law." It says that the Federalist Society seeks to "reorder[] priorities within the legal system to place a premium on individual liberty, traditional values, and the rule of law. It also requires restoring the recognition of the importance of these norms among lawyers, judges, law students and professors. In working to achieve these goals, the Society has created a conservative and libertarian intellectual network that extends to all levels of the legal community."

a. Why did you decide to join the Federalist Society after practicing law for more than 22 years?

As indicated on my Senate Judiciary Questionnaire, in 2019 and 2018 I joined several legal organizations: the American Bar Association, the Pennsylvania Bar Association, the Philadelphia Bar Association and the Federalist Society. I joined these legal organizations, including the Federalist Society, because of the opportunities, such as Continuing Legal Education programs, they provide to keep up to date on legal developments and to broaden my perspective of the legal profession.

b. Could you please elaborate on the "form of orthodox liberal ideology which advocates a centralized and uniform society" that the Federalist Society claims dominates law schools?

I did not write that description and am not familiar with the ideology that is referenced. I have had limited involvement with the Federalist Society and I am not aware of the Federalist Society's understanding of the quote referenced in the question. I have never had a discussion with any member or representative of the Federalist Society about this statement. In my experience, the Federalist Society provides a forum for debate on, discussion of, and education about a wide range of legal topics.

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

I am not aware of any particular effort that the Federalist Society makes to reorder priorities within the legal system. I have never had a discussion with any member or representative of the Federalist Society about this statement. In my experience, the Federalist Society provides a forum for debate on, discussion of, and education about a wide range of legal topics.

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

I am not aware of what the Federalist Society means by the phrase “traditional values.” I have never had a discussion with any member or representative of the Federalist Society about this statement. In my experience, the Federalist Society provides a forum for debate on, discussion of, and education about a wide range of legal topics.

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

I had contact with multiple people regarding my interest in becoming a United States District Court Judge for the Eastern District of Pennsylvania, including individuals at the Federalist Society.

7. On February 22, 2018, when speaking to the Conservative Political Action Conference (CPAC), former White House Counsel Don McGahn told the audience about the Administration's interview process for judicial nominees. He said: “On the judicial piece ... one of the things we interview on is their views on administrative law. And what you're seeing is the President nominating a number of people who have some experience, if not expertise, in dealing with the government, particularly the regulatory apparatus. This is different than judicial selection in past years...”

a. Did anyone in this Administration, including at the White House or the Department of Justice, ever ask you about your views on any issue related to administrative law, including your “views on administrative law”? If

so, by whom, what was asked, and what was your response?

To my recollection, no one in this Administration, including at the White House or the Department of Justice ever asked me about my “views on any issue related to administrative law” or my “views on 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?**

To my recollection, no one affiliated with any those organizations, or any other group, ever asked me about my “views on any issue related to administrative law” or my “views on administrative law”.

- c. What are your “views on administrative law”?**

As a federal prosecutor for the past nineteen years, I have not had the opportunity to study administrative law in depth. I am aware that *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) is a foundational case in administrative law. If confirmed, I would faithfully apply the Supreme Court’s decision in *Chevron*, and subsequent cases from the Supreme Court and the Third Circuit dealing with administrative law.

8. Do you believe that human activity is contributing to or causing climate change?

If confirmed, I would follow Supreme Court and Third Circuit precedent on any case involving climate change.

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

The Supreme Court has held that it is appropriate for judges to consider legislative history when the text of a statute is ambiguous. *See, e.g. Matal v. Tam*, 137 S.Ct. 1744, 1756 (2017).

10. At any point during the process that led to your nomination, did you have any discussions with anyone — including, but not limited to, individuals at the White House, at the Justice Department, or any outside groups — about loyalty to President Trump? If so, please elaborate.

No.

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

I received the questions on Wednesday, September 18, 2019. I read the questions carefully, conducted some limited research and prepared draft responses. I solicited feedback on my draft responses, including from attorneys at the Department of Justice, Office of Legal Policy, and I considered those comments in making final revisions on Monday, September 23, 2019. Each answer herein is my own.

**Written Questions for Karen Spencer
Marston Submitted by Senator Patrick
Leahy September 18, 2019**

1. This year – after having submitted your application to the judicial nomination advisory panel for the Eastern District of Pennsylvania – you joined the Federalist Society and contributed money to the Club for Growth PAC, which advocates for “the full repeal of ObamaCare” and “regulatory reform and deregulation.”

(a) Why did you take these actions after having submitted your application to become a federal judge?

As indicated on my Senate Judiciary Questionnaire, in 2019 and 2018 I joined several legal organizations: the American Bar Association, the Pennsylvania Bar Association, the Philadelphia Bar Association and the Federalist Society. I joined these legal organizations, including the Federalist Society, because of the opportunities, such as Continuing Legal Education programs, they provide to keep up to date on legal developments and to broaden my perspective of the legal profession.

Prior to becoming a judicial nominee, I made a \$100 online contribution to then-member of the Pennsylvania House of Representatives Fred Keller’s special election campaign for U.S. House of Representatives. My contribution was processed through the Club of Growth PAC.

(b) Do you agree that the appearance of political advocacy while seeking a judicial nomination is troubling?

Judicial independence is a core constitutional principle. The Code of Conduct for United States Judges provides guidance to judges and nominees for judicial office. Canon 2 states that “A Judge should avoid impropriety and the appearance of impropriety in all activities.” Canon 5 states that “A Judge should refrain from political activity,” including making a contribution to a political organization or candidate. At the time I made my contribution to support Congressman Fred Keller’s campaign I was not a judicial nominee.

(c) What assurances can you give this Committee that you will be impartial and free from political influence while serving as a federal judge?

Title 28, United States Code, Section 455 and the Code of Conduct for United States Judges, require a judge to be impartial and objective and to decide matters absent any political influence. For the past 19 years as a federal prosecutor, I have adhered to the mission that in a criminal prosecution my job is not to win, but rather to do justice. I have pursued

justice while being impartial and free from political influence. I would apply the same fairness and non-political standard to my role as a judge, if I am confirmed. Judges must remain free from political influence in order to ensure the principle of an independent judiciary. Political influence should never affect the way a judge decides an issue or case. If confirmed, I would abide by 28 U.S.C. § 455 and the Code of Conduct for United States Judges, and I will faithfully uphold the integrity and independence of the judiciary.

2. Chief Justice Roberts wrote in *King v. Burwell* that

“oftentimes the ‘meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.’ So when deciding whether the language is plain, we must read the words ‘in their context and with a view to their place in the overall statutory scheme.’ Our duty, after all, is ‘to construe statutes, not isolated provisions.’”

Do you agree with the Chief Justice? Will you adhere to that rule of statutory interpretation – that is, to examine the entire statute rather than immediately reaching for a dictionary?

As a district court judge, my obligation is to binding precedent on the meaning of any statutory term. As this quote illustrates, looking to the text and structure of a statute is a method of analysis that the Supreme Court has repeatedly recognized.

3. President Trump has issued several attacks on the independent judiciary. Justice Gorsuch called them “disheartening” and “demoralizing.”

(a) Does that kind of rhetoric from a President – that a judge who rules against him is a “so-called judge” – erode respect for the rule of law?

The independence of the federal judiciary is established in Article III of the Constitution and is a crucial aspect of our constitutional framework. Further, Article III provides certain protections to ensure judicial independence and enable federal judges to make decisions without concern about criticism that may follow. Although judges may from time to time be subject to criticism, that does not erode the independence of the federal judiciary.

(b) While anyone can criticize the merits of a court’s decision, do you believe that it is ever appropriate to criticize the legitimacy of a judge or court?

Please see my response to Question 3(a).

4. President Trump praised one of his advisers after that adviser stated during a television interview that “the powers of the president to protect our country are very substantial

and will not be questioned.” (Emphasis added.)

(a) Is there any constitutional provision or Supreme Court precedent precluding judicial review of national security decisions?

I have not had the opportunity to study this area of law in depth. If confirmed, I will faithfully follow Supreme Court and Third Circuit precedent, including case law on the scope of the political question doctrine.

5. Many are concerned that the White House’s denouncement of “judicial supremacy” was an attempt to signal that the President can ignore judicial orders. And after the President’s first attempted Muslim ban, there were reports of Federal officials refusing to comply with court orders.

(a) If this President or any other executive branch official refuses to comply with a court order, how should the courts respond?

Our Constitution creates three co-equal branches of government and the separation of powers doctrine is essential. As such, each branch should respect the powers conferred to the other branches. In any given case, if any party refuses to comply with a court order, the opposing party may seek injunctions or similar remedies from the court. For example, Rule 37 of the Federal Rules of Civil Procedure empowers a federal district court to impose sanctions on a litigant or third party which refuses to comply with a subpoena or other court order.

6. In *Hamdan v. Rumsfeld*, the Supreme Court recognized that the President “may not disregard limitations the Congress has, in the proper exercise of its own war powers, placed on his powers.”

(a) Do you agree that the Constitution provides Congress with its own war powers and Congress may exercise these powers to restrict the President – even in a time of war?

The Constitution states that Congress has the power to declare war as well as the power of the purse to make or deny appropriations. As the quote below states the Supreme Court recognized this distinction in *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004).

Justice O’Connor famously wrote in her majority opinion in *Hamdi v. Rumsfeld* that: “We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.”

(b) In a time of war, do you believe that the President has a “Commander-in-Chief” override to authorize violations of laws passed by Congress or to immunize violators from prosecution? Is

there any circumstance in which the President could ignore a statute passed by Congress and authorize torture or warrantless surveillance?

In *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), the Supreme Court established the governing framework for analysis of disputes between the President and Congress on war. If confirmed, I will fulfill my duty to observe and apply all binding Supreme Court and Third Circuit precedent.

7. How should courts balance the President’s expertise in national security matters with the judicial branch’s constitutional duty to prevent abuse of power?

If such an issue were to arise in district court, I would evaluate any challenge to Executive action, including an action involving a national security matter, by considering all relevant precedent, constitutional provisions and any pertinent statutory provision. The Supreme Court has set forth the analysis for judicial review of Executive action in certain cases, including *Hamden v. Rumsfeld*, 548 U.S. 557 (2006) and *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

8. In a 2011 interview, Justice Scalia argued that the Equal Protection Clause does not extend to women.

(a) Do you agree with that view? Does the Constitution permit discrimination against women?

In *United States v. Virginia*, 518 U.S. 515 (1996), the Supreme Court held that the Equal Protection Clause applies to classifications that discriminate against women. The government must demonstrate an “exceedingly persuasive justification” for gender-based classifications. If confirmed, I will faithfully follow this precedent and all other relevant precedent from the Supreme Court and the Third Circuit.

9. Do you agree with Justice Scalia’s characterization of the Voting Rights Act as a “perpetuation of racial entitlement?”

In 2009, the Supreme Court stated that the Voting Rights Act helped to remedy the disenfranchisement of African Americans and that its accomplishments are “undeniable.” *Northwest Austin Mun. Utility Dist v. Holder*, 557 U.S. 193 (2009). If confirmed, I will faithfully apply all Supreme Court and Third Circuit precedent concerning the Voting Rights Act.

10. What does the Constitution say about what a President must do if he or she wishes to receive a foreign emolument?

Article I, Section 9 of the Constitution states: “And no Person holding any Office or

Profit of Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.”

11. In *Shelby County v. Holder*, a narrow majority of the Supreme Court struck down a key provision of the Voting Rights Act. Soon after, several states rushed to exploit that decision by enacting laws making it harder for minorities to vote. The need for this law was revealed through 20 hearings, over 90 witnesses, and more than 15,000 pages of testimony in the House and Senate Judiciary Committees. We found that barriers to voting persist in our country. And yet, a divided Supreme Court disregarded Congress’s findings in reaching its decision. As Justice Ginsburg’s dissent in *Shelby County* noted, the record supporting the 2006 reauthorization was “extraordinary” and the Court erred “egregiously by overriding Congress’ decision.”

- (a) **When is it appropriate for the Supreme Court to substitute its own factual findings for those made by Congress or the lower courts?**

I understand that an appellate court considers the record that has been developed in the district court. Established standards of review govern an appellate court’s review of factual findings made in the district court. I would faithfully apply *Shelby County* as I would all other binding precedent.

12. **How would you describe Congress’s authority to enact laws to counteract racial discrimination under the Thirteenth, Fourteenth, and Fifteenth Amendments, which some scholars have described as our Nation’s “Second Founding”?**

The Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution reflect a constitutional commitment to counteracting racial discrimination following the Civil War. Each of these Amendments contains an enforcement clause. U.S. Const. amend. XIII, § 2; U.S. Const. amend. XIV, § 5; U.S. Const. amend. XV, § 2. The remedial powers of the Thirteenth, Fourteenth and Fifteenth Amendments also give Congress authority to abrogate the States’ Eleventh Amendment immunity. *See id.*

13. Justice Kennedy spoke for the Supreme Court in *Lawrence v. Texas* when he wrote: “liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct,” and that “in our tradition, the State is not omnipresent in the home.”

- (a) **Do you believe the Constitution protects that personal autonomy as a fundamental right?**

In *Lawrence v. Texas*, 539 U.S. 558 (2003), the Supreme Court held that a Texas statute making it a crime for two adults of the same sex to engage in intimate sexual conduct violates the Due Process Clause.

Lawrence v. Texas is binding Supreme Court precedent, and if confirmed, I will faithfully fulfill it and all binding precedent. In addition, the Supreme Court has long held that the Constitution protects a right of privacy, which the Court has applied in subsequent cases. See *Griswold v. Connecticut*, 381 U.S. 479 (1965). If confirmed, I will faithfully follow those precedents.

14. In the confirmation hearing for Justice Gorsuch, there was extensive discussion of the extent to which judges and Justices are bound to follow previous court decisions by the doctrine of stare decisis.

(a) In your opinion, how strongly should judges bind themselves to the doctrine of stare decisis? Does the commitment to stare decisis vary depending on the court? Does the commitment vary depending on whether the question is one of statutory or constitutional interpretation?

It is never appropriate for lower courts to depart from Supreme Court precedent. The Supreme Court has stated that “the doctrine of *stare decisis* is of fundamental importance to the rule of law.” *Hilton v. South Carolina Public Ry. Comm’n*, 503 U.S. 197, 202 (1991).

15. Generally, federal judges have great discretion when possible conflicts of interest are raised to make their own decisions whether or not to sit on a case, so it is important that judicial nominees have a well-thought out view of when recusal is appropriate. Former Chief Justice Rehnquist made clear on many occasions that he understood that the standard for recusal was not subjective, but rather objective. It was whether there might be any appearance of impropriety.

(a) How do you interpret the recusal standard for federal judges, and in what types of cases do you plan to recuse yourself? I’m interested in specific examples, not just a statement that you’ll follow applicable law.

I will determine whether to recuse myself from a case by reference to the standards in 28 U.S.C. § 455, Canon 3 of the Code of Conduct of United States Judges, as well as any other applicable rules, opinions or ethical guidance. I will also, as necessary and appropriate, consult with judicial colleagues and ethics officials within the judicial system. For instance, I will recuse myself from any case that I have participated in as an Assistant United States Attorney or supervised in my role as Chief of Narcotics & Organized Crime with the United States Attorney’s Office in the Eastern District of Pennsylvania. If confirmed, I will evaluate any real or potential conflict, or relationship that could give rise to appearance of conflict, on a case-by-case basis, and determine appropriate action with the advice of parties and their counsel including recusal where necessary.

16. It is important for me to try to determine for any judicial nominee whether he or she has a sufficient understanding the role of the courts and their responsibility to protect the constitutional rights of individuals, especially the less powerful and especially where the political system has not. The Supreme Court defined the special role for the courts in stepping in where the political process fails to police itself in the famous footnote 4 in *United States v. Carolene Products*. In that footnote, the Supreme Court held that “legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.”

(a) **Can you discuss the importance of the courts’ responsibility under the *Carolene Products* footnote to intervene to ensure that all citizens have fair and effective representation and the consequences that would result if it failed to do so?**

The full sentence quoted above from footnote 4 states: “It is unnecessary to consider now whether legislation which restricts those political process which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment.” *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). Our country was founded on the principle of separation of powers for our three branches of government. Our judiciary branch plays an essential role in protecting constitutional rights through the fair and impartial application of the law to the facts of all cases and controversies. If confirmed, I would faithfully apply the Supreme Court’s decision in *Carolene Products* and all Supreme Court and Third Circuit precedent.

17. Both Congress and the courts must act as a check on abuses of power. Congressional oversight serves as a check on the Executive, in cases like Iran-Contra or warrantless spying on American citizens and politically motivated hiring and firing at the Justice Department during the Bush administration. It can also serve as a self-check on abuses of Congressional power. When Congress looks into ethical violations or corruption, including inquiring into the Trump administration’s conflicts of interest and the events discussed in the Muellerreport we make sure that we exercise our own power properly.

(a) **Do you agree that Congressional oversight is an important means for creating accountability in all branches of government?**

Yes, it can be.

18. **Do you believe there are any discernible limits on a president’s pardon power? For example, President Trump claims he has an “absolute right” to pardon himself. Do you agree?**

I have not studied this issue. If confirmed, and a case raising this issue came before me, I would carefully examine all statutory authority and applicable Supreme Court and Third Circuit precedent.

19. What is your understanding of the scope of congressional power under Article I of the Constitution, in particular the Commerce Clause, and under Section 5 of the Fourteenth Amendment?

The Constitution provides Congress with limited and enumerated powers. The Supreme Court has addressed the scope of Congress' power under the commerce clause in many cases, including but not limited to, *Wickard v. Filburn*, 317 U.S. 111 (1942); *United States v. Lopez*, 514 U.S. v. 549 (1995), and *NFIB v. Sebelius*, 567 U.S. 519 (2012). Further, the Supreme Court has addressed the scope of Congressional authority under Section 5 of the Fourteenth Amendment in cases such as *City of Boerne v. Flores*, 521 U.S. 507 (1997).

20. In *Trump v. Hawaii*, the Supreme Court allowed President Trump's Muslim ban to go forward on the grounds that Proclamation No. 9645 was facially neutral and asserted that the ban was in the national interest. The Court chose to accept the findings of the Proclamation without question, despite significant evidence that the President's reason for the ban was animus towards Muslims. Chief Justice Roberts' opinion stated that "the Executive's evaluation of the underlying facts is entitled to appropriate weight" on issues of foreign affairs and national security.

(a) What do you believe is the "appropriate weight" that executive factual findings are entitled to on immigration issues? Does that weight shift when additional constitutional issues are presented, as in the Establishment Clause claims of *Trump v. Hawaii*? Is there any point at which evidence of unlawful pretext overrides a facially neutral justification of immigration policy?

In *Trump v. Hawaii*, 138 S.Ct. 2392 (2018), the Supreme Court rejected the idea of "a searching inquiry into the persuasiveness of the President's justifications," stating that such an inquiry would be "inconsistent with the broad statutory text and deference traditionally accorded the President in this sphere." *Trump v. Hawaii*, 138 S.Ct. at 2409. If confirmed, I will fulfill my duty to observe and apply all binding Supreme Court and Third Circuit precedent in this area.

21. How would you describe the meaning and extent of the "undue burden" standard established by *Planned Parenthood v. Casey* for women seeking to have an abortion? I am interested in specific examples of what you believe would and would not be an undue burden on the ability to choose.

In *Whole Women's Health v. Hellerstedt*, 136 S.Ct. 2292 (2016), the Supreme Court

held that “unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a women seeking an abortion impose an undue burden on that right.” *Whole Woman’s Health v. Hellerstedt*, 136 S.Ct. 2292, 2309 (2016) (quotations omitted). If confirmed as a district court judge, I will faithfully apply the “undue burden” standard as articulated by the Supreme Court and the Third Circuit.

22. Federal courts have used the doctrine of qualified immunity in increasingly broad ways, shielding police officers in particular whenever possible. In order to even get into court, a victim of police violence or other official abuse must show that an officer knowingly violated a clearly established constitutional right as specifically applied to the facts and that no reasonable officer would have acted that way. Qualified immunity has been used to protect a social worker who strip searched a four-year-old, a police officer who went to the wrong house, without even a search warrant for the correct house, and killed the homeowner, and many similar cases.

(a) Do you think that the qualified immunity doctrine should be reined in? Has the “qualified” aspect of this doctrine ceased to have any practical meaning? Should there be rights without remedies?

In *Pearson v. Callahan*, 555 U.S. 223, 231 (2009), the Supreme Court stated, “Qualified immunity balances two important interests – the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.” As such, the doctrine of qualified immunity takes into account these interests. If confirmed, I will faithfully apply this and all other relevant Supreme Court and Third Circuit precedent.

23. The Supreme Court, in *Carpenter v. U.S.* (2018), ruled that the Fourth Amendment generally requires the government to get a warrant to obtain geolocation information through cell-site location information. The Court, in a 5-4 opinion written by Roberts, held that the third-party doctrine should not be applied to cellphone geolocation technology. The Court noted “seismic shifts in digital technology”, such as the “exhaustive chronicle of location information casually collected by wireless carriers today.”

(a) In light of *Carpenter* do you believe that there comes a point at which collection of data about a person becomes so pervasive that a warrant would be required? Even if collection of one bit of the same data would not?

In *Carpenter v. United States*, 138 S.Ct. 2206 (2018), the Supreme Court recognized that “[a]s technology has enhanced the Government’s capacity to encroach upon areas normally guarded from inquisitive eyes,

the Court has sought to ‘assure preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.’” *Id.* at 2214 (quoting *Kyllo v. United States*, 533 U.S. 27, 34 (2001)). Congress has also enacted the Electronic Communication Privacy Act, which imposes several statutory restrictions above and beyond those required by the Fourth Amendment on searches involving certain types of electronic communications. *See* 18 U.S.C. § 2518. If confirmed, I will faithfully apply all relevant Supreme Court and Third Circuit precedent when addressing the application of the Fourth Amendment to new technologies.

24. Earlier this year, President Trump declared a national emergency in order to redirect funding toward the proposed border wall after Congress appropriated less money than requested for that purpose. This raised serious separation-of-powers concerns because the Executive Branch bypassed the congressional approval generally needed for appropriations. As a member of the Appropriations Committee, I take seriously Congress’s constitutional duty to decide how the government spends money.

- (a) **With the understanding that you cannot comment on pending cases, are there situations when you believe a president can legitimately allocate funds for a purpose previously rejected by Congress?**

I have not had the opportunity to study this issue. Further, as a judicial nominee, it would not be appropriate for me to comment on this question because it relates to matters that may arise or that are currently pending in the federal courts. *See* Code of Conduct for United States Judges, Canon 3(A)(6).

25. During Justice Kavanaugh’s confirmation hearing, he used partisan language to align himself with Senate Republicans. For instance, he accused Senate Democrats of exacting “revenge on behalf of the Clintons” and warned that “what goes around comes around.” The judiciary often considers questions that have a profound impact on different political groups. The Framers sought to address the potential danger of politically-minded judges making these decisions by including constitutional protections such as judicial appointments and life terms for Article III judges.

- (a) **Do you agree that the Constitution contemplates an independent judiciary? Can you discuss the importance of judges being free from political influence?**

Judicial independence is a core constitutional principle. Canons 1 and 5 of the Code of Conduct for United States Judges requires that judges remain free from political influence in order to ensure the principle of an

independent judiciary. Specifically, Canon 1 provides that “[a]n independent and honorable judiciary is indispensable to justice in our society.”

**Nomination of Karen Spencer Marston
to the United States District Court for the Eastern District of Pennsylvania
Questions for the Record
Submitted September 18, 2019**

QUESTIONS FROM SENATOR WHITEHOUSE

1. Your questionnaire indicates that you joined the Federalist Society earlier this year.
 - a. What was your primary motivation for joining the organization? Did you believe that being a member of the Federalist Society would improve your odds of being confirmed as a federal judge in the Trump administration?

As indicated on my Senate Judiciary Questionnaire, in 2019 and 2018 I joined several legal organizations: the American Bar Association, the Pennsylvania Bar Association, the Philadelphia Bar Association and the Federalist Society. I joined these legal organizations, including the Federalist Society, because of the opportunities, such as Continuing Legal Education programs, they provide to keep up to date on legal developments and to broaden my perspective of the legal profession.

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

My participation in the Federalist Society has consisted of attending a few Continuing Legal Education programs sponsored by the Federalist Society. If confirmed, I will carefully review my participation in each organization listed in my response to Question 1(a) above, consulting the Code of Conduct for United States Judges, including Advisory Opinion #116, and determine if it is proper to remain a member and/or attend any sponsored programs.

- c. If confirmed, do you plan to donate money to the Federalist Society?

No.

- d. Have you had contacts with representatives of the Federalist Society, in either their official or unofficial capacity, in preparation for your confirmation hearing? Please specify.

No.

2. A Washington Post report from May 21, 2019 (“A conservative activist’s behind-the-scenes campaign to remake the nation’s courts”) documented that Federalist Society Executive Vice President Leonard Leo raised \$250 million, much of it contributed anonymously, to influence the selection and confirmation of judges to the U.S. Supreme Court, lower federal courts, and state courts. If you haven’t already read that story and listened to recording of Mr. Leo published by the Washington Post, I request that you do so in order to fully respond to the following questions.
 - a. Have you read the Washington Post story and listened to the associated recordings of Mr. Leo?

As requested, I read the story and listened to the recording.

- b. Do you believe that anonymous or opaque spending related to judicial nominations of the sort described in that story risk corrupting the integrity of the federal judiciary? Please explain your answer.

I have no personal knowledge of anonymous or opaque spending related to judicial nominations. Judicial independence is a core constitutional principle. If confirmed, I will faithfully decide all cases and controversies fairly and impartially and uphold the integrity and independence of the judiciary.

- c. Mr. Leo was recorded as saying: “We’re going to have to understand that judicial confirmations these days are more like political campaigns.” Is that a view you share? Do you believe that the judicial selection process would benefit from the same kinds of spending disclosures that are required for spending on federal elections? If not, why not?

I have not studied this issue. Further, to the extent that this question concerns a political matter relating to the process of nominating and confirming judges, I respectfully refrain from any further response pursuant to Canon 5 of the Code of Conduct for United States Judges.

- d. Do you have any knowledge of Leonard Leo, the Federalist Society, or any of the entities identified in that story taking a position on, or otherwise advocating for or against, your judicial nomination? If you do, please describe the circumstances of that advocacy.

No. I have met Leonard Leo and other members of the Federalist Society, but I am not aware that he or any of the entities identified in that Washington Post story have taken a position on, or otherwise advocated for or against, my nomination.

- e. As part of this story, the Washington Post published an audio recording of Leonard Leo stating that he believes we “stand at the threshold of an exciting moment” marked by a “newfound embrace of limited constitutional government in our country [that hasn’t happened] since before the New Deal.” Do you share the beliefs espoused by Mr. Leo in that recording?

I believe the role of a judge is to faithfully adhere to the oath of office in 28 U.S.C. 453. If confirmed, I will administer justice fairly and impartially to all parties. I will faithfully follow Supreme Court and Third Circuit precedent with respect for the principles of judicial restraint and an understanding of the separation of powers and the proper role for an Article III judge.

3. During his confirmation hearing, Chief Justice Roberts likened the judicial role to that of a baseball umpire, saying “[m]y job is to call balls and strikes and not to pitch or bat.”
- a. Do you agree with Justice Roberts’ metaphor? Why or why not?

Yes, this metaphor is appropriate as both an umpire and a judge should be impartial arbiters with no stake in the outcome other than ensuring that all parties follow the rules and that the proceedings are fair to all.

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

A judge should consider the practical consequences when directed to do so by controlling law. See, e.g. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (noting that in the context of ruling on a motion for a preliminary injunction, a judge should consider practical consequences such as whether the plaintiff is likely to suffer irreparable harm in the absence of preliminary relief, among other considerations).

4. Federal Rule of Civil Procedure 56 provides that a court “shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact” in a case. Do you agree that determining whether there is a “genuine dispute as to any material fact” in a case requires a trial judge to make a subjective determination?

In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986), the Supreme Court held that “the ‘genuine issue’ summary judgment standard is ‘very close’ to the ‘reasonable jury’ directed verdict standard” and that “the inquiry under each is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.”

5. During Justice Sotomayor’s confirmation proceedings, President Obama expressed his view that a judge benefits from having a sense of empathy, for instance “to recognize what it’s like to be a young teenage mom, the empathy to understand what it’s like to be poor or African-American or gay or disabled or old.”
 - a. What role, if any, should empathy play in a judge’s decision-making process?

Empathy is an important trait for human beings; however, a judge cannot allow empathy to supersede a judge’s obligation to follow the law. Empathy can play a role in making decisions for which the law gives a judge discretion. For example, a judge can be empathetic in exercising his or her discretion in setting court dates and schedules in order to avoid unduly burdening the parties, counsel, witnesses, victims, or jurors.

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

A judge’s personal preferences have no place in a judge’s decision-making process as a judge must follow the law. A judge’s personal life experiences, including a judge’s knowledge, education, and training, can aid a judge’s ability to respect all persons and treat them with respect and dignity, to have an open mind to all arguments, and to communicate effectively with and relate to the people in a judge’s courtroom, including parties, counsel, witnesses, victims, and jurors.

6. In your view, is it ever appropriate for a judge to ignore, disregard, refuse to implement, or issue an order that is contrary to an order from a superior court?

No, it is not.

7. The Seventh Amendment ensures the right to a jury “in suits at common law.”
 - a. What role does the jury play in our constitutional system?

The Seventh Amendment “preserved” the right to jury trial as it existed at common law and it is a core principle of our American system of justice. The Supreme Court has espoused the virtues of the right to trial by jury: “It is assumed that twelve men know more of the common affairs of life than does one man, that they can draw wiser and safer

conclusions from admitted facts thus occurring than can a single judge.” *Sioux City & Pac. R.R. Co. v. Stout*, 657, 664 (1873). Although not incorporated to the states, in the federal system, the Seventh Amendment guarantees a trial by jury to litigants in civil cases. Further, in criminal cases, trial by jury is a fundamental right guaranteed by the Sixth Amendment and incorporated to the states through the Fourteenth Amendment. *See, Williams v. Florida*, 399 U.S. 78 (1970).

- b. Should the Seventh Amendment be a concern to judges when adjudicating issues related to the enforceability of mandatory pre-dispute arbitration clauses?

I have not encountered this issue. If a matter came before me wherein there may be a tension between the enforcement of a pre-dispute arbitration clause and the Seventh Amendment, I would faithfully follow the Supreme Court and Third Circuit precedent in order to resolve the issue for the litigants.

- c. Should an individual’s Seventh Amendment rights be a concern to judges when adjudicating issues surrounding the scope and application of the Federal Arbitration Act?

Please see my response to Question 7(b).

- 8. What deference do congressional fact-findings merit when they support legislation expanding or limiting individual rights?

This issue arises often in the context of legislation enacted pursuant to one of the enforcement clauses of a constitutional amendment, *see, e.g.*, U.S. Const. amend. XIV, § 5 & amend. XV, § 2, and the Supreme Court has generated a body of precedent with respect to several pieces of individual-rights legislation. *See, e.g., Tennessee v. Lane*, 541 U.S. 509 (2004) (in the context of the Americans with Disabilities Act of 1990); *Nev. Dep’t of Hum. Res. V. Hibbs*, 538 U.S. 721 (2003) (in the context of the Family and Medical Leave Act of 1993); *Kimel v. Fla. Bd. Of Regents*, 528 U.S. 62 (2000) (in the context of the Age Discrimination in Employment Act of 1967); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (in the context of the Religious Freedom Restoration Act of 1993); *Katzenbach v. Morgan*, 384 U.S. 641 (1966) (in the context of the Voting Rights Act of 1965). As a district court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Third Circuit precedent, including precedent in this area.

- 9. The Federal Judiciary’s Committee on the Codes of Conduct recently issued “Advisory Opinion 116: Participation in Educational Seminars Sponsored by Research Institutes, Think Tanks, Associations, Public Interest Groups, or Other Organizations Engaged in Public Policy Debates.” I request that before you complete these questions you review that Advisory Opinion.
 - a. Have you read Advisory Opinion #116?

Yes.

- b. Prior to participating in any educational seminars covered by that opinion will you commit to doing the following?
 - i. Determining whether the seminar or conference specifically targets judges or judicial employees.

I will abide by the Code of Conduct for United States Judges, and I will consider Advisory Opinion # 116 along with any subsequent advisory opinion from the

Committee of Codes of Conduct relating to participation in any such educational seminar. I understand that Advisory Opinion # 116 states that “it is essential for judges to assess each invitation to participate or attend a seminar on a case-by-case basis.” I also understand the opinion identifies nine factors relating to the sponsoring organization and three factors relating to the educational program itself that the judge should take into consideration. I commit that in deciding whether to attend any particular educational seminar, I will carefully consider the factors set forth in Advisory Opinion # 116.

- ii. Determining whether the seminar is supported by private or otherwise anonymous sources.

Please see my response to Question 9(b)(i).

- iii. Determining whether any of the funding sources for the seminar are engaged in litigation or political advocacy.

Please see my response to Question 9(b)(i).

- iv. Determining whether the seminar targets a narrow audience of incoming or current judicial employees or judges.

Please see my response to Question 9(b)(i).

- v. Determining whether the seminar is viewpoint-specific training program that will only benefit a specific constituency, as opposed to the legal system as a whole.

Please see my response to Question 9(b)(i).

- c. Do you commit to not participate in any educational program that might cause a neutral observer to question whether the sponsoring organization is trying to gain influence with participating judges?

Please see my response to Question 9(b)(i).

**Questions for Karen Marston
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 Karen Spencer Marston
United States District Court for the Eastern District of Pennsylvania
Questions for the Record
Submitted September 18, 2019

QUESTIONS FROM SENATOR BOOKER

1. Do you consider yourself an originalist? If so, what do you understand originalism to mean?

As a district court judge, my obligation would be to apply binding precedent, rather than to apply any specific interpretative method. It is exceedingly rare for a lower court to consider a constitutional case for which there is no applicable Supreme Court precedent. I am aware that the Supreme Court has indicated that looking to the original public meaning of the terms in the Constitution is a method of analysis in the appropriate case. For example, in *District of Columbia v. Heller*, 544 U.S. 570 (2008), the majority opinion by Justice Scalia and the dissenting opinion by Justice Stevens were based on their respective understandings of the original public meaning of the Second Amendment.

2. Do you consider yourself a textualist? If so, what do you understand textualism to mean

As a district court judge my obligation would be to apply Supreme Court and Third Circuit precedent on the meaning of any statutory term. I am aware that the Supreme Court has stated that statutory interpretation begins with the text, and where the text is clear, that is the end of the inquiry. *See, e.g. Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

3. Legislative history refers to the record Congress produces during the process of passing a bill into law, such as detailed reports by congressional committees about a pending bill or statements by key congressional leaders while a law was being drafted. The basic idea is that by consulting these documents, a judge can get a clearer view about Congress's intent. Most federal judges are willing to consider legislative history in analyzing a statute, and the Supreme Court continues to cite legislative history.

- a. If you are confirmed to serve on the federal bench, would you be willing to consult and cite legislative history?

As a district court judge my obligation would be to apply all binding Supreme Court and Third Circuit precedent. I recognize that the Supreme Court has made clear that when a statute is ambiguous, it is permissible for a court to consider legislative history.

- b. If you are confirmed to serve on the federal bench, your opinions would be subject to review by the Supreme Court. Most Supreme Court Justices are willing to consider legislative history. Isn't it reasonable for you, as a lower-court judge, to evaluate any relevant arguments about legislative history in a case that comes before you?

Please see my response to Question 3(a).

4. Do you believe that judicial restraint is an important value for a district judge to consider in deciding a case? If so, what do you understand judicial restraint to mean?

Yes, judicial restraint is an important value for all judges to possess. Judicial restraint is illustrated by a judge who allows process and reason to drive the results. Judicial restraint is the opposite of judicial activism.

- a. The Supreme Court's decision in *District of Columbia v. Heller* dramatically changed the Court's longstanding interpretation of the Second Amendment.¹ Was that decision guided by the principle of judicial restraint?

Heller is binding Supreme Court precedent and if confirmed as a district court judge, I will faithfully fulfill my duty to observe and apply all binding Supreme Court and Third Circuit precedent. As a judicial nominee, it would not be appropriate for me to opine on the correctness of Supreme Court decisions, and therefore, I respectfully refrain from further responding to this question.

- b. The Supreme Court's decision in *Citizens United v. FEC* opened the floodgates to big money in politics.² Was that decision guided by the principle of judicial restraint?

Citizens United is binding Supreme Court precedent and if confirmed as a district court judge, I will faithfully fulfill my duty to observe and apply all binding Supreme Court and Third Circuit precedent. As a judicial nominee, it would not be appropriate for me to opine on the correctness of Supreme Court decisions, and therefore, I respectfully refrain from further responding to this question.

- c. The Supreme Court's decision in *Shelby County v. Holder* gutted Section 5 of the Voting Rights Act.³ Was that decision guided by the principle of judicial restraint?

Shelby County is binding Supreme Court precedent and if confirmed as a district court judge, I will faithfully fulfill my duty to observe and apply all binding Supreme Court and Third Circuit precedent. As a judicial nominee, it would not be appropriate for me to opine on the correctness of Supreme Court decisions, and therefore, I respectfully refrain from further responding to this question.

5. Since the Supreme Court's *Shelby County* decision in 2013, states across the country have adopted restrictive voting laws that make it harder for people to vote. From stringent

¹ 554 U.S. 570 (2008).

² 558 U.S. 310 (2010).

³ 570 U.S. 529 (2013).

voter ID laws to voter roll purges to the elimination of early voting, these laws disproportionately disenfranchise people in poor and minority communities. These laws are often passed under the guise of addressing purported widespread voter fraud. Study after study has demonstrated, however, that widespread voter fraud is a myth.⁴ In fact, in-person voter fraud is so exceptionally rare that an American is more likely to be struck by lightning than to impersonate someone at the polls.⁵

- a. Do you believe that in-person voter fraud is a widespread problem in American elections?

I have not studied this issue in depth. I understand that there is currently pending litigation in several courts that may implicate this issue. Therefore, as a judicial nominee, I respectfully refrain from responding to this question pursuant to Canon 3(A)(6) of the Code of Conduct for United States Judges, which states that “[a] judge should not make public comment on the merits of a matter pending or impending in any court.” *See also* Canons 2 and 5, Code of Conduct for United States Judges.

- b. In your assessment, do restrictive voter ID laws suppress the vote in poor and minority communities?

Please see my response to Question 5(a).

- c. Do you agree with the statement that voter ID laws are the twenty-first-century equivalent of poll taxes?

Please see my response to Question 5(a).

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.⁶ Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.⁷ 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.⁸ In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.⁹

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

As a federal prosecutor for the past nineteen years, I have worked hard to pursue the mission of the Department of Justice and ensure there was never any bias in the cases I handled.

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

As a federal prosecutor for the past nineteen years, I have worked hard to pursue the mission of the Department of Justice and ensure there was never any bias in the

cases I handled.

- 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 participated in implicit bias training recommended by the Department of Justice.

⁴ *Debunking the Voter Fraud Myth*, BRENNAN CTR. FOR JUSTICE (Jan. 31, 2017), <https://www.brennancenter.org/analysis/debunking-voter-fraud-myth>.

⁵ *Id.*

⁶ 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>.⁷

Id.

⁸ 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>.

⁹ *Id.*

- d. According to a report by the United States Sentencing Commission, black men who commit the same crimes as white men receive federal prison sentences that are an average of 19.1 percent longer.¹⁰ Why do you think that is the case?

I have not studied this report and have no basis to opine as to why this may be occurring. Those disparities concern me, and in recognition of the depth of this interdisciplinary issue, I look forward to updates and explanations that the Sentencing Commission may provide – those would be very important to me.

- e. According to an academic study, black men are 75 percent more likely than similarly situated white men to be charged with federal offenses that carry harsh mandatory minimum sentences.¹¹ Why do you think that is the case?

I am not aware of this academic study and have no basis to opine as to why this may be occurring. Those disparities concern me, and I look forward to updates and explanations on this significant issue as they become available – those would be very important to me.

- f. What role do you think federal district judges, who review difficult, complex criminal cases, can play in addressing implicit racial bias in our criminal justice system?

Federal district judges should be aware of implicit racial bias in order to ensure that they are able to fulfill their oath to treat all people equally and fairly. This has been my mission as a federal prosecutor for the past nineteen years, and if confirmed, I commit that all persons that come into my courtroom will be treated fairly, respectfully and equally.

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

- 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.

Please see my response to Question 7(a) above.

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.

Yes.

9. Would you honor the request of a plaintiff, defendant, or witness in a case before you who is transgender to be referred to in accordance with that person's gender identity?

Yes.

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

Yes, *Brown v. Board of Education* was correctly decided. *Brown* is a landmark unanimous Supreme Court decision. *Brown* ended a terrible wrong in our nation's history, that is, the false doctrine of separate but equal.

¹⁰ U.S. SENTENCING COMM'N, DEMOGRAPHIC DIFFERENCES IN SENTENCING: AN UPDATE TO THE 2012 *BOOKER* REPORT 2 (Nov. 2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114_Demographics.pdf.

¹¹ Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1323 (2014)

¹² 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>.

¹³ *Id.*

¹⁴ 347 U.S. 483 (1954).

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

No, *Plessy v. Ferguson* was a terrible wrong in our nation's history. In *Brown v. Board of Education*, the Supreme Court correctly ruled in a unanimous decision that *Plessy* was not correctly decided.

12. 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?

My responses are my own.

13. As a candidate in 2016, President Trump said that U.S. District Judge Gonzalo Curiel, who was born in Indiana to parents who had immigrated from Mexico, had "an absolute conflict" in presiding over civil fraud lawsuits against Trump University because he was "of Mexican heritage."¹⁶ Do you agree with President Trump's view that a judge's race or ethnicity can be a basis for recusal or disqualification?

The decision to recuse or disqualify is primarily one for the presiding judge to make himself or herself, *see* 28 U.S.C. § 455. If confirmed, I will determine whether to recuse myself from a case by reference to the standards in 28 U.S.C. § 455, Canon 3 of the Code of Conduct of United States Judges, as well as any other applicable rules, opinions or ethical guidance. I will also, as necessary and appropriate, consult with judicial colleagues and ethics officials within the judicial system. For instance, I will recuse myself from any case that I have participated in as an Assistant United States Attorney or supervised in my role as Chief of Narcotics & Organized Crime with the United States Attorney's Office in the Eastern District of Pennsylvania. If confirmed, I will evaluate any real or potential conflict, or relationship that could give rise to appearance of conflict, on a case-by-case basis, and determine appropriate action with the advice of parties and their counsel including recusal where necessary. Every case is unique, therefore, I cannot speculate about the appropriateness of recusal in hypothetical situations for other judges. I will commit that, if confirmed, I will examine recusal issues with great care. Generally speaking, I would not anticipate recusing from a case based on race or ethnicity.

14. 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."¹⁷ Do you believe that immigrants, regardless of status, are entitled to due process and fair adjudication of their claims?

The Supreme Court held in *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001), that "the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." If confirmed, I will fulfill my duty to observe and apply all binding Supreme Court and Third Circuit precedent, including *Zadvydas*.

¹⁵ 163 U.S. 537 (1896).

¹⁶ Brent Kendall, *Trump Says Judge's Mexican Heritage Presents 'Absolute Conflict,'* WALL ST. J. (June 3, 2016), <https://www.wsj.com/articles/donald-trump-keeps-up-attacks-on-judge-gonzalo-curiel-1464911442>.

¹⁷ 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 September 18, 2019
For the Nomination of

Karen S. Marston, to the U.S. District Court for the Eastern District of Pennsylvania

1. District court judges have great discretion when it comes to sentencing defendants. It is important that we understand your views on sentencing, with the appreciation that each case would be evaluated on its specific facts and circumstances.

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

I understand the importance for a district court judge to make an individualized assessment based on the facts and arguments presented in order to fashion an appropriate sentence that is sufficient, but not greater than necessary to comply with the purposes set forth in 18 U.S.C. § 3553(a). As such, I would carefully study the relevant materials, including the Presentence Investigation Report, the recommendation of the United States Probation Office, the sentencing memoranda and evidence submitted by the parties, letters submitted on behalf of the defendant, any victim impact statements, and any allocution of the defendant. I would take into consideration the Sentencing Guidelines and specifically follow the three steps set forth in *Gall v. United States*, 552 U.S. 38 (2007). First, I would calculate the guideline range; second, I would formally rule on any departure or variance motions and state how those rulings affect the guideline range; and finally, I would consider the statutory factors in 18 U.S.C. § 3553(a). I would adhere to Third Circuit precedent in *United States v. Flores-Mejia*, 759 F.3d 253, 256 (3d Cir. 2014) (en banc) and give arguments of counsel meaningful consideration by acknowledging and responding to “any properly presented sentencing argument which has colorable legal merit and a factual basis.”

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

I would follow the steps outlined in my response to Question 1(a), however, I would also bring my experience from participating in hundreds of sentencing hearings where numerous district court judges determined what constituted a fair and proportional sentence. In addition, I would avail myself to available sentencing data for comparative convictions, as needed.

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

The Sentencing Guidelines are discretionary; however, a district court judge must carefully consider the advisory guideline calculation in every case. A district judge may determine that a departure from the guidelines is warranted based on the facts and circumstances presented in a particular case, such as based on the inadequacy of the criminal history category, or for substantial assistance to

authorities or upon a finding of “an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.” 18 U.S.C. § 3553(b).

- 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?**

- Congress has established certain mandatory minimum sentencing requirements for certain crimes, and if confirmed, I would follow the law established by Congress, regardless of my personal views. As a judicial nominee, I must respectfully refrain from responding to this question which is asking for my personal views on a matter of policy reserved for Congress.

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

- Please see my response to Question 1(d)(i).

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

- Please see my response to Question 1(d)(i).

- iv. Former-Judge John Gleeson has criticized mandatory minimums in various opinions he has authored, and has taken proactive efforts to remedy unjust sentences that result from mandatory minimums.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 do not believe it is appropriate for me to commit to doing so at this time.

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>

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

In general charging decisions are entrusted to the Executive branch. To the extent applicable case law and ethical rules permit me to discuss charging policies with members of the Executive branch, I would consider doing so under certain, limited circumstances where the policies undermine confidence in the criminal justice system.

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).

- 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?**

If confirmed, I would consider all sentencing options permitted by statute and in accord with the Sentencing Guidelines, including alternatives to incarceration in the appropriate situations.

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.

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

Yes, I am aware of the statistics from many sources, including from the United States Sentencing Commission, indicating that the rate of incarceration is higher for black men than for white men and that sentences imposed on black men are longer than sentences imposed on white men. If confirmed, I will do everything in my power to guard against racial disparities in cases that come before me. I commit that all persons that come into my courtroom will be treated fairly, respectfully and equally.

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

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

Yes.

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

I intend to make staffing decisions on a case-by-case basis, and in doing so I would look for opportunities to hire and promote qualified minorities and women.