

**Nomination of John Kenneth Bush to be
United States Circuit Judge for the Sixth Circuit
Questions for the Record
Submitted June 21, 2017**

QUESTIONS FROM SENATOR COONS

1. With respect to substantive due process, what factors do you look to when a case requires you to determine whether a right is fundamental and protected under the Fourteenth Amendment?

I would look to any factors identified by the applicable Supreme Court and Sixth Circuit precedents.

- a. Would you consider whether the right is expressly enumerated in the Constitution?

Please see my response to Question 1 above.

- b. Would you consider whether the right is deeply rooted in this nation's history and tradition? If so, what types of sources would you consult to determine whether a right is deeply rooted in this nation's history and tradition?

Please see my response to Question 1 above.

- c. Would you consider whether the right has previously been recognized by Supreme Court or circuit precedent? What about the precedent of another court of appeals?

Please see my response to Question 1 above.

- d. Would you consider whether a similar right has previously been recognized by Supreme Court or circuit precedent?

Please see my response to Question 1 above.

- e. Would you consider whether the right is central to "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life"? See *Planned Parenthood v. Casey*, 505 U.S. 833, 581 (1992); *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (quoting *Casey*).

Please see my response to Question 1 above.

- f. What other factors would you consider?

Please see my response to Question 1 above.

2. You have said that originalism is the “only principled way” to interpret the Constitution and that it is “better than the other approaches” because “it’s a matter of common sense.”
 - a. In his opinion for the unanimous Court in *Brown v. Board of Education*, 347 U.S. 483 (1954), Chief Justice Warren wrote that although the “circumstances surrounding the adoption of the Fourteenth Amendment in 1868 . . . cast some light” on the amendment’s original meaning, “it is not enough to resolve the problem with which we are faced. At best, they are inconclusive. . . . We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.” 347 U.S. at 489, 490-93. Do you consider *Brown* to be consistent with originalism even though the Court in *Brown* explicitly rejected the notion that the original meaning of the Fourteenth Amendment was dispositive or even conclusively supportive?

I have not studied the issue, but I am aware that others have argued that *Brown* is consistent with originalism. See Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 Va. L. Rev. 947 (1995). I believe that Justice John Marshall Harlan’s dissent in *Plessy v. Ferguson*, rather than the majority opinion in *Plessy* overruled in *Brown*, better reflected the original meaning of the Fourteenth Amendment.

- b. How do you respond to the criticism of originalism that terms like “‘the freedom of speech,’ ‘equal protection,’ and ‘due process of law’ are not precise or self-defining”? Robert Post & Reva Siegel, *Democratic Constitutionalism*, National Constitution Center, <https://constitutioncenter.org/interactive-constitution/white-pages/democratic-constitutionalism> (last visited June 21, 2017).

I have not studied this issue. If I am fortunate enough to be confirmed to the Sixth Circuit, my assessment of such terms will be guided by binding Supreme Court and Sixth Circuit precedent.

3. Does your approach to judicial interpretation lead you to conclude that the Fourteenth Amendment’s promise of “equal protection” guarantees equality across race and gender, or does it only require racial equality?

The Supreme Court has held that the Equal Protection Clause applies to classifications other than race. See *Obergefell v. Hodges*, 135 S. Ct. 3584 (2015); *United States v. Virginia*, 518 U.S. 515 (1996). But because the scope of protection afforded by the Clause is the subject of active litigation, I cannot comment further. See Canon 3(A)(6), Code of Conduct for United States Judges (“A judge should not make public comment on the merits of a matter pending or impending in any court.”); cf. also Canon 1, Commentary (“The Code is designed to provide guidance to judges and nominees for judicial office.”).

- a. If you conclude that it does require gender equality under the law, how do you respond to the argument that the Fourteenth Amendment was passed to address certain forms of racial inequality during Reconstruction, and thus was not intended to create a new protection against gender discrimination?

Please see my response to Question 3 above.

- b. If you conclude that the Fourteenth Amendment has always required equal treatment of men and women, as some originalists contend, why was it not until 1996, in *United States v. Virginia*, 518 U.S. 515 (1996), that states were required to provide the same educational opportunities to men and women?

Please see my response to Question 3 above.

- c. Does the Fourteenth Amendment require that states treat gay and lesbian couples the same as heterosexual couples? Why or why not?

Please see my response to Question 3 above.

- d. Does the Fourteenth Amendment require that states treat transgender people the same as those who are not transgender? Why or why not?

Please see my response to Question 3 above.

- 4. During your hearing, you acknowledged that the Supreme Court has recognized there is a constitutional right to privacy, including a right to privacy rooted in the Fourteenth and Fifth Amendments.

The Supreme Court has recognized that the Constitution protects the specific rights mentioned in the subparts of this Question. See *Lawrence v. Texas*, 539 U.S. 558 (2003); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992); *Eisenstadt v. Baird*, 405 U.S. 438 (1972). If confirmed to the Sixth Circuit, I would faithfully apply those and any other binding precedents of the Supreme Court and Sixth Circuit.

- a. Do you agree that the right to privacy protects a woman's right to use contraceptives?

Please see my response above.

- b. Do you agree that the right to privacy protects a woman's right to obtain an abortion?

Please see my response above.

- c. Do you agree that the right to privacy protects intimate relations between two consenting adults, regardless of their sexes or genders?

Please see my response above.

- d. If you do not agree with any of the above, please explain whether these rights are protected or not, and which constitutional rights or provisions encompass them.

Please see my response above.

5. In *United States v. Virginia*, 518 U.S. 515, 536 (1996), the Court explained that in 1839, when the Virginia Military Institute was established, “Higher education at the time was considered dangerous for women,” a view widely rejected today. In *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600-01 (2013), the Court reasoned, “As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. . . . Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser.” This conclusion rejects arguments made by campaigns to prohibit same-sex marriage based on the purported negative impact of such marriages on children.

- a. When is it appropriate to consider evidence that sheds light on our changing understanding of society?

I have not had the opportunity to study this issue, but, if confirmed, would follow all precedents of the Supreme Court and Sixth Circuit that guide consideration of evidence by appellate judges.

- b. What is the role of sociology, scientific evidence, and data in judicial analysis?

I have not had the opportunity to study this issue, but, if confirmed, would follow all precedents of the Supreme Court and Sixth Circuit that guide consideration of evidence by appellate judges.

6. You testified in your hearing before the Senate Judiciary Committee, “There are some things that I have written on the post or the blog that I wish I could phrase differently or said differently at this point.”

- a. Which things would you like to have said differently, and how would you have rephrased them?

When I commented at my hearing that I wish I could have phrased or said things differently in some of my blog posts, I did not have a particular list of posts in mind. Rather, based on my review of the posts in the course of completing my Senate Judiciary Questionnaire, I have a

general sense that many of them used flippant or intemperate language that does not accurately reflect my demeanor or legal abilities.

- b. Please explain how you chose what topics to write about, what language to use, and which sources to rely on in writing your posts.

The nature of the blog was to provide fast-paced commentary upon topics in the news, rather than original research. I usually relied upon readily available sources on the internet discussing topics that might be of interest to the blog's readership. It was my practice to review briefly and to cite any material I relied upon, to enable readers to judge for themselves the credibility of the news discussed. Given the informal nature of the commentary I provided on the blog, it was not my practice to conduct an exhaustive review of the information cited.

- c. Why did you choose to use a pseudonym when publishing your blog posts?

I published my blog posts under a pseudonym to draw a distinction between my political views and my law practice. In our nation's history, lawyers and judges have written under pseudonyms on political issues, including the first Chief Justice, John Jay, who, along with Alexander Hamilton and James Madison, published the Federalist Papers under the pseudonym "Publius". Gouverneur Morris, the chief editor of the U.S. Constitution who wrote its preamble, published political writings under the pseudonym "An American".

- d. Your testimony suggests that while you regret the phrasing of your posts, you do not regret their substance. Please identify the posts that you regret writing because of their substance, if any; also, explain why you thought these posts were appropriate at the time and why you have come to regret them.

Please see my response to Question 6(a) above.

- e. During the entire judicial selection process, from beginning to end, did any White House staff or Justice Department staff raise any concerns about your posts? If so, please identify the individuals who raised concerns, the posts discussed, and the nature of the concerns raised.

I disclosed my blog posts with attorneys from the White House Counsel's Office and the Department of Justice during the judicial selection process. We discussed the content of the blog posts and potential concerns that might be raised about them during the confirmation process.

- 7. In a blog post, you wrote, "The two greatest tragedies in our country -- slavery and abortion - relied on similar reasoning and activist justices at the U.S. Supreme Court, first in the *Dred Scott* decision, and later in *Roe*." During your hearing you testified that "millions of Americans" disagree with the Supreme Court's decision in *Roe v. Wade*.
 - a. Are you one of the Americans who disagrees with how *Roe v. Wade* was decided?

My personal views are irrelevant to the position for which I have been nominated. If I am fortunate enough to be confirmed to the Sixth Circuit, I would faithfully apply *Roe*, along with any other binding precedents of the Supreme Court and Sixth Circuit.

- b. Please explain how the reasoning in *Roe v. Wade* and *Dred Scott* is similar.

As commentators from across the spectrum have acknowledged, *Roe* and *Dred Scott* share a similarity in methodology, in that both decisions relied upon reasoning based in the substantive component of due process.

- c. Please explain why you characterized the seven justices in the majority in *Roe v. Wade* as “activist justices.”

I used that language to comment upon the breadth of a decision that many commentators, including Justice Ruth Bader Ginsburg, have described as going too far, too fast.

- d. Do you believe that any of the current justices are “activist justices”?

My personal views on this issue are irrelevant to the position for which I have been nominated. If I am fortunate enough to be confirmed to the Sixth Circuit, I would be bound to apply all precedents of the Supreme Court, and I would faithfully do so.

- e. How does your conclusion that a justice – past or present – is an “activist” affect your view of that justice’s decisions?

Please see my response to Question 7(d) above.

- f. Why have you not edited or removed this post, which is still available as of June 21, 2017 at <https://elephantsinthebluegrass.blogspot.com/2008/01/legacy-from-dr-kings-dream-that.html>?

I did not deem it proper to remove or alter anything on the blog that the Committee might desire to review during the pendency of my nomination.

- 8. During your hearing, you testified that the blogging you engaged in was political activity and that you would not bring politics to the bench but would merely apply the law. In the same blog post mentioned above, you quoted Senator McConnell stating, in the context of abortion, “It makes a difference who wins elections . . . It makes an awful lot of difference who appoints judges -- an awful lot of difference.”

- a. Do you agree with Senator McConnell that it makes a difference who – Republicans or Democrats – appoints judges? Why or why not?

It would be inappropriate for me to opine on this political question. *See* Canon 5, Code of Conduct for United States Judges; *cf. also* Canon 1, Commentary (“The Code is designed to provide guidance to judges and nominees for judicial office.”).

- b. How do you reconcile Senator McConnell’s statement with your promise to not bring politics to the bench?

Please see my response to Question 8(a) above.

- 9. In a 2007 blog post, you wrote, “A more recent liberal pet peeve has been the ongoing scientific research into alternatives for embryonic stem cell research. Progress on this front would, of course, take away the false Democratic talking point that the sick are being denied new medical cures because the Republicans keep insisting on protecting embryonic life.”
 - a. Do you believe that the Constitution protects embryonic life?

My personal views are irrelevant to the position for which I have been nominated. If confirmed to the Sixth Circuit, I will faithfully apply any relevant precedents of the Supreme Court and Sixth Circuit on this subject.

- b. On what evidence did you base your determination that it is “false” to state that opposing stem cell research denies new medical cures to the sick?

Again, my personal views are irrelevant to this position, but the only point that the blog post sought to make was that research into alternatives for embryonic stem cell research offered hope for new medical cures.

- 10. In another 2007 blog post, you criticized the Log Cabin Republicans for attacking Mitt Romney and quoted Mike Huckabee’s statement that he “strongly disagree[s] with [gay rights advocates] on the idea of same-sex marriage.” You wrote that this was one of Huckabee’s “no-compromise yet adroitly articulated positions.” What evidence can you point to that would assure a party relying on a precedential opinion recognizing a constitutional right to same-sex marriage that you will be a fair and neutral arbiter?

If I am fortunate enough to be confirmed, I will assure all litigants that I would abide by my oath to “administer justice without respect to persons, and do equal right to the poor and to the rich, and . . . [to] faithfully and impartially discharge and perform all the duties incumbent upon me as a [judge] under the Constitution and laws of the United States.” 28 U.S.C. § 453. Also, if I am fortunate enough to be confirmed, I will follow *Obergefell* just as I will follow every other precedential opinion of the Supreme Court.

- 11. Have you ever posted on any blog or website other than Elephants in the Bluegrass?

A few articles I wrote appear on my law firm’s website. I did not post them myself. Those have been disclosed on my Senate Judiciary Questionnaire.

12. Have you ever used a pseudonym other than “G. Morris”?

No.

13. Have you ever reviewed, edited, or contributed to any blog posts on Elephants in the Bluegrass that are not posted with the name “G. Morris”? If so, please provide copies of all such posts.

No.

14. Have you ever reviewed, edited, or contributed to any blog posts on a website other than Elephants in the Bluegrass? If so, please provide copies of all such posts.

No.