

**Nomination of Mary Kay Vyskocil
United States District Court for the Southern District of New York**

**Questions for the Record
From Senator Mazie Hirono
For Diane Gujarati, Eric Komitee, John L. Sinatra, Jr., Rachel P., Kovner, Lewis J. Liman,
Mary Kay Vyskocil and Gary Brown**

1. As part of my responsibility as a member of the Senate Judiciary Committee and to ensure the fitness of nominees, I am asking nominees to answer the following two questions:

- a. Since you became a legal adult, have you ever made unwanted requests for sexual favors, or committed any verbal or physical harassment or assault of a sexual nature?**

No.

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

No.

2. In these hearings, when a Senator asks about a nominee's personal views on a topic, about their involvement in certain organizations or their decisions to advocate for certain points of view, they tell us that those parts of their records don't matter, that as judges they will simply "follow the law." But, cases are so infrequently decided by the direct application of legal precedent that at some point, as one nominee told us, "judging kicks in."

Do you acknowledge that there will be times on the bench, that a judge does bring personal experiences and views to bear on their decisions?

It is human nature that every person, regardless of one's career, brings to his or her role personal experiences and views. As Chief Justice Rehnquist observed in *Laird v. Tatum*, 409 U.S. 824, 835 (1972): "[p]roof that a Justice's mind at the time he joined the Court was a complete tabula rasa in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias." I believe, however, that a good judge will faithfully follow binding law and precedent and not permit her personal views to dictate her rulings.

3. A recent nominee before the Committee spoke about the importance of training to help judges identify their implicit biases.

- a. Would you agree that training on implicit bias is important for judges to have?**

I believe implicit bias exists in America and remains an important challenge for our country and many individuals and institutions to overcome. While I have not studied in depth the effectiveness of implicit bias training, I am aware that the issue has received

significant and increasing attention in scholarly studies and in broader public debates. If I am fortunate enough to be confirmed, I will treat all persons equally regardless of race, ethnicity, religion, gender, or sexual orientation, and take strong affirmative actions to try to ensure that everyone in my courtroom does the same.

b. Have you ever taken such training?

I have participated in seminars on implicit bias sponsored by my former law firm and by bar associations.

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

Racial bias has no place in the courtroom or my chambers. If I am fortunate enough to be confirmed, I will commit to taking all steps necessary to carry out my oath to “administer justice without respect to persons,” to “do equal right to the poor and to the rich,” and to “faithfully and impartially discharge and perform all the duties . . . under the Constitution and laws of the United States.” 28 U.S.C. § 453.

**Nomination of Mary Kay Vyskocil
United States District Court for the Southern District of New York
Questions for the Record
Submitted August 7, 2018**

QUESTIONS FROM SENATOR BOOKER

1. According to a Brookings Institution study, African Americans and whites use drugs at similar rates, yet blacks are 3.6 times more likely to be arrested for selling drugs and 2.5 times more likely to be arrested for possessing drugs than their white peers.¹ Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.² These shocking statistics are reflected in our nation's prisons and jails. Blacks are five times more likely than whites to be incarcerated in state prisons.³ In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.⁴

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

I believe that implicit bias, including racial and other forms of bias, exists in society at large, including in our criminal justice system.

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

I have not studied the issue and therefore am not in a position to comment beyond to say that, as a general matter, it is my understanding that people of color make up a statistically disproportionate share of the prison population.

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 the issue of implicit racial bias, but have attended seminars on the subject of implicit bias sponsored by my former law firm and by bar associations.

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

a. Do you believe there is a direct link between increases in a state's incarcerated population and decreased crime rates in that state? If you believe there is a direct link, please explain your views.

I have not studied this issue and have not formed any opinion on potential links between increases or decreases in incarcerated populations and decreased crime

rates.

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

I have not studied this issue and have not formed any opinion on potential links between increases or decreases in incarcerated populations and decreased crime rates.

¹ Jonathan Rothwell, *How the War on Drugs Damages Black Social Mobility*, BROOKINGS INST. (Sept. 30, 2014), <https://www.brookings.edu/blog/social-mobility-memos/2014/09/30/how-the-war-on-drugs-damages-black-social-mobility>.

² *Id.*

³ Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, SENTENCING PROJECT (June 14, 2016), <http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons>.

⁴ *Id.*

⁵ Fact Sheet, *National Imprisonment and Crime Rates Continue To Fall*, PEW CHARITABLE TRUSTS (Dec. 29, 2016), <http://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2016/12/national-imprisonment-and-crime-rates-continue-to-fall>.

⁶ *Id.*

3. **Do you believe it is an important goal for there to be demographic diversity in the judicial branch? If not, please explain your views.**

Yes.

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

As a sitting federal judge and a nominee for the United States District Court, it is not appropriate for me to comment on the correctness of a Supreme Court decision. *See* Canon 2 of the Code of Conduct for United States Judges. If confirmed, I will faithfully apply *Brown* and all binding Supreme Court and Second Circuit precedent. I will also faithfully discharge my oath to uphold the law fairly and without regard to persons. 28 U.S.C. § 453.

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

See my answer to Question 4. The Supreme Court overturned *Plessy v. Ferguson* in *Brown v. Board of Education*, correctly condemning the grave injustice of racial segregation.

6. **Has any official from the White House or the Department of Justice, or anyone else involved in your nomination or confirmation process, instructed or suggested that you not opine on whether any past Supreme Court decisions were correctly decided?**

Each answer I have provided is my own. I have met with officials from the Department of Justice who have advised me to answer questions truthfully and in a manner consistent with the Canons of Ethics. I have provided my answers, including in certain instances declining to offer opinions, after careful consideration of the questions and the issues framed, and of the implications of the Canons of Ethics that govern federal judges.

7. **President Trump stated recently on Twitter: “We cannot allow all of these people to invade our Country. When somebody comes in, we must immediately, with no Judges or Court Cases, bring them back from where they came.”⁹ Do you believe that immigrants, regardless of status, are entitled to due process and fair adjudication of their claims?**

Yes.

⁷ 347 U.S. 483 (1954).

⁸ 163 U.S. 537 (1896).

⁹ Donald J. Trump (@realDonaldTrump), TWITTER (June 24, 2018, 8:02 A.M.), <https://twitter.com/realDonaldTrump/status/1010900865602019329>.

**Nomination of Mary Kay Vyskocil
United States District Court for the Southern District of New York**

**Questions for the Record from Senator Kamala D. Harris
Submitted August 8, 2018
For the Nominations of**

Gary Brown, to the U.S. District Court for the Eastern District of New York

Diane Gujarati, to the U.S. District Court for the Eastern District of New York

Eric R. Komitee, to the U.S. District Court for the Eastern District of New York

Rachel P. Kovner, to the U.S. District Court for the Eastern District of New York

Lewis J. Liman, to the U.S. District Court for the Southern District of New York

John L. Sinatra, Jr., to the U.S. District Court for the Western District of New York

Mary Kay Vyskocil, to the U.S. District Court for the Southern District of New York

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

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

If I were confirmed as a district court judge, sentencing would be one of the most profound responsibilities of my office. I would follow all federal sentencing law and the applicable precedent from the Supreme Court and the Second Circuit. I would dedicate significant care and thought to every sentence in an effort to ensure that it is “sufficient, but not greater than necessary” to comport with the purposes of sentencing memorialized in 18 U.S.C. § 3553(a)(2), following the steps outlined by the Supreme Court in *Gall v. U.S.*, 552 U.S. 38, 49–50 (2007). Specifically, I would begin by carefully reviewing the pre-sentence report required by Federal Rule of Criminal Procedure 32(c)(1), taking care to ensure that the applicable sentencing guidelines range for the offense is correctly calculated and considering whether upward or downward departures are appropriate. I would also consider all applicable statutes and precedents. Next, I would consider all other relevant materials including the recommendation of the probation officer, letters and other materials in support of the defendant, victim impact statements or related materials, and the arguments of the parties. I would consider all of the statutory factors in Section 3553(a) to determine whether the requested sentence is supported, making an individualized assessment based on the facts presented in the particular case before me. I would ensure that any requested deviation from the Guidelines was warranted, taking into account the

extent of the deviation and the justification for such deviation. Finally, I would take care to adequately explain on the record the chosen sentence.

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

See my response to Question 1(a) above. In addition, I would continue to study decisions of the Supreme Court and the Second Circuit on the subject of sentencing, as well as publications of the Sentencing Commission. I would also discuss issues of sentencing with my colleagues within the Southern District of New York.

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

Supreme Court precedent and the advisory Sentencing Guidelines dictate the circumstances and factors that could justify a departure or variance from the Sentencing Guidelines. Part K of Section 5 of the Guidelines and the factors listed in 18 U.S.C. § 3553 may justify a departure from the Guidelines range.

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

i. Do you agree with Judge Reeves?

I have never studied whether mandatory minimum sentences are more likely to deter certain types of crimes than discretionary or indeterminate sentences, and I am unfamiliar with Judge Reeves or his views on the subject. Moreover, as a sitting federal judge and as a district court nominee, it would be inappropriate for me to comment on the efficacy of sentencing-related policy. *See* Canon 3(A)(6) & Canon 5, Code of Conduct for United States Judges. If confirmed, I would apply the law with respect to sentencing without regard to any personal views on the required sentences.

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).

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

iv. Former-Judge John Gleeson has criticized mandatory minimums in various opinions he has authored, and has taken proactive efforts to remedy unjust sentences that result from mandatory minimums.² If confirmed, and you are required to impose an unjust and disproportionate sentence, would you commit to taking proactive efforts to address the injustice, including:

1. Describing the injustice in your opinions?

If I were confirmed and were confronted with an injustice, I would take such measures as are appropriate consistent with governing law and ethical considerations. While I would provide a detailed decision explaining the circumstances of the crime and the law that required the sentence imposed, I would be mindful not to inject my personal views regarding the wisdom of Congress' decision-making and policy with respect to mandatory minimum sentences.

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

The authority to make charging decisions lies exclusively in the Executive Branch under our Constitution. I believe that judges need to be mindful not to encroach on the authority of the Executive Branch in this regard and to respect the separation of powers under the Constitution. I would, however, reach out to prosecutors if I were concerned about ethical improprieties, lack of professionalism, or prosecutorial misconduct and would address the issues consistent with judicial ethics.

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

Clemency power is reserved to the Executive Branch. If confirmed as a district court judge, I would be bound to respect that authority and the separation of powers under our Constitutional framework.

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?

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>

Yes, to the extent consistent with applicable law.

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

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

Yes.

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.

It is my understanding that there are statistical racial disparities in our criminal justice system, including rates of “stop & frisk,” access to counsel, and incarceration rates. I have not studied the issue sufficiently to cite to specific studies or specific examples. I am, however, aware of the issue and, if confirmed, would strive to ensure that everyone is treated equally and fairly in my courtroom.

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?

If confirmed, I would ensure that qualified minorities and women are given serious consideration for all positions that I have occasion to fill.

**Nomination of Mary Kay Vyskocil
United States District Judge for the Southern District of New York
Senate Judiciary Committee – Questions for the Record
August 1, 2018**

Hearing entitled: “Nominations”

Panel I

Questions for Richard Sullivan, to be United States Circuit Judge for the Second Circuit

1. Can you name something that is constitutional that you think should be unconstitutional?
2. Why do you think it is okay for you to give your opinion about the death penalty?
 - a. If a death penalty case comes before you and you’ve already announced that you’re against the death penalty, doesn’t that violate your rule that you shouldn’t comment about constitutionality and unconstitutionality?
3. What does the ninth amendment mean?
 - a. What are those other rights in your opinion?
 - b. What’s a penumbra?
 - c. Are there other penumbras in the Constitution?
 - d. Can you see a penumbra?
 - e. Well if you can’t see it, how do you know it’s there?
 - f. What other penumbras are there in the Constitution?
4. A guy is walking down the street in a high crime area. We know statistically that it’s a high crime area, it’s not a subjective thing. It’s the middle of August and he’s wearing a really heavy coat and he’s got a big satchel with him. Every now and then he looks into a car.
 - a. Can the police stop and talk to him?
 - b. Is there reasonable suspicion?

Panel II

Questions for Diane Gujarati, to be United States District Judge for the Eastern District of New York, and

Questions for Eric Ross Komitee, to be United States District Judge for the Eastern District of New York, and

Questions for John L. Sinatra, Jr., to be United States District Judge for the Western District of New York, and

Questions for Rachel P. Kovner, to be United States District Judge for the Eastern District of New York, and

Questions for Lewis J. Liman, to be United States District Judge for the Southern District of New York, and

Questions for Mary Kay Vyskocil, to be United States District Judge for the Southern District of New York:

1. The following are yes or no answers.

- a. Do you believe that retribution is a legitimate purpose of our penal system?

Yes. Having considered the issue further, I believe retribution is a legitimate purpose of our penal system. *See Rita v. United States*, 551 U.S. 338, 347–48 (2007).

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

No.

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

No. If *Brown v. Board of Education* were overruled and *Plessy v. Ferguson* were reinstated, I would hope and expect that Congress would act swiftly to pass legislation to address the injustice. I would see it as my duty to remain a judge and do everything within my power to advance racial equality; the resignation of members of the judiciary would not achieve that goal.

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

Yes.

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

No. The text of the amendments is the most important thing in interpreting the Bill of Rights.

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

No. In the absence of binding precedent, the original public understanding of the words of the amendment should inform interpretation of the text to the extent the plain meaning of the text is not apparent.