

Senator Dick Durbin
Written Questions for John Bush, Kevin Newsom, and Damien Schiff
June 21, 2017

For questions with subparts, please answer each subpart separately.

Questions for John Bush

1. You say in your questionnaire that you were a co-founder of the Louisville Lawyers Chapter of the Federalist Society in 1997 and that you have been president of that chapter for most of the chapter's existence. **Why did you join the Federalist Society?**

I believed that membership in the Federalist Society would help me to learn about interesting legal topics that I might not otherwise encounter in my practice.

2. **Do you agree with the views espoused by the Federalist Society?**

In my experience, the Federalist Society does not espouse views on any particular legal issues. Rather, it is an open debate society that encourages participation from across the political spectrum.

3. **Do you believe that the views espoused by the Federalist Society views are compatible with your own views?**

Please see my response to Question 2 above.

4.
 - a. **Do you believe it was appropriate for the President to announce the involvement of the Federalist Society in the selection of his candidates for the Supreme Court?**

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. **Do you believe that the President's announcement sent a message that lawyers and judges should not assert views that are at odds with the Federalist Society if they aspire to serve on the Supreme Court?**

Please see my response to Question 4(a) above.

- c. **Are you concerned that the announced involvement of the Federalist Society and Heritage Foundation in selecting Supreme Court candidates undermines confidence in the independence and integrity of the federal judiciary?**

Please see my response to Question 4(a) above.

5. The Federalist Society website lists the organization's statement of purpose. That statement begins with the following: "Law schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society." **Do you agree or disagree with this statement? Please explain your answer.**

I do not know what the Federalist Society was referring to in that statement.

6. **Please list all years in which you attended the Federalist Society's annual national convention.**

As best as I can recall, I attended the Federalist Society's annual national convention in 2000, 2001, 2005, 2006, 2007, 2008, 2010, 2011, 2012, 2014 and 2016.

7. During the confirmation process of Justice Gorsuch, special interests contributed millions of dollars in undisclosed dark money to a front organization called the Judicial Crisis Network that ran a comprehensive campaign in support of the nomination. It is likely that many of these secret contributors have an interest in cases before the Supreme Court. I fear this flood of dark money undermines faith in the impartiality of our judiciary.

- a. **Do you want outside groups or special interests to make undisclosed donations to front organizations in support of your nomination?**

I have not sought, and I am not aware of, any such donations in support of my nomination.

- b. **Would you discourage donors from making such undisclosed donations?**

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

- c. **If any such donations are made, will you call for the donors to make their donations public so that you can have full information when you make subsequent decisions about recusal in cases that these donors may have an interest in?**

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

8. You have given us insight into your personal views through your writings on the blog "Elephants in the Bluegrass," which you posted under a pseudonym. Among your writings, you said in a blog post on January 23, 2008 that "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*."

a. Do you believe the *Roe* decision is similar to the *Dred Scott* decision?

As I explained in my blog post, *Roe* and *Dred Scott* share a similarity in methodology, in that both decisions relied upon reasoning based in the substantive component of due process, and a similarity in effect, in that both decisions deeply divided our country.

b. Do you believe that the *Dred Scott* case was wrongly decided?

Yes.

c. Do you believe the *Roe* case was wrongly decided?

As noted above, I believe it would be both inappropriate and irrelevant for me to opine on my personal views of any binding Supreme Court precedent. If fortunate enough to be confirmed, I would faithfully apply *Roe*, along with any other binding Supreme Court precedents.

d. You say in your questionnaire that you met with Majority Leader Mitch McConnell in November 2016 and expressed your interest in serving as a federal judge. On what date did you first disclose to Leader McConnell or his staff your blog posts on the “Elephants in the Bluegrass” website?

I believe it would be inappropriate for me to reveal the substance of my communications with Majority Leader McConnell, who is not officially involved in the nomination decision.

9. In a blog post during the 2016 Republican National Convention, you wrote: “Time to roll with the changes. Time to roll with Trump.”

a. What did you mean by this statement?

I was encouraging Republicans who had not supported President Trump in the presidential primaries to support him in the general election. I believe the song “Roll with the Changes”, by REO Speedwagon, was playing at the Convention when I wrote this post.

b. Do you regret writing this statement?

No.

10. In a 2008 blog post entitled “Thanks, Mama Pelosi, For That 700 Point Stock Market Plunge!” you said that someone should “gag the House speaker,” referring to then-House Speaker Nancy Pelosi.

a. What did you mean by this statement?

I was lamenting the injection of partisan politics into the debate over legislation to address the 2008 financial crisis and urging Congress to move beyond it.

b. Do you regret writing this statement?

Yes, I regret using that intemperate language.

11. During your hearing you were asked “If you get to be a Circuit judge, how does that change your political life?” You responded, “Well, it’s already changed my life. I took a sticker off my truck- a political sticker.”

a. What did this sticker say?

There were actually two stickers I removed: “McConnell 2014” and “Rand.”

b. Why did you take it off of your truck?

Because it is not ethically appropriate for judicial nominees to weigh in on political questions, and a political bumper sticker could certainly be seen as doing so. *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.”).

12. I believe it is important for judicial nominees to demonstrate that they will be independent of President Trump. One of the ways to demonstrate this independence is for nominees to answer honestly whether they believe in the President’s most outrageous assertions.

Do you agree, as a factual matter, with President Trump’s claim that 3 to 5 million people voted illegally in the 2016 election?

Again, I cannot ethically opine on questions that are the subject of political debate. *See* Canon 5, Code of Conduct for United States Judges.

13. In several of your blog posts, you criticized Democratic opposition to the nomination of Hans von Spakovsky to the Federal Election Commission. Von Spakovsky is widely known as a proponent of voter ID laws that have deprived many Americans of their right to vote. **Do you believe Mr. von Spakovsky was a good nominee for this position?**

Because I am a judicial nominee, the Code of Conduct for United States Judges precludes my addressing any political views you express regarding Mr. von Spakovsky.

14. In 2008 you wrote a blog post criticizing a bill I wrote, the Fair Elections Now Act. You said that public financing of campaigns “runs afoul of constitutional guarantees by forcing taxpayers to subsidize candidates’ political speech in contravention of those taxpayers’ First Amendment rights.” You have also argued in a blog post that public financing of campaigns is “constitutionally dubious.” **Do you believe that the 13 states that currently provide some type of public financing for their campaigns are in violation of the Constitution?**

It would be inappropriate for me to opine on a question that could come before me if confirmed to the Sixth Circuit. See Canon 3(A)(6).

15. In 1886, the Supreme Court noted that the right to vote “is regarded as a fundamental political right, because [it is] preservative of all rights,” a quote which Chief Justice Roberts paraphrased at his confirmation hearing. References to the right to vote appear five times in the Constitution.

a. Do you believe that the right to vote is fundamental?

The Supreme Court has repeatedly held that it is. See, e.g., *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966).

b. Do you believe that laws that make it more difficult for Americans to exercise this right must be scrutinized very closely by the courts?

If confirmed to the Sixth Circuit, I would faithfully apply Supreme Court and Sixth Circuit precedent governing the standard of review for such laws.

c. Is it preferable for this judicial scrutiny to take place before the law goes into effect so that, if the law is unconstitutional, it will not have done irreparable harm by preventing someone from voting?

If confirmed to the Sixth Circuit, I would faithfully apply Supreme Court and Sixth Circuit precedent governing the timing of judicial review.

16. Do you believe that systemic racial discrimination still exists in America today?

Unfortunately, racial discrimination still exists in America today.

17. Chief Justice Roberts wrote in the case *Parents Involved in Community Schools v. Seattle School District No. 1* that “the way to stop discrimination on the basis of race is to stop discriminating on the basis of race.” He used this rationale to rule against school districts that took race into account in trying to integrate public school systems.

In her dissent in *Schuette v. Coalition to Defend Affirmative Action* Justice Sotomayor wrote:

The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination. As members of the judiciary tasked with intervening to carry out the guarantee of equal protection, we ought not sit back and wish away, rather than confront, the racial inequality that exists in our society.

Do you agree with Justice Sotomayor’s statement, or are your views closer to Chief Justice Roberts’ statement in *Parents Involved*?

My personal views are irrelevant to the position for which I have been nominated. If confirmed to the Sixth Circuit, I would faithfully apply *Parents Involved*, along with any other binding Supreme Court or Sixth Circuit precedents.

18. Do you believe that courts should interpret the Constitution according to its original public meaning?

My personal views on constitutional interpretation will be largely irrelevant if I am fortunate enough to be confirmed to the Sixth Circuit. As a lower court judge, I would be bound to apply the precedents of the Supreme Court and Sixth Circuit in deciding any question of constitutional interpretation that comes before me.

19. Do you believe that the original public meaning of the Constitution evolves or changes over time?

Please see my response to Question 18 above.

20. What is your understanding of the original meaning of the Foreign Emoluments Clause in Article I, Section 9, Clause 8, of the Constitution?

It would be inappropriate for me to comment upon the meaning of the Foreign Emoluments Clause, which could come before me as a Sixth Circuit judge. 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.”).

21. Do you believe that this original public meaning of the Foreign Emoluments Clause should be adhered to by courts in interpreting and applying the Clause today?

Please see my response to Question 20 above.