

Nomination of David Morales to the U.S. District Court for the Southern District of Texas
Questions for the Record
June 13, 2018

QUESTIONS FROM SENATOR FEINSTEIN

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

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

It is never appropriate for a district court to depart from Supreme Court or relevant circuit court precedent.

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

No.

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

It would be appropriate for a district court to overturn one of its orders at the direction of the circuit court or of the Supreme Court.

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

As a district court nominee, it would be inappropriate for me to comment on the question or opine on Supreme Court precedent or procedures concerning same.

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”?

The terms above can mean different things to different people. However, no matter how described, as a district judge, *Roe v. Wade* would be binding precedent on me.

b. Is it settled law?

Roe v. Wade is settled and binding precedent of the U.S. Supreme Court.

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?**

Obergefell v. Hodges is settled and binding precedent of the U.S. Supreme Court.

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?**

Any personal opinions held on this or any other matter would not be relevant to my role as a district judge. If confirmed, I would faithfully follow *District of Columbia v. Heller*, as well as all other precedent established by the U.S. Supreme Court and the 5th Circuit Court of Appeals.

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

The Supreme Court held in *Heller* that the "right secured by the Second Amendment is not unlimited" and also stated that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons or the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." 554 U.S. 570, 626-27 (2008).

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

Although I have not studied *Heller* and previous Supreme Court precedent in this area of the law recently, *Heller* is binding U.S. Supreme Court precedent and I will faithfully follow its holdings if confirmed.

5. According to several news sources, in 2010, while you were serving as Texas's Deputy Attorney General responsible for all civil litigation, you declined to approve pursuing a \$5.4 million settlement with Trump University in relation to its fraudulent and misleading practices. (Morgan O'Hanlon, *Trump Nominates Austin Attorney Who Stymied Investigation into Trump University*, TEXAS OBSERVER (April 11, 2018)) Documents published as a result of public records requests make clear that attorneys in the Attorney General's Consumer Protection Division had sought your approval to enter into settlement negotiations. In flagging the settlement proposal for you, the attorneys in that division also discussed whether there was sufficient

evidence to show that Trump himself could be held individually liable for Trump University's operations. Those attorneys wrote that they "believe[d] the evidence will demonstrate that Trump himself approved the business model and marketing plan for the 'free' workshops," which those attorneys believed was "sufficient to impose individual liability." (*See Request for Approval to Settle, Memo to David Morales, Deputy Attorney General for Civil Litigation, from the Consumer Protection and Public Health Division (May 11, 2010)*)

The detailed settlement proposal submitted by attorneys in the Consumer Protection Division suggested seeking from Trump University over \$425,000 for restitution for "267 Texas consumers who purchased the 3 day [Trump University] seminar"; over \$1.36 million for the "39 Texas consumer who purchased" Trump University's "Gold Elite" package; and over \$826,000 for the "150 Texas consumers who purchased other goods or services." The settlement proposal also specifically cited as a condition that Trump University be permanently enjoined from future seminars in Texas. (*See Request for Approval to Settle, Memo to David Morales, Deputy Attorney General for Civil Litigation, from the Consumer Protection and Public Health Division (May 11, 2010)*)

a. Why did you decline to approve the \$5.4 million settlement with Trump University sought by attorneys in the Consumer Protection Division?

During my tenure at the Office of the Attorney General, decisions as to whether the State of Texas would pursue a consumer protection suit or seek monetary damages against individuals or companies during my tenure would have depended on a host of factors including the number of consumer complaints the Office of Attorney General received, the severity and scope of those complaints, and the cooperation or non-cooperation of the company or individual during the investigation of those complaints.

In the matter referenced above, it is my recollection that the Office of the Attorney General did not receive any consumer complaints either before, during, or following this investigation. During the pendency of the investigation, the company agreed to temporarily cease all operations in Texas and, by May 2010, had agreed to permanently cease doing business in Texas.

Based on the lack of consumer complaints and the company's cooperation in 2010, as well as because the Office of the Attorney General could always re-evaluate and file suit at any time if it started receiving consumer complaints, the decision was made to not file suit or seek a monetary settlement at that time. This decision allowed the office to investigate and devote resources to investigating and/or filing suit against businesses which Texas consumers had filed complaints with our office.

b. What was the basis for rejecting the recommendation to enter into settlement negotiations?

Please see the above answer to Question 5 (a).

c. At the time you refused to allow attorneys to enter into settlement negotiations, were you aware of the number of Texas consumers who had been

defrauded by Trump University?

Please see the above answer to Question 5 (a), concerning the fact that, to my recollection, the Office of Attorney General received no consumer complaints regarding this company. I do recall that approximately five people state-wide had filed Better Business Bureau complaints against the company which would have factored in the decision to begin open an investigation into the company.

i. If so, why did you not pursue a monetary settlement?

Please see the above answer to Question 5 (a).

ii. If not, what due diligence did you perform to make your decision?

Please see the above answer to Question 5 (a). Additionally, as a matter of course, I would have consulted with my Associate Deputy for Civil Litigation, and my Consumer Protection Division chief prior to making this decision.

d. Were you aware that then-businessman Trump could be held individually liable for Trump University's operations, including for Trump University's violation of the Texas Deceptive Trade Practices and Consumer Protection Act?

As a general matter, I was and am aware that individuals can be held liable under the Texas Deceptive Trade Practices and Consumer Protection Acts.

e. Did you discuss with attorneys from the Consumer Protection Division whether then-businessman Trump could be held individually liable for Trump University's operations, including for Trump University's violation of the Texas Deceptive Trade Practices and Consumer Protection Act?

Any conversations had with Consumer Protection Division attorneys concerning a consumer protection investigation would be attorney-client and or work product privileged communications. However, generally, I would always require our consumer protection attorneys to fully investigate and analyze the strengths and weaknesses of potential litigation.

i. If so, what was the nature of those discussions?

Please see the above answer to Question 5(e).

ii. If not, what was the basis for your decision?

Please see the above answer to Question 5(e).

f. Do you believe that Trump University did in fact defraud Texas consumers as a result of its fraudulent and misleading practices?

Please see the above answer to Question 5 (a). Additionally, any opinion concerning the strengths or weaknesses of a Consumer Protection Division investigation opened under my tenure would have been gained pursuant to a confidential Civil Investigative Demand procedure under the Texas Deceptive Practices Act. As such, it would be inappropriate for me to provide any such opinion.

6. In 2016, you wrote a letter to the editor in the *Houston Chronicle* meant to explain your decision not to press forward with a monetary settlement. In your letter, you wrote: “By May 2010, Trump University had agreed to permanently suspend all operations in Texas. That agreement to permanently and immediately leave Texas was, in my opinion, the most important element of resolving this investigation.” ((Letter to the Editor, *Trump U. Lawsuit and Texas*, HOUSTON CHRONICLE (June 4, 2016))

a. As noted in Question 5, attorneys in the Consumer Protection Division presented a settlement that included both monetary penalties and a permanent injunction. Did anything stop you from both pursuing a monetary settlement and seeking to halt, whether permanently or temporarily, Trump University’s operations in Texas?

Please see the answer to Question 5(a), concerning the continuing ability of the Attorney General’s Office to pursue litigation or monetary settlement if consumer complaints warranted same.

b. If not, why did you choose not to pursue both a monetary settlement and a permanent injunction against Trump University?

Please see the answer to Question 5(a) and the above answer to Question 6(b).

c. Were you aware of what legal action other states had taken against Trump University?

It is my recollection that other states were investigating this company at the time I approved opening an investigation.

d. Were you aware of whether other states had both pursued a monetary settlement with and a permanent injunction against Trump University?

As stated above, the attorneys in the Consumer Protection Division would have advised me of all strengths and weaknesses regarding investigations and potential litigation. This would have included investigations brought by other states.

7. In the same letter to the editor, you also wrote that Trump University’s agreement to halt its operations in Texas “did not preclude those consumers who felt they wanted a refund to demand it from Trump University or in court.” ((Letter to the Editor, *Trump U. Lawsuit and Texas*, HOUSTON CHRONICLE (June 4, 2016))

a. Do you believe that the office of a state attorney general has the responsibility

to help consumers who have been defrauded by businesses?

Yes.

If so, why did you choose not to help those consumers recover funds that they had spent on Trump University seminars?

Please see the answer to Question 5(a).

i. If not, why not?

b. At the time you refused to approve pursuing a monetary settlement with Trump University, was the Office of the Texas Attorney General tasked under law, regulation, or formal or informal practice with the responsibility of helping consumers who had been defrauded by entities like Trump University to recover money that they had lost?

The Office of the Attorney General is charged with the enforcement of the Texas Deceptive Practices and Consumer Protection Act. With that authority comes the Attorney General's responsibility to investigate and allegations and complaints of fraud and deceptive trade practices. Decisions as to whether the State of Texas would pursue a consumer protection suit or seek monetary damages against individuals or companies during my tenure would have depended on a host of factors including the number of consumer complaints the Office of Attorney General received, the severity and scope of those complaints, and the cooperation or non-cooperation of the company or individual during the investigation of those complaints.

c. I understand that the office of the New York Attorney General did in fact enter into a settlement with Trump University over its operations in New York. Was there anything different about Trump University's operations in Texas, as opposed to its operations in New York, which caused you not to seek a monetary settlement with Trump University?

I do not know the specifics of the company's operations in New York or how many consumers complaints the New York Attorney General may have received. However, in Texas, our office did not receive any consumer complaints concerning this business.

d. If you don't know, did you or your office review New York's case? Did your office talk to New York's Attorney General's office?

As a matter of practice, our Consumer Protection Division attorneys will frequently discuss and work with their counter-parts in other states.

8. According to your Senate Judiciary Questionnaire, on May 3, 2017, you interviewed with attorneys from the White House Counsel's Office and the Justice Department's Office of Legal Policy.

a. At any point during these interviews or during any other discussions with Trump Administration officials, was the case about Trump University discussed?

Yes.

b. If so, what was discussed?

I had a comprehensive conversation about my time at the Texas Attorney General's Office with the career Department of Justice official responsible for conducting my background investigation.

9. In your role as Governor Rick Perry's General Counsel, you helped screen and recommend judicial candidates for appointment. During your tenure, in 2013, Governor Perry appointed then-Texas Supreme Court Justice Nathan Hecht to serve as the court's Chief Justice. In 2008 — five years before his elevation to be Chief Justice — the Texas Ethics Commission assessed a \$29,000 fine against Hecht for receiving "a discount for his legal bills" from a law firm, which the Commission held "amounted to a campaign contribution." (Brian Sweany & Paul Burka, *The Life and Fines of Nathan Hecht*, TEXAS MONTHLY (Dec. 4, 2013))

a. In your role as Governor Perry's General Counsel, were you involved in any aspect of Justice Hecht's nomination to serve as Chief Justice of the Texas Supreme Court? If so, describe the nature of your involvement.

No.

b. At the time Governor Perry elevated Hecht to serve as Chief Justice, were you aware of the \$29,000 fine assessed against Hecht by the Texas Ethics Commission?

Yes. As Deputy Attorney General for Civil Litigation in, my office represented the Texas Ethics Commission in subsequent litigation of concerning this matter.

10. In 2007, you served as supporting counsel on an amicus brief filed in *Crawford v. Marion County Election Board*. The amicus brief, submitted on behalf of Texas and several other states, argued in favor of allowing voter ID laws, and specifically argued that "requiring photo ID imposes a negligible burden on the right to vote." (Brief of Texas et al. as Amici Curiae Supporting Respondents, *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008))

a. On what basis did you conclude that a voter ID law imposes only a "negligible burden" on voting rights?

The amicus brief referenced above was filed by the Texas Solicitor General on behalf of the State of Texas, seven other states and Puerto Rico, stating their positions in that matter. As with all amicus briefs filed while I was serving as Deputy Attorney General for Civil Litigation, I appeared on the brief as supporting counsel. The factual and legal support for the above position, as advocated on behalf of the states and Puerto Rico, is contained on pages 17-26 of the brief.

b. Did you have any evidence to support this conclusion? If so, what was that evidence?

Please see the above answer to Question 10 (a).

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

No.

b. Since 2016, has anyone with or affiliated with the Federalist Society, the Heritage Foundation, or any other group, asked you about your views on any issue related to administrative law, including your "views on administrative law"? If so, by whom, what was asked, and what was your response?

No.

c. What are your "views on administrative law"?

As a judicial nominee it would be improper for me to comment or offer an opinion on any particular law or area of the law which would likely be at issue in my court.

12. 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.

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

On Wednesday, June 13, 2018, I received these questions for the record from the Department of Justice, Office of Legal Policy (OLP). I reviewed and drafted responses to same. On Friday, June 15, 2018, I shared the draft responses with OLP. I discussed the questions and my responses with OLP and, after making edits and finalizing my responses, I authorized OLP to submit my responses to the committee.

**Nomination of David Steven Morales United States District Court
For the Southern District of Texas Questions for the Record Submitted June 13, 2018**

QUESTIONS FROM SENATOR WHITEHOUSE

1. 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. In baseball, an umpire is a neutral arbiter who calls balls, strikes and home-plate tags in the same manner for all players. Similarly, a judge should apply the law impartially and equally to all parties and attorneys appearing before the court.

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

Generally, a judge should fairly, impartially and diligently follow the law without regard to any possible consequences of a particular ruling. It is not the role of a judge to be invested in any particular outcome. To the contrary, a judge’s role is to apply the applicable law to the facts in any given case. It is the legislature’s role to create laws to garner a particular outcome. However, there are certain circumstances where, as a matter of law, a judge is required to consider the practical consequences of a particular ruling, such as when a court must determine whether a failure to issue an injunction would result in “irreparable harm.”

2. 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?

While I do not believe empathy should play a role in determining the facts in a particular case or how the law should be applied to those facts, I do believe that empathy can properly play a role in reminding a judge that he or she must treat all parties and attorneys with respect, patience and courtesy.

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

A judge’s life experience should not play a role in determining the facts in a particular case or how the law should be applied to those facts. However, a judge’s professional experience, such as a strong litigation background, can assist a judge in managing the practical responsibilities of presiding over his or her court.

3. 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.

4. What assurance can you provide this committee and the American people that you would, as a federal judge, equally uphold the interests of the “little guy,” specifically litigants who do not have the same kind of resources to spend on their legal representation as large corporations?

A judge is bound by oath to be impartial and “administer justice without respect to persons, and do equal right to the poor and to the rich.” *See* 28 U.S.C. §453. I believe that judges have a critical role in ensuring that judicial proceedings are fair, impartial and equitable. If confirmed, I would work every day to ensure that everyone who entered the courtroom would receive justice in a fair and equitable manner.

a. In civil litigation, well-resourced parties commonly employ “paper blizzard” tactics to overwhelm their adversaries or force settlements through burdensome discovery demands, pretrial motions, and the like. Do you believe these tactics are acceptable? Or are they problematic? If they are problematic, what can and should a judge do to prevent them?

The Federal Rules of Civil Procedure control the scope and procedure for discovery and motion practice in federal court. Rule 26 requires all civil litigants to agree to a proposed discovery plan that contemplates the scope and timing of discovery and Rules 12 and 56 strictly control which pre-trial motions are proper. Should any party or attorney allegedly abuse these rules or engage in discovery for “annoyance, embarrassment, oppression or undue burden or expense,” a motion for protective order could be filed. As with any motion, I would consider same after allowing all sides to fully and fairly present their respective positions and authority.

5. Do you believe that discrimination (in voting access, housing, employment, etc.) against minorities—including racial, religious, and LGBT minorities—exists today? If so, what role would its existence play in your job as a federal judge?

I do believe that discrimination, in many forms, exists today. If confirmed as a federal district judge, my role would be to treat all persons appearing before me in the same manner, without regard to their race, religion, gender or any other status.

6. In *Crawford v. Marion County Election Board*, you argued in an amicus brief that “requiring photo ID imposes a negligible burden on the right to vote.” Do you believe this to be true? What in your personal experience has shaped the way you understand this issue? As a district court judge, what would be your role in combating voter discrimination and intimidation?

The amicus brief referenced above was filed by the Texas Solicitor General on behalf of the State of Texas, seven other states and Puerto Rico, stating their positions in that matter. As with

all amicus briefs filed while I was serving as Deputy Attorney General for Civil Litigation, I appeared on the brief as supporting counsel. The legal support for the above position, as advocated on behalf of the states, is contained on pages 17-26 of the brief.

The question of voter discrimination and intimidation is a political issue, and it would be inappropriate for me as a judicially nominee to comment. Further, as cases may come before me in the future involving these matters, I am precluded from commenting on them pursuant to Canon 3(A)(6) of the Code of Judicial Conduct.

Senator Mazie K. Hirono Questions for the Record for David Morales

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. While serving as the Deputy Attorney General of Texas, you declined to approve a \$5.4 million settlement with Trump University for its fraudulent and misleading practices. As a result, although Trump University agreed to suspend operations in Texas, it avoided any monetary settlement. Your statement defending the actions taken by your office—that you “ensured that no further Texas citizens would be exposed to the company” acknowledge the fraud, but never explained why you declined to approve the settlement request.

Why did you decline to approve this settlement?

Decisions as to whether the State of Texas would pursue a consumer protection suit or seek monetary damages against individuals or companies during my tenure would have depended on a host of factors including the number of consumer complaints the Office of Attorney General received, the severity and scope of those complaints, and the cooperation or non-cooperation of the company or individual during the investigation of those complaints.

In the matter referenced above, it is my recollection that the Office of the Attorney General had not received any consumer complaints either before, during, or following this investigation. During the pendency of the investigation, the company agreed to temporarily cease all operations in Texas and, by May 2010, had agreed to permanently cease doing business in Texas.

Based on the lack of complaints and the company’s cooperation in 2010, as well as because the Office of the Attorney General could re-evaluate and file suit at any time had it started receiving consumer complaints, the decision was made to not file suit or seek a monetary settlement at that time.

Nomination of David Steven Morales
United States District Court for the Southern District of Texas
Questions for the Record
Submitted June 13, 2018

QUESTIONS FROM SENATOR BOOKER

1. According to a Brookings Institute 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* to sell drugs than blacks.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?

Although I have not conducted research into this specific issue, I do believe racial bias affects our country despite our best efforts to eradicate it from all areas of society. Racial bias and discrimination are antithetical to the rule of law and to the core liberties protected by the U.S. Constitution. If confirmed, I will be duty-bound to treat all persons in the same manner, regardless of race.

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

I have not conducted research into this issue, but I am aware of studies regarding the disproportionate proportion of incarcerated people of color in the prison system. I appreciate the need for the criminal justice system to treat all persons the same regardless of race, and I will do so if confirmed as a district judge.

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.

Please see my answer to Question 1(a) above.

¹ JONATHAN ROTHWELL, HOW THE WAR ON DRUGS DAMAGES BLACK SOCIAL MOBILITY, BROOKINGS INSTITUTE (Sept. 30, 2014), available at <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, PH.D., THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS, THE SENTENCING PROJECT 14 (June 14, 2016), available at <http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/>.

⁴ *Id.* at 8.

2. According to a Pew Charitable Trusts fact sheet, in the 10 states with the largest declines in their incarceration rates, crime fell an average of 14.4 percent.⁵ In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an 8.1 percent average.⁶

a. Do you believe there is a direct link between increases of 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 whether there is a direct link between increases of a state's incarcerated population and decreased crime rates and, therefore, have not formed a belief about same.

b. Do you believe there is a direct link between decreases of 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 answer to Question 2(a) above.

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. Since *Shelby County, Alabama v. Holder*, states across the country have adopted restrictive voting laws that make it harder, not easier for people to vote. From strict voter ID laws to the elimination of early voting, these laws almost always have a disproportionate impact on poor minority communities. These laws are often passed under the guise of widespread voter fraud. However, study after study has demonstrated that widespread voter fraud is a myth. In fact, an American is more likely to be struck by lightning than to impersonate someone voter at the polls.⁷ One study that examined over one billion ballots cast between 2000 and 2014, found only 31 credible instances of voter fraud.⁸ Despite this, President Trump, citing no information, alleged that widespread voter fraud occurred in the 2016 presidential election. At one point he even claimed—again without evidence—that millions of people voted illegally in the 2016 election.

⁵ THE PEW CHARITABLE TRUSTS, NATIONAL IMPRISONMENT AND CRIME RATES CONTINUE TO FALL 1 (Dec. 2016), available at http://www.pewtrusts.org/~media/assets/2016/12/national_imprisonment_and_crime_rates_continue_to_fall_web.pdf.

⁶ *Id.*

⁷ JUSTIN LEVITT, THE TRUTH ABOUT VOTER FRAUD, BRENNAN CENTER FOR JUSTICE 6 (2007), available at <http://www.brennancenter.org/sites/default/files/legacy/The%20Truth%20About%20Voter%20Fraud.pdf>.

⁸ Justin Levitt, *A comprehensive investigation of voter impersonation finds 31 credible incidents out of one billion ballots cast*, THE WASHINGTON POST, Aug. 6, 2014, available at https://www.washingtonpost.com/news/wonk/wp/2014/08/06/a-comprehensive-investigation-of-voter-impersonation-finds-31-credible-incidents-out-of-one-billion-ballots-cast/?utm_term=.4da3c22d7dca.

a. As a general matter, do you think there is widespread voter fraud? If so, what studies are you referring to support that conclusion?

The issue of voter fraud is a political one which is currently being litigated in the Fifth Circuit Court of Appeals. As such, it would be inappropriate for me as a judicial nominee to comment on same.

b. Do you agree with President Trump that there was widespread voter fraud in the 2016 presidential election?

Please see my answer to Question 4(a) above.

c. Do you believe that restrictive voter ID laws suppress the vote in poor and minority communities?

Please see my answer to Question 4(a) above.

5. The color of a criminal defendant plays a significant role in capital punishment cases. For instance, people of color have accounted for 43 percent of total executions since 1976 and 55 percent of those currently awaiting the death penalty.⁹

a. Do those statistics alarm you?

Any racial disparity in the criminal justice system is concerning, whether the disparity concerns the death penalty, life-without-parole sentences, or sentences for a term of years.

b. Do you believe it is cruel and unusual to disproportionately apply the death penalty on people of color in compared to whites? Why not?

Whether a statistical racial disparity in the application of the death penalty renders a death sentence unconstitutional is presently pending in litigation, *see Wood v. Oklahoma*, No. 17-6891 (U.S.), and it would be inappropriate for me to comment on that pending litigation under Canon 3(A)(6) of the Code of Conduct for United States Judges.

c. The color of the victim also plays an important role in determining whether the death penalty applies in a particular case. White victims account for about half of all murder victims, but 80 percent of all death penalty cases involve white victims. If you were a judge, and those statistics were playing out in your courtroom, what would you do?

I would evaluate the prosecutor's charging practices to determine whether the statistical disparity is explainable by any factor other than race. If I determined that the race of the victim or defendant played a role in the prosecutor's request for a particular sentence, I

⁹ The American Civil Liberties Association, Race and the Death Penalty, <https://www.aclu.org/other/race-and-death-penalty> (Last visited June 13, 2018).

would consider any and all available remedial steps consistent with applicable statutes and case law.

**Questions for the Record from Senator Kamala D. Harris
Submitted June 13, 2018
For the Nominations of**

- Holly A. Brady, to be U.S. District Judge for the Northern District of Indiana
- Andrew Brasher, to be U.S. District Judge for the Middle District of Alabama
- James Patrick (“JP”) Hanlon, to be U.S. District Judge for Southern District of Indiana
- David Steven Morales, to be U.S. District Judge for the Southern District of Texas
- Lance Edward Walker, to be U.S. District Judge for the District of Maine

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?

If confirmed, I would undertake significant pre-sentencing preparation prior to sentencing a defendant. Specifically, I would review the Presentence Investigative Report, the Advisory Sentencing Guidelines, and the factors set forth in 18 U.S.C. §13553(a). I would consider the relevant filings made by the defendant and the government, consult with the presentence officer, read and listen to any victim statements, and consider the presentation of counsel, the defendant, and other relevant parties. Ultimately, I would work to impose a sentence that is “sufficient, but not greater than necessary” to achieve the sentencing purposes set forth by Congress. 18 U.S.C. §3553(a)(2).

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

Please see my answer to Question 1(a) above.

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

The Advisory Sentencing Guidelines and Supreme Court precedent explain circumstances and considerations that can justify a departure or variance from the range specified in the Guidelines. Specifically, the guidelines enumerate the circumstances where it would be appropriate to make “departures” above or below the advisory guideline range. I would further have to consider whether any factors listed in 18 U.S.C. § 3553(a) call for imposing a sentence above or below the Guidelines range. As required by Federal Rule of Criminal Procedure 32(h), I would provide reasonable advance notice in those cases where I am considering a departure.

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

i. Do you agree with Judge Reeves?

I am not familiar with the basis for Judge Reeves' statement above. The inclusion of mandatory minimum sentences in criminal statutes is reserved to Congress's judgment. It would be inappropriate for me as a judicial nominee to publicly comment on matter of legislative policy or to address a political question. Moreover, cases may come before in the future involving such statutes, and thus I am precluded from publicly commenting on them, pursuant to Canon 3(A)(6) of the Code of Conduct for United States Judges. If confirmed, I will faithfully apply all federal statutory and guideline sentencing provisions, as interpreted by the Supreme Court and the Fifth Circuit.

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 previously 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 am aware that mandatory minimum sentences have generated significant controversy and debate. As I noted above, however, the power to legislate mandatory minimum sentences lies exclusively with Congress. Although, in rare cases, judges have criticized statutes for working an injustice, it is generally inappropriate for judges to publicly comment on matters of legislative policy or to address a political question.

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?

The power to charge individuals with crimes lies exclusively with the Executive Branch. As a judge, I am bound to respect the separation of powers built into the constitutional framework, and not intrude upon the authority reserved to another branch. Accordingly, it would be inappropriate for a district court judge to discuss or attempt to influence charging decisions by the executive branch.

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

The clemency power is reserved to the executive branch. For the reasons stated in response to Question 1(d)(iv)(2) above, it would be inappropriate for a district court judge to encroach upon this authority.

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.

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. A judge is bound by oath to be impartial and “administer justice without respect to persons, and do equal right to the poor and to the rich.” *See* 28 U.S.C. § 453. I believe that judges have the critical role of ensuring that judicial proceedings are fair, impartial, and equitable.

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

I am aware of studies that cite evidence of bias and racial disparities in the criminal justice system, including studies indicating that people of color are disproportionately represented in our nation’s jails and prisons. Although these issues and any potential remedies are with the province of the legislative branch, if confirmed as a district judge, I will be duty bound to treat all persons appearing before me in the same manner, regardless of race.

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. I will endeavor to make all hiring decisions based on the quality of the applicant, regardless of age, gender, race, color, national origin, or religion.