

**Nomination of John K. Bush to the U.S. Court of Appeals for the Sixth Circuit Questions
for the Record
Submitted June 21, 2017**

QUESTIONS FROM SENATOR FEINSTEIN

1. In March 2009, you participated in a panel discussion called “The Constitution and the Importance of Interpretation: Original Meaning” in which you 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. **With respect to constitutional interpretation, do you believe judges should always employ an originalist approach to interpretation of the Constitution?**

My personal views on constitutional interpretation will be 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. As I also said in the March 2009 panel discussion, judges should respect precedent.

- b. **If you are confirmed, how will you treat Supreme Court and Sixth Circuit precedents that are not based on originalism?**

If I am fortunate enough to be confirmed, I will apply all Supreme Court and Sixth Circuit precedent faithfully, as I will be bound to do.

- c. In *Obergefell v. Hodges*, the Supreme Court upheld a constitutional right to same-sex marriage. **How do you understand an originalist reading of the Constitution to support this right?**

I have not had occasion to study this decision of the Supreme Court in light of any methodology of constitutional interpretation. If confirmed to the Sixth Circuit, I would apply *Obergefell* faithfully, as I would any precedent of the Supreme Court.

- d. In *Loving v. Virginia* (1967), the Supreme Court upheld a constitutional right to marry persons of a different race. **How do you understand an originalist reading of the Constitution to support this right?**

I have not had occasion to study this decision of the Supreme Court in light of any methodology of constitutional interpretation. If confirmed to the Sixth Circuit, I would apply *Loving* faithfully, as I would any precedent of the Supreme Court.

2. In that same March 2009 panel discussion, you said that, under an originalist reading of the First Amendment, “the *New York Times v. Sullivan* case was wrongly decided.” *New York Times v. Sullivan* is one of the primary Supreme Court opinions that protects the press from libel suits brought by public officials.

a. Do you still believe that *New York Times v. Sullivan* was wrongly decided?

My personal views of the correctness of any Supreme Court opinion are irrelevant to the position for which I have been nominated. As noted, in that same March 2009 panel discussion, I pointed out that judges should respect precedent. If I am fortunate enough to be confirmed to the Sixth Circuit, I would faithfully apply *New York Times v. Sullivan*, as I would any precedent of the Supreme Court.

b. If you are confirmed, will you follow *New York Times v. Sullivan* and any Sixth Circuit precedent based on that case?

Yes.

3. You blogged under a pseudonym for several years, posting extremely political and provocative content under the name “G. Morris.” You disclosed your authorship of these blog posts on your Senate Judiciary Questionnaire.

a. Prior to your nomination, did you disclose your authorship of these blog posts to anyone at the White House Counsel’s Office?

Yes.

b. Prior to your nomination, did you disclose your authorship of these blog posts to anyone at the Department of Justice?

Yes.

c. Did you disclose your authorship of these blog posts to either Majority Leader McConnell or Senator Paul prior to your nomination?

I do not believe it would be appropriate for me to comment upon my communications with the Majority Leader or Senator Paul, who are not officially involved with the nomination or decision.

b. Did anyone indicate that your blog posts were cause for concern? If so, who?

I discussed the blog posts with attorneys from the White House Counsel’s Office and the Department of Justice in preparing for my hearing.

c. Why did you publish your blog posts under an assumed name, rather than your own name?

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 an assumed name, “Publius”. Gouverneur Morris, the chief editor of the U.S. Constitution who wrote its preamble, published political writings under an assumed name, “An American”.

4. At your hearing, I asked you about your statement, in a blog post, 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*.” I asked you whether you still believed that *Roe* was a tragedy, and you responded that it was “a tragedy in the sense that it divided our country.”

- a. **By your response, are we also to understand that you only believe *Dred Scott* was a tragedy because “it divided our country”?**

Dred Scott was a tragedy both in its immediate consequence of denying Mr. Scott his freedom and in its more global consequences of taking the issue of slavery out of the political process and leading to civil war.

- b. **Can you point to any blog posts you authored or any other statements you have made which suggest that *Roe* was a tragedy *only* because it “divided our country”?**

To the best of my recollection, I have only referred to *Roe* as a tragedy in the blog post you cite. As I explained at the hearing, in that blog post, I was referring to the tragic division that our country has experienced since the Supreme Court’s decision in that case.

- c. **Is it your belief that if *Roe* had been decided the other way—if the Court had held that states were free to criminalize or restrict abortion in any way they chose, or to ban abortion outright—the nation would be less divided on the issue of abortion?**

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 concerning abortion. That said, commentators on both sides of the aisle, including Justice Ruth Bader Ginsburg, have criticized *Roe* for stoking division on the subject of abortion.

5. In October 2008, you wrote a blog post asserting that Barack Obama “has done next to nothing for his half-brother who lives in a hut in Kenya on less than \$1 a month Today comes word that a reporter who traveled to Kenya to report on Obama’s kin has been detained by authorities.” To support that statement, you cited *World Net Daily*, a website that heavily promoted the “birther” conspiracy which alleged that President Obama was not born in this country. You also wrote other posts suggesting that a person reading your blog from Kenya must be connected to President Obama.

- a. **Why did you write these blog posts focused on President Obama’s ties to Kenya?**

I wrote the blog post because I thought the subject might be of interest to the blog's readers.

b. In 2008, when you wrote these blog posts, did you believe that President Obama was born in the United States?

Yes.

c. What do you believe now?

I continue to believe that President Obama was born in the United States.

6. In another blog post, you suggested that William Ayers was the ghost writer for President Obama's book, *Dreams From My Father*. You cited Jack Cashill—an author who promoted the “birther” conspiracy as well—to support this statement. You concluded, “[i]f Cashill is correct, and Obama has hidden this relationship, the impact on the election could be huge.” (Did Ayers Ghostwrite Obama's Book?, 10/13/08)

a. On your blog you have regularly cited and relied upon individuals with extreme political views. How did you decide what sources to rely upon for support for assertions and opinions in your blog?

Because 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.

b. Before you drafted a blog post based on upon news from other sources, was it your practice to evaluate for yourself the credibility and veracity of the information before using it?

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. During your hearing, when Senator Franken asked you about why you relied on *World Net Daily* to support factual assertions, you said, “I was finding things that were in the news that were of note.” Do you consider stories that appear on *World Net Daily* to be credible news?

Please see responses to Questions 6(a) and 6(b) above.

7. Some of your blog posts raise concerns about your impartiality given your deeply-held political views. For example:

- You attended the 2016 Republican National Convention and wrote several posts praising Donald Trump and the Republican Party. In one, you wrote, “The decision of who will replace Justice Scalia-and perhaps others on the high court-is the top reason why the choice between Trump and Hillary is a no brainer.” (Majority Leader Offers the Best Reason to Vote for Trump, 7/19/16)
- In another post, you referred to then-Speaker Nancy Pelosi as “Mama Pelosi” and suggested that she should be “gag[ged].” (Thanks, Mama Pelosi, for that 700 Point Stock Market Plunge! 9/29/08)
- In another post regarding the 2016 election, you wrote “[t]he Democrats are trying to win with the same game plan as in 2008, only substitute woman for Black.” (Baring My Pre-Convention Thoughts, 7/17/16)

a. Why did you refer to then-Speaker Pelosi as “Mama Pelosi”?

Nancy Pelosi was then the Speaker of the United States House of Representatives. The use of the word “Mama” was a regrettable reference to her leadership position.

b. If you were assigned a case in which one of the litigants was prominently associated with the Democratic Party or a progressive issue, how could you reassure that litigant that you would be impartial?

If I am fortunate enough to be confirmed I will 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.

8. In your blog, you repeatedly refer to climate change and global warming in quotation marks. For example, in one post you wrote, “‘Saving’ the world from ‘climate change’ will just have to wait until we go to bed victorious after the UofL-North Carolina game.” (Enviro Do-Gooders Can’t Hold a Candle to NCAA Basketball, 3/8/08) In another post, you wrote, “Since when has banning offshore drilling been a positive for ‘global warming’?” (McCain’s New Energy Ad Makes Sense, 6/19/08)

a. Why did you use quotation marks around the terms climate change and global warming in the blog posts quoted above?

In using quotation marks, I was intending to incorporate by reference specific views advanced by others about climate change and global warming.

b. Do you acknowledge that climate change is a scientifically-proven phenomenon, and that overwhelming scientific evidence supports the fact that the current warming trend is the result of human activity?

This question calls upon me to weigh in on a political debate, which I cannot ethically do as a nominee for judicial office. 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.”).

c. What sources of information have informed your views on the issue of climate change and global warming?

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

9. In your blog, you have also repeatedly made it clear that you oppose the Affordable Care Act because “it is a vehicle to raise taxes on hardworking Americans” and that “[i]t needs to be repealed and replaced.” (Don’t Let the Door “HIT” American Taxpayers on Obama’s Way Out, 9/25/16) You’ve also stated that “I already have health insurance and pay for it handsomely, thank you. I don’t need to tack onto my bill the tab for someone else.” (A Shout-Out For a Papa John’s “Buycot,” 8/10/12). You clearly have extremely strong personal beliefs regarding the Affordable Care Act, and believe that it should be “repealed and replaced.” **Will you commit to recusing yourself from any case involving the Affordable Care Act or any legislation purporting to repeal and replace it if you are confirmed?**

If I am fortunate enough to be confirmed, I will evaluate any real or potential conflicts that might necessitate recusal by reference to 28 U.S.C. § 455, Canon 3 of the Code of Conduct for United States Judges, and any and all other laws, rules, and practices governing such circumstances. Also, if I am fortunate enough to be confirmed, I will not allow my personal beliefs as to the wisdom of any statute as a public policy matter influence my role as a judge to give all federal statutes, including the Affordable Care Act, their full force and effect consistent with the United States Constitution, following all Supreme Court and Sixth Circuit precedent.

10. In yet another blog post, you posted a picture of a sign that says the following: “On 10-3 Obama supporters vandalized-trespassed and stole my Palin-McCain sign violating my 1st Amendment right to free speech. Do it again and you will find out what the 2nd Amendment is all about!!!” (Take That!, 10/15/08)

a. What did you believe is conveyed by the sign’s warning that “you will find out what the 2nd Amendment is all about?”

I believe the sign speaks for itself. I understood the sign’s message to be political hyperbole and did not seriously threaten any physical harm.

b. Why did you post a picture of it?

I thought the sign would be of interest to the readership of the blog.

11. During your hearing, you told Senator Tillis about your blog posts, “if I could do some of them over today I would do them over.” **Please list the particular posts to which you were referring, and how you would “do them over.”**

I did not have a particular list of posts in mind when I made that comment. 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.

12. You also told Senator Tillis during your hearing that you believe that impartiality “is an aspiration.”

a. Why, in your view, is judicial impartiality aspirational?

Absolute impartiality is a requirement that all judges should aspire to meet.

b. In light of your view, and in light of all of the divisive political opinions you’ve expressed in your blog—if you are confirmed, what steps will you take to assure litigants that you will “will administer justice without respect to persons” and “faithfully and impartially discharge” the duties of a judge, as the judicial oath requires, if you are confirmed?

If confirmed, I would take seriously 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. I would evaluate each and every case that comes before me in light of the relevant texts, applicable precedents, and arguments made by the parties, and, after receiving counsel from my law clerks and my colleagues, I would faithfully apply those legal texts and precedents to the best of my ability.

13. In your Committee Questionnaire, you stated you were a member of the Pendennis Club, a private social club in Louisville, from 2006 to 2011. The Pendennis Club had a long history of discriminating on the basis of race and gender until at least the 1990s. The Committee’s Questionnaire asks all judicial nominees to disclose whether any organization they have been a member of “currently discriminate or formerly discriminated on the basis of race, sex, religion, or national origin.” The plain text of the question does not limit a nominee’s response to only the time period that they were a member. You did not provide a complete response to this question. You acknowledged the Pendennis Club’s discriminatory history only after my staff followed up with you on this issue.

a. At the time you filled out the Committee Questionnaire, were you aware of the Club’s discriminatory history?

I was aware that the Club had had members of different religions since its founding in the 1880s, women members since the 1980s and African American members since at least the early 1990s.

b. Why did you initially fail to disclose the Pendennis Club's history of discrimination in your response to the Committee Questionnaire?

I understood the question to ask whether any of the clubs to which I belong or have belonged invidiously discriminated during the time of my membership. Once your staff pointed out to me that the question was broader than that, I supplemented my answers accordingly.

14. You also noted on your Committee Questionnaire that you have been a member of the Society of Colonial Wars in the Commonwealth of Kentucky and the Forum Club. Both of these organizations are all-male—and were all-male organizations while you were a member. But you did not initially disclose that on your Questionnaire either. **Why did you fail to acknowledge that fact as required by the Committee Questionnaire?**

I understood the question to ask whether the clubs to which I belong or have belonged invidiously discriminated during the time of my membership. Once your staff pointed out that the question was broader than that, I supplemented my answers accordingly.

15. In 1993, you co-authored a Supreme Court amicus brief supporting the Virginia Military Institute (VMI)'s policy barring women from attending the school. However, in 1996 the Supreme Court ruled 7-1 that VMI's policy violated women's rights under the Constitution's Equal Protection Clause. Justice Ginsburg wrote in the majority opinion that classifications based on sex "may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women."

a. Why did you get involved in this case?

A partner at my law firm, Ted Olson, asked me as an associate to assist him with a brief that the firm had been retained to write on behalf of Women's Washington Issues Network, Women for VMI, Frank F. Hayden, and Oscar W. King III.

b. If confirmed, what would be your approach as a judge in interpreting the Fourteenth Amendment's Equal Protection Clause with regard to discrimination against women?

If confirmed, I would faithfully apply all precedents from the Supreme Court and the Sixth Circuit interpreting the Fourteenth Amendment's Equal Protection Clause, just as I would faithfully apply any other controlling precedents from those courts.

16. On your Senate Questionnaire, you indicate that you have been the President of the Louisville Lawyers Chapter of the Federalist Society since 1997. The Federalist Society's "About Us" webpage, explains the purpose of the organization as follows: "Law schools and the legal profession are currently strongly dominated by a form of

orthodox liberal ideology which advocates a centralized and uniform society. While some members of the academic community have dissented from these views, by and large they are taught simultaneously with (and indeed as if they were) the law.” It says that the Federalist Society seeks to “reorder[] priorities within the legal system to place a premium on individual liberty, traditional values, and the rule of law. It also requires restoring the recognition of the importance of these norms among lawyers, judges, law students and professors. In working to achieve these goals, the Society has created a conservative and libertarian intellectual network that extends to all levels of the legal community.”

- a. Could you please elaborate on the “form of orthodox liberal ideology which advocates a centralized and uniform society” that the Federalist Society claims dominates law schools?**

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

- b. How exactly does the Federalist Society seek to “reorder priorities within the legal system”?**

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

- c. What “traditional values” does the Federalist Society seek to place a premium on?**

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

17. Please respond with your views on the proper application of precedent by judges.

- a. Are you committed to following circuit court precedent if confirmed?**

Yes, consistent with any Sixth Circuit precedent governing the treatment of its own precedent.

- b. When, if ever, is it appropriate for lower courts to depart from Supreme Court precedent?**

I cannot think of any circumstance in which it would be appropriate for lower courts to depart from controlling Supreme Court precedent.

- c. Do you believe it is proper for a circuit court judge to question Supreme Court precedent in a concurring opinion? What about a dissent?**

In general, I do not believe it is the role of a circuit judge to question binding Supreme Court precedent. I can imagine only some circumstances in which a circuit judge’s opinion about a precedent might be useful to the Supreme Court—for example, by identifying a need among appellate judges for clarification of a particular point in a precedent.

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

A panel of the Sixth Circuit may not overturn its precedent “unless an inconsistent decision of the United States Supreme Court requires modification of the decision or [the Sixth Circuit] sitting en banc overrules the prior decision.” *United States v. Elbe*, 774 F.3d 885, 891 (6th Cir. 2014).

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

I have not studied this issue, as it would not be relevant to the position for which I have been nominated. If confirmed, I would be bound to apply all controlling precedents of the Supreme Court faithfully and to the best of my ability.

18. 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 textbook 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 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”? “superprecedent”?

I have not studied this question, but *Roe v. Wade* would be absolutely binding upon me as a circuit judge, regardless of whether it is labeled “super-stare decisis” or “super-precedent.”

b. Is it settled law?

Roe is settled as a precedent of the Supreme Court, binding upon all lower courts.

19. 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?**

Obergefell is settled as a precedent of the Supreme Court, binding upon all lower courts.

20. 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?

I have not studied the issue, and it would be both inappropriate and irrelevant for me to opine about my personal views on any particular Supreme Court precedent. *Heller*, like all precedents of the Supreme Court, would be binding upon me as a circuit judge, if I am fortunate enough to be confirmed.

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

I have not studied the issue, but I am aware that *Heller* itself stated that it should not “be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or imposing conditions and qualifications on the commercial sale of arms.” 554 U.S. 570, 626–27 (2008).

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

Please see response to Question 20(a) above.

21. In *Citizens United v. FEC*, the Supreme Court held that corporations have free speech rights under the First Amendment and that any attempt to limit corporations’ independent political expenditures is unconstitutional. This decision opened the floodgates to unprecedented sums of dark money in the political process.

a. Do you believe that corporations have First Amendment rights that are equal to individuals’ First Amendment rights?

My personal views are irrelevant to the position for which I have been nominated. If confirmed to the Sixth Circuit, I will be bound to apply *Citizens United* and all other applicable Supreme Court and Sixth Circuit precedents, and I will faithfully do so.

b. Do individuals have a First Amendment interest in not having their individual speech drowned out by wealthy corporations?

Please see my response to Question 21(a) above.

c. Do you believe corporations also have a right to freedom of religion under the First Amendment?

Please see my response to Question 21(a) above.

22. Please describe with particularity the process by which these questions were answered.

The Office of Legal Policy forwarded me these questions after they received them from the Committee. With advice and assistance from attorneys in the Office, I drafted and revised these responses. After a final review of the answers, I authorized the Office to submit the responses on my behalf.