

**Nomination of Rossie David Alston, Jr. to the United States District Court for
the Eastern District of Virginia
Questions for the Record October 17, 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 not appropriate for a district court to depart from Supreme Court or relevant circuit precedent.

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

Generally, a district court should not question a higher court's precedent. In certain rare circumstances, a district court could potentially recognize that a change in a statute or a recent Supreme Court ruling might affect a precedent. Of course, the district court would still be bound to follow the binding precedent.

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

While a district court possesses the authority to overturn its own precedent, I am not in a position to opine on the circumstances under which the district court should overturn itself. If fortunate enough to be confirmed as a district court judge, I would follow all precedent in the United States District Court for the Eastern District of Virginia.

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

If fortunate enough to be confirmed as a district court judge, I would follow all Supreme Court precedent. I am not in a position to opine on the circumstances under which the Supreme Court should overturn itself.

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”?**

I have never considered either term before and have not read Justice Gorsuch’s book, so I cannot comment on the adjectives used. However, I am very familiar with the concept of precedent. I follow precedent on a daily basis in my current position as an appellate judge, and will follow it as a district court judge, if I am fortunate enough to be confirmed.

- b. Is it settled law?**

Yes.

- 3. In *Obergefell v. Hodges*, the Supreme Court held that the Constitution guarantees same-sex couples the right to marry. Is the holding in *Obergefell* settled law?**

Yes.

- 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?**

As a district court nominee, it would not be appropriate for me to express an opinion on an issue that I may ultimately be called upon to decide. If I am fortunate enough to be confirmed, I will follow the holding of *Heller* and other applicable precedent.

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

As a district court nominee, it would not be appropriate for me to express an opinion on an issue that I may ultimately be called upon to decide. If I am fortunate enough to be confirmed, I will follow the holding of *Heller* and other applicable precedent.

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

As a district court nominee, it would not be appropriate for me to express an

opinion on an issue that I may ultimately be called upon to decide. If I am fortunate enough to be confirmed, I will follow the holding of *Heller* and other applicable precedent.

5. In 2018, you joined the majority opinion in a case called *Dellis v. Commonwealth*, which upheld the conviction of a woman for concealing a dead body. Dellis went into labor at her home, alone, and lost consciousness. She awoke to find the fetus on the floor next to her, and she disposed of the remains. Thereafter, she sought treatment at an emergency room. An autopsy later revealed that the fetus's lungs had never been exposed to air and the fetus died in the womb prior to still birth. Dellis argued that a fetus dying in the womb did not fall within the statutory definition of "dead body." (*Dellis v. Commonwealth*, 2018 WL 1915460 (Apr. 24, 2018)).

a. On what basis did you conclude that the state legislature intended the crime of concealing a dead body to include the disposal of a stillborn fetus?

The majority opinion in *Dellis* resolved the case on the basis of the state's interest in maintaining public health and safety due to the biological and environmental concerns related to the disposal of human remains in general.

b. Please provide all evidence supporting this conclusion.

Because the Court of Appeals of Virginia has already decided this case, the evidence relied upon to support that conclusion is contained within the majority opinion. It would not be appropriate for me to comment separately.

c. Why did the court not reach Dellis's argument that a fetus could not be a dead body "if life never occurred"?

Pursuant to the policy of the Court of Appeals of Virginia, the majority opinion resolved this case on the narrowest possible grounds.

6. In 2015, you wrote an opinion in a case called *Luttrell v. Cucco* in which you held that the use of the term "cohabiting" or cohabitation in a Virginia divorce statute applied only where "a man and a woman live together continuously . . . mutually assuming obligations *normally attendant* with a marital relationship." The Virginia Supreme Court later reversed the opinion that you authored, concluding that the term cohabitation in the divorce statute applied equally to same-sex as to opposite-sex couples. (*Luttrell v. Cucco*, 2015 WL 1782065 (Va. App. Ct. Apr. 21, 2015)).

On what basis did you conclude that the terms cohabiting or cohabitation, as defined in the divorce statute at issue in *Luttrell v. Cucco*, did not apply to same-sex couples?

Luttrell was an unpublished case (meaning that it carried no precedential effect) that was decided prior to the United States Supreme Court's opinion in *Obergefell*. The case did not hinge on whether the couple had "cohabitated," but rather on the legal definition of

“marriage” under Virginia law. As a member of the Court of Appeals of Virginia, I was bound to follow approximately 50 years of Virginia jurisprudence which provided that marriage was defined as between a man and a woman, and I was not in a position to question that precedent.

As *Obergefell* is now settled law and binding precedent, I am duty-bound to follow it and adhere to its holding.

7. 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 district court nominee, it would not be appropriate for me to express an opinion or view on a subject that may ultimately come before me. If I am fortunate enough to be confirmed, I will follow all applicable United States Supreme Court and United States Court of Appeals for the Fourth Circuit precedent.

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

As a district court nominee, it would not be appropriate for me to express an opinion or view on a principle that I may ultimately be called upon to interpret. If I am fortunate enough to be confirmed, I will follow all applicable precedent and decide cases to the best of my ability.

9. 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.

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

I received these questions, reviewed them, and drafted answers truthfully and honestly to the best of my ability. I then returned them to the Department of Justice for their suggestions and assistance in returning the package to the Senate Judiciary Committee.

**Questions for the Record for Rossie David Alston, Jr.
From Senator Mazie K. Hirono**

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

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

No.

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

No.

2. In the 1980s, you worked for an organization called the National Right to Work Legal Defense Foundation, which has long pursued an anti-union agenda. This organization describes its mission as “eliminat[ing] coercive union power and compulsory unionism abuses through strategic litigation, public information, and education programs.”

a. Do you still agree with the mission statement of the National Right to Work Legal Defense Foundation?

I did not write the mission statement for the National Right to Work Legal Defense Foundation, and as a nominee to the district court, it would not be appropriate for me to express such an opinion on a mission statement of any organization.

b. What do you think is the proper role of unions in the workplace?

As a nominee to the district court, it would not be appropriate for me to express an opinion on the proper role of unions in the workplace.

3. The National Right to Work Legal Defense Foundation has fought to overturn *Abood v. Detroit Board of Education*, a 41-year-old precedent that upheld the use of fair share fees for public sector workers. Earlier this year, the National Right to Work Legal Defense Foundation realized its goal when the Supreme Court issued its decision in *Janus v. AFSCME*, which overturned *Abood*. Workers around the country depended on *Abood* to be able to secure fair salaries and basic rights. The National Right to Work Legal Defense Foundation described *Janus* as “a major victory for First Amendment rights.”

Do you agree that the *Janus* decision was “a major victory for First Amendment rights”?

As a nominee to the district court, I do not have the authority to comment on this characterization of *Janus*. If confirmed, I will follow *Janus* and all applicable precedent in this area of the law.

4. Justice Kagan, in her dissenting opinion in *Janus*, wrote that the majority in that case had “weaponiz[ed] the First Amendment, in a way that unleashes judges, now and in the future, to intervene in economic and regulatory policy.”

a. What do you think Justice Kagan meant by her statement?

As a nominee to the district court, it would not be appropriate for me to express an opinion regarding what Justice Kagan meant by her statement. If confirmed, I will follow all applicable precedent.

b. Do you agree with Justice Kagan’s statement that the First Amendment has been weaponized in a way that allows judges to intervene in economic and regulatory policy?

As a nominee to the district court, it would not be appropriate for me to express an opinion regarding Justice Kagan’s statement. If confirmed, I will follow all applicable precedent.

c. Do you believe there is a difference between judges making policy decisions and judges making decisions with policy implications? In your view, what is that difference?

Judges are bound to follow the law and not be inappropriately influenced based upon the policy-related consequences of their rulings. Policy-oriented concerns more appropriately rest within the purview of the legislature.

Nomination of Rossie David Alston, Jr.
United States District Court for the Eastern District of Virginia
Questions for the Record
Submitted October 17, 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 system is greater than 10 to 1.⁴

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

Yes.

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

Yes, the substantial body of statistics that I have read would clearly suggest this.

- 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.

No, I have not studied the issue in the form of books, articles, or reports, but as a person of color, I can personally say that implicit racial bias exists in our society generally in a variety of forms, and that I have experienced it myself on several occasions.

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 am not in a position to opine on this issue at this time. My familiarity with this issue is limited to a review of the Pew Charitable Trust fact sheet, which

I have not intensively studied. I would need to review other material to form a more educated view.

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.

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.*

- 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.

I am not in a position to opine on this issue at this time. My familiarity with this issue is limited to a review of the Pew Charitable Trust fact sheet, which I have not intensively studied. I would need to review other material to form a more educated view.

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. 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.⁷

- a. Do those statistics alarm you?

As an individual of color who currently serves as a judge and as a member of the Virginia Sentencing Commission, I was aware of those statistics and they continue to be a concern to me, and I would continue to maintain my awareness of them as a district court judge.

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

Yes.

- 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?

If I am fortunate enough to be confirmed as a district court judge, I would consider the facts and circumstances of each individual case as it came before me. In addition, I would note that race is not and should not be a dispositive factor under any circumstances in any case that may come before me.

5. You worked for the National Right to Work Legal Defense Foundation for five years in the 1980s. On its own website, this group says that its mission is to “eliminate coercive union power and compulsory unionism abuses.” The group was instrumental in the litigation that led to the Supreme Court’s decision in *Janus* earlier this year—which held that public-sector workers could not be required to pay “agency fees” to unions that represent them in the workplace.

The *Janus* decision was an attack on the rights of working men and women everywhere. It was a distressing victory for corporate interests that have been trying to dilute worker power for decades.

While you were working at the National Right to Work Legal Defense Foundation in the late 1980s, you co-authored an article stressing “employees’ right to refrain from supporting [a] union.” You also expressed the hope that “involuntary union ‘members’” could “protect themselves from unfair or unlawful union disciplinary actions.”⁸

- a. Do you think that requiring public-sector workers to pay agency fees to unions to represent them in the workplace—the issue in *Janus*—is “unfair”?

I recognize that there are still issues open after the *Janus* opinion, and as a district court nominee, it would not be appropriate for me to express an opinion or view on an issue that I may ultimately be called upon to decide. If I am fortunate enough to be confirmed, I will follow the holding of all applicable precedent in this area of law.

⁷ The American Civil Liberties Association, Race and the Death Penalty, <https://www.aclu.org/other/race-and-death-penalty> (Last visited June 13, 2018).

⁸ Rossie D. Alston, Jr. & Glenn M. Taubman, *Union Discipline and Employee Rights*, 38 LABOR L.J. 119 (1987), <https://www.nrtw.org/union-discipline-and-employee-rights> (revised and updated).

- b. Do you think that requiring *private*-sector workers to pay agency fees to unions to represent them in the workplace is “unfair”?

I recognize that there are still issues open after the *Janus* opinion, and as a district court nominee, it would not be appropriate for me to express an opinion or view on an issue that I may ultimately be called upon to decide. If I am fortunate enough to be confirmed, I will follow the holding of all applicable precedent in this area of law.

- c. Is the reasoning of *Janus*—which was based on the First Amendment—limited only to public-sector unions? Do you think it could potentially be extended to private-sector unions?

I recognize that there are still issues open after the *Janus* opinion, and as a district court nominee, it would not be appropriate for me to express an opinion or view on an issue that I may ultimately be called upon to decide. If I am fortunate enough to be confirmed, I will follow the holding of all applicable precedent in this area of law.

- d. Given your prior writings, what assurances can you offer this Committee that you will be able to fairly adjudicate any case that comes before you involving the viability of labor unions?

If fortunate enough to be confirmed as a district court judge, I will adhere to my judicial oath to God and country to follow the law, and fairly and evenhandedly apply it to each case before me. I will follow all applicable United States Supreme Court and United States Court of Appeals for the Fourth Circuit precedent.

**Questions for the Record from Senator Kamala D. Harris
Submitted October 17, 2018
For the Nominations of**

Rossie D. Alston, Jr., to the U.S. District Court for the Eastern District of Virginia

1. In 2015, the Supreme Court ruled in *Obergefell v. Hodges* that the Fourteenth Amendment guarantees to same-sex couples the fundamental right to marry. The next year, the Obama Administration published guidance stating that Title IX protects the right of transgender students to use restrooms and locker rooms that match their gender identities. These landmark civil rights events brought our country closer to its guiding principle of “equal justice under law.”

- a. **Do you agree that LGBTQ individuals have historically been discriminated against?**

There is an historical and societal basis to conclude that LGBTQ individuals have suffered discrimination. If confirmed, I will follow *Obergefell* and all applicable precedent.

- b. **Does the right to marry include an implicit guarantee that everyone should be able to exercise that right equally?**

As a nominee to the district court, it would not be appropriate for me to express an opinion as to an issue that I may ultimately have to decide. If confirmed, I will follow *Obergefell* and applicable precedent.

- c. **If a state or county makes it harder for same-sex couples to marry than for straight couples to marry, are those additional hurdles constitutional?**

As a nominee to the district court, it would not be appropriate for me to express an opinion as to an issue that I may ultimately have to decide. If confirmed, I will follow *Obergefell* and all applicable precedent.

2. In 1987, you co-authored an article in the *Labor Law Journal* titled “Union Discipline and Employee Rights.” In that article, you argued that employees have a right to refrain from supporting a union. The article also provided information about the rights of employees who choose to act against the wishes or dictates of a union.

- a. **Do you still agree with the positions that you took in the *Labor Law Journal*?**

As a nominee to the district court, it would not be appropriate for me to express an opinion as to an issue that I may ultimately have to decide. If confirmed, I will follow all applicable precedent regarding participation in union activity.

b. Do you believe that, under current law, workers have a right to unionize and engage in collective bargaining?

Yes.

c. Do you agree that unions play a critical role in advancing the bargaining power of workers as compared to employers and corporations?

History tells us that unions have indeed played a critical role in advancing the bargaining power of workers. As a nominee to the district court, it would not be appropriate for me to express any other opinion regarding such matters. If confirmed, I will follow all applicable 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?

In sentencing, I would follow the applicable law and take appropriate consideration of traditional criteria, including probation reports, statements of defendants, and statements of victims, as well as adhering to the requirements of the sentencing guidelines.

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

In sentencing, I would follow the applicable law and take appropriate consideration of traditional criteria, including probation reports, statements of defendants, and statements of victims, as well as adhering to the requirements of the sentencing guidelines.

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

The Sentencing Guidelines provide specific criteria for when it is appropriate to depart from the guidelines. I will consider these criteria in all cases.

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?

As a nominee to the district court, it would not be appropriate for me to express an opinion regarding the efficacy of mandatory minimums.

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

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

As a nominee to the district court, it would not be appropriate for me to express an opinion regarding the effects of mandatory minimums.

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

I am unable to provide specific instances regarding such circumstances; however, I am obligated to follow the law, which includes, in an appropriate case, to impose mandatory minimum sentences.

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 confirmed, I will highlight any circumstances pertinent to the sentencing process.

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

As a nominee to the district court, it would in my view not be appropriate for me to discuss charging policies with the U.S. Attorney and other federal prosecutors. Those matters are more appropriate for the executive branch's consideration.

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

As a nominee to the district court, it would in my view not be appropriate for me to discuss clemency-related matters with the U.S. Attorney and other federal prosecutors. Those matters are more appropriate for the executive branch's consideration.

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

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>

otherwise serious offense.” If confirmed as a judge, would you commit to taking into account alternatives to incarceration?

In sentencing, I would follow the applicable law, such as 28 U.S.C. Section 994(j), and take appropriate consideration of traditional criteria, including probation reports, statements of defendants, and statements of victims, as well as sentencing guidelines. Further, as a nominee to the district court, it would not be appropriate for me to express an opinion as to an issue that I may ultimately have to decide.

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.

From literature that I have read and my personal experience of serving on the Virginia Sentencing Commission, I believe that historically there are racial disparities in our criminal justice system. My service on the Virginia Sentencing Commission was a cooperative effort to avoid any such racial disparities in the criminal justice system of the Commonwealth of Virginia.

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?

In hiring staff and law clerks, I have taken diversity into consideration in addition to other factors and will continue to do so if confirmed as a district court judge. My history of hiring speaks for itself; over seventy-five percent of my law clerks and staff have been qualified minorities and women.