

**Nomination of Alan D Albright to the  
United States District Court  
For the Western District of Texas  
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?**

Yes. The role of a judge is to interpret the law and apply it to the facts of each case. Judges are not advocates. In the words of the Chief Justice’s metaphor, a judge is not to act as a player for either team, but to decide all issues as impartially and fairly as possible. I approached judging in this way during my time as a magistrate judge, and would strive to do so again, if confirmed to be a district court judge.

- 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 not take into consideration what he or she perceives might be the practical consequences of any particular ruling. Of course, in certain occasions the law or precedent allows for a judge to take the consequences of his decision into consideration. For example, when evaluating a request for an injunction, a judge must look to the practical effects of entering or denying the injunction, specifically whether the movant has established that he would suffer irreparable harm if the injunction were denied. Judges also have considerable discretion to consider the practical consequences of rulings on case management issues.

- 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?**

A judge’s role is to fairly apply the law, regardless of the judge’s personal views. A judge, of course, can still show empathy while presiding over the case (and fairly applying the law). For example, in my own experience as a former magistrate and a practicing attorney for thirty years, I have found empathy to be invaluable when a court seeks to fashion remedies after mistakes made by attorneys before me. In the criminal sentencing context, empathy – both for the defendant who stands charged with the crime and the victims of the crime alleged – plays a role. The sentencing factors set forth in 18 U.S.C. §3553, encourage a judge to understand and consider the

experiences of both the defendant as well as the victim(s) of crime.

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

Please see the response to question 2.a above. In addition, when sitting as a fact finder, a judge's life experience can be a helpful aid in understanding and weighing the evidence. A judge's experience as a lawyer also can be a useful tool when managing the case before him.

**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?**

All litigants who appear before a judge are entitled to a fair hearing and equal treatment. During my service as a magistrate judge (1992 – 1999), I presided over hundreds of civil and criminal cases. I always strove to honor my oath to be impartial and to "administer justice without respect to persons, and do equal to the poor and to the rich." *See* 28 U.S.C. § 453. I believe that I upheld that oath as a magistrate, and will continue to do so if I have the honor of being confirmed to be a district court judge.

**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 believe that such tactics are problematic. The December 2015 amendments to the Federal Rules of Civil Procedure provide judges with the ability to more actively "secure the just, speedy, and inexpensive determination of every action and proceeding[.]" Fed. R. Civ. P. 1, by requiring discovery to be proportional to the case. *See* Fed. R. Civ. P. 26(b)(2)(C)(iii). If fortunate enough to be confirmed, I would utilize these and other rules to limit the impact of such problematic tactics.

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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.<sup>1</sup> Notably, the same study found that whites are actually *more likely* to sell drugs than blacks.<sup>2</sup> 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.<sup>3</sup> In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.<sup>4</sup>**

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

I have not researched the issue of implicit racial bias in the criminal justice system. Racial bias continues to affect our country despite our efforts to eradicate it from all areas of our society, including the criminal justice system. Racial bias and discrimination are clearly antithetical to the rule of law and to the core liberties protected by the Constitution. If I am fortunate enough to be confirmed as a district court judge, 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 extensive research into whether people of color are disproportionately represented in jails and prisons, but I am aware of studies regarding the proportion of incarcerated people of color. To me, these studies suggest that there is disproportionate representation. I appreciate the need for the criminal justice system to treat all persons the same regardless of race, and I will do so if I am confirmed as a district court 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.**

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<sup>1</sup> 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/>.

<sup>2</sup> *Id.*

<sup>3</sup> 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/>.

<sup>4</sup> *Id.* at 8.

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

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.<sup>5</sup> In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an 8.1 percent average.<sup>6</sup>**

- 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 in that state, and therefore, have not formed a belief about this subject. From my own experience as a magistrate judge, I believe that crime rates are influenced by a number of factors.

- 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).

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.<sup>7</sup> One study that examined over one billion ballots cast between 2000 and 2014, found only 31 credible instances of voter fraud.<sup>8</sup> 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.**

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<sup>5</sup> 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](http://www.pewtrusts.org/~media/assets/2016/12/national_imprisonment_and_crime_rates_continue_to_fall_web.pdf).

<sup>6</sup> *Id.*

<sup>7</sup> 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>.

<sup>8</sup> 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](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?**

I have not studied this matter and thus have not formed a belief as to the existence or extent of any purported voter fraud. Moreover, the question of voter fraud is a political issue, and it would be inappropriate for me as a judicial nominee to publicly comment. Further, cases may come before in the future involving this matter, 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.

- 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 Alan D Albright,**  
**to be United States District Judge for the Western District of Texas**

- 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 as a district court judge, I would approach sentencing in the same way that I did when I served as a magistrate judge – undertaking significant pre-sentencing preparation and, where appropriate, research. I would devote careful thought to the sentencing before me, and follow the pertinent rules, statutes, and precedent. In engaging in the sentencing process, I would review the Presentence Investigation Report, the Advisory Sentencing Guidelines, and the factors set forth in 18 U.S.C. § 3553(a). I would consider the relevant filings made by the government and the defendant, consult with the presentence officer, read and listen to any victim statements, and consider presentations made by counsel, the defendant, and other relevant parties. In light of all this information (and the binding precedent), I would strive to impose sentences that are “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 response to Question 1.a.

- 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, Part K of section 5 of the Sentencing Guidelines enumerates 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’m 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.<sup>1</sup>**

**i. Do you agree with Judge Reeves?**

I am not familiar with the basis for Judge Reeves' statement that mandatory minimum sentences are more likely to deter certain types of crime than discretionary or indeterminate sentencing. 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 as a district court judge, 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.<sup>2</sup> 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.

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

<sup>2</sup> 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, a district court judge should not 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 a critical role in ensuring that judicial proceedings are fair, impartial, and equitable. During my service as a magistrate judge, I understood how vital it was for every person who entered my courtroom—regardless of whether it was a party or an attorney or a family member of someone accused of a crime—to see that I was administering justice in a fair and equitable manner. If I am fortunate enough to be confirmed as a district court judge, I would certainly approach my role in exactly the same way.

- 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 have read 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. *See, e.g.*, ASHLEY NELLIS, PH.D., THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS, THE SENTENCING PROJECT 14 (June 14, 2016). I am also aware of studies cited by Senator Booker indicating that such disparities exist in terms of the manner in which minorities are treated by law enforcement as well as other aspects of the legal process. I do not have any reason to dispute these studies, although I have not formed an opinion about the precise extent or prevalence of the disparities they discuss. In any event, if I am confirmed as a district court judge, I will be duty bound to treat all persons in the same manner, regardless of race. As I did when I served as a magistrate judge, if confirmed, I will fully and faithfully uphold my oath.

**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.