

**Nomination of Peter J. Phipps to the
United States District Court
For the Western District of West Pennsylvania
Questions for the Record Submitted
May 2, 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?

Every metaphor has its limitations, but yes, I think that Chief Justice Roberts’ metaphor provides a helpful understanding of the judicial role, especially for a district judge. For district courts, the metaphorical strike zone is typically well-defined, either by precedent, statute, regulation, or rule, such as the Federal Rules of Civil Procedure, the Federal Rules of Evidence, or the Federal Rules of Criminal Procedure. The district judge is bound to abide by each of those authorities and not to implement his or her personal preferences.

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

In ruling, a judge should not consider practical consequences unless directed to do so by controlling law. For instance, in ruling on a motion for a preliminary injunction, a judge should consider several practical consequences, such as whether the plaintiff “is likely to suffer irreparable harm in the absence of preliminary relief, [whether] the balance of equities tips in his favor, and [whether] an injunction is in the public interest.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

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?

There is some role for empathy to play in a judge’s decision-making process. For instance, a judge can be empathetic in exercising his or her discretion in setting court dates and schedules so as to avoid unduly burdening parties, counsel, witnesses, victims, or jurors. Empathy, however, does not supersede a judge’s obligation to follow the law.

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

Several components of a judge's experience can affect the judge's decision-making process, such as a judge's knowledge, education, training, and ability to respect all persons and to treat them with respect and dignity. A judge's personal preferences, however, have no place in a judge's decision-making process; a judge should follow the law.

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, it is not.

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. 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?

I do not believe that the above-described tactics are acceptable. The Federal Rules of Civil Procedure, as recently amended, include a proportionality requirement for discovery requests, *see* Fed. R. Civ. P. 26(b)(1), and along with the initial disclosure requirement, *see* Fed. R. Civ. P. 26(a)(1)(A), the rules provide a foundation for (i) ensuring that discovery burdens are manageable and (ii) avoiding litigation by surprise. Also, a judge may, through case management conferences, monitor the application of the Civil Rules so that they are administered to "secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1.

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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?

I have not studied this issue in depth, but the conclusion that members of the criminal justice system have acted with implicit social cognition on the basis of race would not surprise me. If this issue were before me as a judge in a specific case, I would apply the standards in Rule 702 of the Federal Rules of Evidence as well as precedent in the *Daubert / Joiner / Kumho Tire* line of cases to govern the admissibility of expert opinions on this topic.

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

Generally yes.

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

I have not studied this issue in depth. When my wife was in graduate school, she alerted me to literature on implicit social cognition. I do not recall if I read any of the scholarship myself, or if it was in conversation that she informed me of the substance of the literature.

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 this issue in depth, but I recognize that it is difficult to distinguish causation from correlation, especially on a multivariate issue such as this one.

- 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 response to Question 2.a.

3. 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.

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

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.

I have not studied this issue in depth. Moreover, I understand that there is currently pending litigation in several courts that may implicate this issue. Therefore, pursuant to Canon 3(A)(6) of the Code of Conduct for United States Judges, which directs that “[a] judge should not make public comment on the merits of a matter pending or impending in any court,” I respectfully refrain from answering this question as a judicial nominee, *see* Commentary to Canon 1.

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

Please see my response to Question 3.a.

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

Please see my response to Question 3.a.

- 4. 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.

Questions for the Record from Senator Kamala D. Harris
Submitted May 2, 2018
For the Nomination of:

Peter J. Phipps, to be United States District Judge for the Western District of Pennsylvania

1. On your senate judiciary committee questionnaire, you listed *Witt v. United States Air Force* as one of your 10 most significant litigated matters you personally handled. During the litigation, you submitted a trial brief on August 31, 2010, in which you stated that a lesbian woman's conduct posed a risk to unite cohesion and morale, and that her discharge advanced those interests.

a. Do you continue to believe that sexual orientation poses a risk to unit cohesion in the military and that gay and lesbian service members should be discharged to advance those interests?

In *Witt v. United States Air Force*, I represented the United States in the defense of a now-repealed federal statute, 10 U.S.C. 654. The arguments made in that brief were not my own, but rather were made on behalf of the United States – after Attorney General Holder wrote a letter pursuant to 28 U.S.C. 530D to the Senate Legal Counsel on April 24, 2009. Copy available at <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/04-24-2009.pdf>. In that letter, Attorney General Holder referenced correspondence from the General Counsel for the Department of Defense (Jeh Johnson) to the Solicitor General (Elena Kagan) and determined that the appropriate course was to “to defend the constitutionality of 10 U.S.C. 654 on remand in the district court.” As lead counsel at the trial, I defended the constitutionality of the statute; later in the case, my duties included negotiating and drafting a settlement agreement with the plaintiff.

b. Do you believe that transgender service members pose a risk to unit cohesion?

I understand that there is currently pending litigation in several courts that may implicate this issue. Therefore, pursuant to Canon 3(A)(6) of the Code of Conduct for United States Judges, which directs that “[a] judge should not make public comment on the merits of a matter pending or impending in any court,” I respectfully refrain from answering this question as a judicial nominee, *see* Commentary to Canon 1.

2. Since 2011, you have been a member of the Knights of Columbus, a Catholic fraternal organization limited only to men. The Knights of Columbus state that they “[defend] the right to life of every human being, from the moment of conception to natural death.”

a. As a member of this organization, do you carry out this mission?

My activities have been limited to social and recreational functions. From the date I joined through June of 2012, my activities consisted of the following: going to the pool with my family and attending social gatherings with my wife / family on a couple of occasions. After June of 2012, I do not recall engaging in any activities with the Knights of Columbus.

b. If confirmed to the bench, will you defend the right to life of every human being, from the moment of conception to natural death?

If confirmed to the bench, I will follow the law and not any personal views that I may have.

c. Must you swear an oath in order to join this organization? If so, what is that oath?

Membership in the Knights of Columbus is open to men 18 years of age or older who are practicing Catholics, and I do not recall swearing an oath to join.

d. When your group's organizational values conflict with litigants' constitutional rights, how can litigants in your court expect a fair hearing?

I have a deep and abiding respect for the rule of law. I have been a public servant in the Department of Justice for three different administrations and under six different Attorneys General. Litigants can rest assured that my adherence to the rule of law is firm and that I will follow the law and not any personal views that I may have.

e. As a member of a group that avowedly opposes abortion, how will you approach that constitutionally-protected right in your courtroom?

If confirmed, I would follow all binding precedent.

f. Is *Roe v. Wade* settled law?

It is binding precedent of the United States Supreme Court; if confirmed, I would follow all binding precedent.

3. 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 would make an individualized assessment based on the facts and arguments presented. To do so, I would review the presentence report and the recommendation of the probation officer; I would also pay close attention to the

statements of victims and witnesses as well as the allocution of the defendant. With respect to the arguments of counsel, I would give them meaningful consideration by acknowledging and responding to “any properly presented sentencing argument which has colorable legal merit and a factual basis.” *United States v. Flores-Mejia*, 759 F.3d 253, 256 (3d Cir. 2014) (en banc) (quoting *United States v. Begin*, 696 F.3d 405, 411 (3d Cir. 2012)). As far as applying the Sentencing Guidelines, I would follow the three steps set forth in *Gall v. United States*, 552 U.S. 38 (2007), and *United States v. Lofink*, 564 F.3d 232 (3d Cir. 2009). First, I would calculate the guidelines range. Next, I would formally rule on any departure motions and state how those rulings affect the guidelines range. And finally, I would consider the statutory factors, *see* 18 U.S.C. 3553(a), to evaluate the individual circumstances of each defendant before imposing a sentence.

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 answer to Question 3.a, and in addition, I would avail myself of available sentencing data for comparative convictions, as needed.

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

The term “depart” is distinct from the term “variance,” and my answer is therefore limited to the circumstances under which it would be appropriate for a court to “depart” from the Sentencing Guidelines. *See generally Irizarry v. United States*, 553 U.S. 708, 714 (2008) (“explaining that ‘[d]eparture’ is a term of art under the Guidelines and refers only to non-Guidelines sentences imposed under the framework set out in the Guidelines”). A court may depart from a guideline-specified sentence in certain situations, 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?

I interpret this question as asking my view, as a nominee for judicial office, on a matter of policy reserved for Congress, which has established

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

certain mandatory minimum sentencing requirements. I would follow the law established by Congress, regardless of my personal views.

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

Please see response to Question 3.d.i.

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

Please see response to Question 3.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 do not believe it is appropriate for me to commit to doing so at this time.

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

Please see response to Question 3.d.iv.1

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

Please see response to Question 3.d.iv.1

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 as a judge, it would be my intent to consider alternatives to incarceration for first offenders not convicted of violent or otherwise serious

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>

offenses.

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

Yes, without studying this issue in depth, I believe that there are. If confirmed, all persons will be treated respectfully, fairly, and evenly in my courtroom.

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

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

Yes.

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

I 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.