

Hearing before the Senate Committee on the Judiciary
“Nominations”
Questions for the Record Submitted by Senator Al Franken

Questions for John Kenneth Bush:

Question 1. You stated in your Senate questionnaire that among the published material you have written or edited are “[b]log posts published under the pseudonym ‘G. Morris’ on www.Elephantsinthebluegrass.com.” You also stated, regarding your blog posts, “[c]opy supplied.” You provided the Committee with more than 460 printed pages of posts you wrote as “G. Morris.” However, you failed to provide the Committee with copies of at least eight posts:

1. G. Morris, *Roll With the Changes*, ELEPHANTS IN THE BLUEGRASS (July 19, 2016), <https://elephantsinthebluegrass.blogspot.com/2016/07/roll-with-changes.html>.
2. G. Morris, *Fineman: This is McConnell’s Moment*, ELEPHANTS IN THE BLUEGRASS (Aug. 3, 2011), <https://elephantsinthebluegrass.blogspot.com/2011/08/fineman-this-is-mcconnells-moment.html>.
3. G. Morris, *That’s Reaaally Scaaary!*, ELEPHANTS IN THE BLUEGRASS (Oct. 13, 2008), <https://elephantsinthebluegrass.blogspot.com/2008/10/thats-reeaally-scaaary.html>.
4. G. Morris, *Obama’s Incredible Shrinking Lead*, ELEPHANTS IN THE BLUEGRASS (Oct. 7, 2008), <https://elephantsinthebluegrass.blogspot.com/2008/10/obamas-incredible-shrinking-lead.html>.
5. G. Morris, *Celebrities Pay Indecent Price To Schmooze With Obama*, ELEPHANTS IN THE BLUEGRASS (Sept. 17, 2008), <https://elephantsinthebluegrass.blogspot.com/2008/09/celebrities-pay-indecent-price-to.html>.
6. G. Morris, *Pennies From Lunsford’s Heaven*, ELEPHANTS IN THE BLUEGRASS (May 22, 2008), <https://elephantsinthebluegrass.blogspot.com/2008/05/pennies-from-lunsfords-heaven.html>.
7. G. Morris, *Family Ties*, ELEPHANTS IN THE BLUEGRASS (Mar. 25, 2008), <https://elephantsinthebluegrass.blogspot.com/2008/03/family-ties.html>.
8. G. Morris, *Bourbon Politics*, ELEPHANTS IN THE BLUEGRASS (Mar. 25, 2008), <https://elephantsinthebluegrass.blogspot.com/2008/03/bourbon-politics.html>.

- **Why were the above eight blog posts omitted from the materials you originally provided to the Committee?**

They were inadvertently omitted. I did not intend to withhold any blog posts, which are all available on the internet.

- **Are the above eight blog posts the only posts you authored as “G. Morris” that are missing from the materials you originally provided to the Committee?**

Yes, to the best of my knowledge.

- **Please submit supplemental questionnaire responses to ensure that the Committee has access to your full record, including the above eight blog posts and any other content omitted from the materials you originally provided to the Committee.**

I will do so.

- **Were any blog posts you authored as “G. Morris” deleted from *Elephants in the Bluegrass* or otherwise rendered no longer publicly available and therefore not included among the materials you originally submitted? If so, why were the posts deleted, and by whom? If so, please submit supplemental questionnaire responses to ensure that the Committee has access to your full record.**

To the best of my knowledge, no “G. Morris” blog posts have been deleted or otherwise rendered no longer publicly available.

Question 2. In addition to publishing blog posts under the pseudonym “G. Morris” on the blog www.Elephantsinthebluegrass.com, you also used the same alias to comment on blog posts published by other authors on that same blog. For example, you commented on the following two blog posts as “G. Morris”:

1. Bridget M. Bush, *National Pundits Agree: Paul Won Debate*, ELEPHANTS IN THE BLUEGRASS (Oct. 26, 2010), <https://elephantsinthebluegrass.blogspot.com/2010/10/national-pundits-agree-paul-won-debate.html>. “G. Morris” commented, “Like G. Morris wrote, Rand schooled him.”
2. Bridget M. Bush, *Sabato On Kentucky Senate Race*, ELEPHANTS IN THE BLUEGRASS (Jan. 22, 2010), <https://elephantsinthebluegrass.blogspot.com/2010/01/sabato-on-kentucky-senate-race.html>. “G. Morris” commented, “I think in Obama-speak the President’s efforts to campaign for Democratic Senators would be to ‘push them over the precipice.’ As George Will pointed out in a column this week, Obama uses the

word “precipice” in a very curious way: ‘We are on the precipice of an achievement that’s eluded Congresses and presidents for generations.’-- President Barack Obama, Dec. 15, on health-care legislation
Precipice, 1. a headlong fall or descent, esp. to a great depth.
-- Oxford English Dictionary”

The above comments qualify as “other published material you have written or edited, including material published only on the Internet,” as requested in your Senate questionnaire. However, you did not provide the Committee with the above two comments.

- **Why were the above two comments omitted from the materials you originally provided to the Committee?**

It did not occur to me to include such comments as “published material,” and subsequent discussions with the Office of Legal Policy have confirmed that they are not responsive as such.

- **Are the above two comments the only comments you authored as “G. Morris” that are missing from the materials you originally provided to the Committee?**

Yes, to the best of my knowledge.

- **Please submit supplemental questionnaire responses to ensure that the Committee has access to your full record, including the above two comments and any other content omitted from the materials you originally provided to the Committee.**

After further consultation with the Office of Legal Policy, it has been explained to me that internet comments are not the kind of published material responsive to the questionnaire. In any event, to the best of my knowledge these are the only two comments I have made as “G. Morris”.

- **Were any comments you authored as “G. Morris” deleted from *Elephants in the Bluegrass* or otherwise rendered no longer publicly available and therefore not included among the materials you originally submitted? If so, why were the comments deleted, and by whom? If so, please submit supplemental questionnaire responses to ensure that the Committee has access to your full record, including “other published material you have written or edited, including material published only on the Internet.”**

I am not aware of any such deleted comments.

Question 3. Why did you choose to publish blog posts pseudonymously rather than under 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 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".

Question 4. Why did you choose the pseudonym "G. Morris?" What is the significance of this name?

"G. Morris" is a reference to Gouverneur Morris, one of the Founders of the United States. I have spent many years researching and writing an historical novel about Morris. He spoke openly against slavery, drafted the preamble of the Constitution, and served as the "penman" for its final form. Among his many other accomplishments, he was instrumental in obtaining provisions from the Continental Congress for the American troops at Valley Forge, courageously represented our country as ambassador to France during the French Revolution, and was a United States Senator who was a strong advocate for the federal judiciary. Morris also served on commissions that planned the Erie Canal and devised the street plan for the City of New York. While I do not agree with everything Gouverneur Morris wrote and did, I have a great deal of admiration for many of the things he accomplished.

Question 5. Did you write, post, or comment under the alias "G. Morris" on any other public fora, including but not limited to blogs, social networking sites, or the comment sections of other online publications? If so, please submit supplemental questionnaire responses to ensure that the Committee has access to your full record, including "other published material you have written or edited, including material published only on the Internet."

No.

Question 6. Did you write, post, or comment under an alias other than "G. Morris" on any public fora, including but not limited to blogs, social networking sites, or the comment sections of other online publications? If so, please submit supplemental questionnaire responses to ensure that the Committee has access to your full record, including "other published material you have written or edited, including material published only on the Internet."

No.

Question 7. The Senate questionnaire asks you to "describe your experience in the entire judicial selection process, from beginning to end." In response, you stated that you met with Senate Majority Leader Mitch McConnell and Senator Rand Paul to express an interest in serving as a federal judge. You also stated that you later interviewed with attorneys from the White House Counsel's Office and the Department of Justice, and have subsequently been in contact with the White House Counsel's Office and the Department of Justice's Office of Legal Policy regarding your nomination.

- **During the judicial selection process, did you disclose and/or discuss your blog posts during the above listed meetings? If not, why?**

I disclosed my blog posts to attorneys from the White House Counsel's Office and Department of Justice during the judicial selection process. 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 decision.

- **During your February 23, 2017 interview with attorneys from the White House Counsel's Office and the Department of Justice, did you disclose and/or discuss your blog posts? If not, why? If so, did anyone express concern about the content of your writings? If so, what was the nature of their concern?**

I do not recall discussing my blog posts with attorneys from the White House Counsel's Office during my February 23, 2017 interview. Subsequently, I disclosed those posts to attorneys from the White House Counsel's Office and Department of Justice in later contacts. We discussed the content of the blog posts and potential concerns that might be raised about them during the confirmation process.

- **You state that you met with attorneys from the White House Counsel's Office again on March 2, 2017. For what reason did you sit for a second interview? How did the second interview differ from the first? Were your blog posts discussed during the March 2, 2017 meeting? If so, how?**

I was in Washington, D.C. on business for a client. I stopped by to meet Don McGahn, who had not been able to join the February 23, 2007 interview. I do not recall discussing the blog posts with Mr. McGahn.

Question 8. During your hearing, I asked you about a series of posts you authored as "G. Morris" that focused on President Obama's Kenyan heritage, including your October 7, 2008 post, "'Brother's Keeper'—As in, Keep that Anti-Obama Reporter in Jail!;" your October 16, 2008 post, "Greetings to Kenya!;" and your October 25, 2008 post, "Kenya, Speak Up!" Your October 7 post quoted at length from an article published on *World News Daily*, an alt-right website known for trafficking in fake news, conspiracy theories, white nationalism, and "birtherism"—the debunked and racist belief that President Obama was not born in the United States.

I asked you what point you were trying to make in the October 7, 2008 post. Rather than answer the question, you replied, "Well, first of all, before getting into a particular post, I have to tell the Committee there are some things I've written on the post—or the blog—that I wish I could phrase differently or said differently at this point. That particular post, I don't recall all the details of it, but I was certainly not intending to endorse any views of another group as far as birtherism goes."

- **Now that you have had time to review the post and refresh your recollection, what point were you trying to make in the October 7, 2008 post titled, “‘Brother’s Keeper’—As in, Keep that Anti-Obama Reporter in Jail!”?**

I was commenting upon a news report that I thought would be of interest to the readership of the blog.

- **In the two subsequent posts identified above (published on October 16 and October 25, 2008), you chose to revisit the topic of President Obama’s Kenyan heritage. Why was the president’s Kenyan heritage of such interest to you?**

The two subsequent posts mentioned above were not primarily concerned with President Obama, but rather with data showing that an individual in Kenya was reading the blog, an unusual and interesting occurrence for a Kentucky-based blog.

- **In attempting to answer my question, you said “I was certainly not intending to endorse any views of another group as far as birtherism goes.” You also said, “I was not intending through the posts to say that President Obama was not born in this country.” Do you believe that President Obama was born in the United States? If so, why did you rely upon sources that trafficked in the theory that he was not born in the United States?**

I believe President Obama was born in the United States. 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.

Question 9. During your hearing, I asked you how you decided which sources to rely upon in your writings, and how you determined which sources were credible. In my view, whether you are capable of discerning real news from fake news, or blogs that traffic in conspiracy theories from legitimate journalism, is of interest to the Committee as we attempt to understand how you might approach cases as a judge. Your capacity to evaluate the credibility of a source or a claim bears on the question of how you might approach the factual records in cases before the court.

I asked you to explain your thought process several times, but you were unable to answer the question.

- **Now that you have had time to reflect on the question, please explain how you decided which sources to rely upon in your writings and which sources were credible.**

As noted above, 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. If fortunate enough to be confirmed to the Sixth Circuit, I would not conduct outside research about the facts

of a case, but limit myself to consideration of the evidence in the record developed by the parties, consistent with all applicable standards for review of such evidence.

Question 10. *World News Daily* was just one among many questionable and conspiracy-minded websites that you cited to support arguments and assertions that you made in your posts. For example, in an October 13, 2008 blog post you cite Jack Cashill, a conspiracy theorist who was known for questioning President Obama’s place of birth. During your hearing, as you attempted to answer my question, you said, “I was—as a blogger, I was finding things that were in the news that were of note, I thought.”

- **In finding “things that were in the news that were of note,” how did you come upon sources like *World News Daily* or the writings of Jack Cashill?**

I do not remember how I came upon those sources. I do not recall reading any article from *World News Daily* or any writing of Jack Cashill other than those specific pieces cited in my blog posts.

- **Do you regularly rely upon sources like *World News Daily* to stay informed on matters of public concern? If so, why?**

No.

Question 11. During your hearing, Senator Tillis asked you whether, in your view, impartiality was “an aspiration or an absolute expectation.” You answered, “It is an aspiration. I will do my best to be impartial.”

28 U.S.C. 455(a) provides that “any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.”

- **Do you believe that, given your past writings, there are matters about which your ability to be impartial might reasonably be questioned? If so, which matters?**

Canon 3(C)(1) generally requires consideration of recusal on a proceeding by proceeding basis. If I am fortunate enough to be confirmed, I will evaluate any real or potential conflicts that might necessitate recusal on a case-by-case basis by reference to that canon, along with any and all other laws, rules, and practices governing such circumstances.

Question 12. In your past writings, you equated abortion to slavery. You wrote, “the two greatest tragedies in our country—abortion and slavery—relied on similar reasoning and activist judges at the U.S. Supreme Court, first in *Dred Scott* and then in *Roe*.” You also wrote a lengthy post in which you ridiculed the State Department’s decision to update passport applications in order to acknowledge gay and lesbian parents.

- **If confirmed to the Sixth Circuit Court of Appeals, it is not inconceivable that a case concerning reproductive rights or same-sex parents might come before you.**

Given your previous writings on this issue, and understanding your obligations under 28 U.S.C. 455(a), what steps would you take to ensure litigants in such cases that their claims will be heard by a fair and impartial judge?

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.

As for the blog post you reference regarding passport applications, I did not intend for that post to criticize gay and lesbian parents. My point was to criticize the State Department for assigning a rank or order to parents – “Parent 1” and “Parent 2”. The State Department should have simply used the word “Parent” for each parent rather than force parents – whether different sex or same sex – to make a choice as to their respective priority in filling out the application.

Question 13. During your hearing, in response to a question from Senator Feinstein concerning your past writings on abortion and *Roe v. Wade*, you said, “There are absolutely no circumstances in which I would decline to follow precedent, if confirmed. I would always follow precedent, and I would follow *Roe v. Wade*, *Casey*, and all the decisions that have come after that important decision.”

- **In the area of reproductive rights, it is conceivable that a question could come before the Sixth Circuit that is not squarely answered by Supreme Court precedent. How will you approach matters relating to abortion in such circumstances?**

If faced with a question not squarely answered by Supreme Court precedent, I would carefully review the relevant legal texts and precedents, consider the arguments of the parties on both sides, and consult with my law clerks and my colleagues. It would be inappropriate for me to comment any further upon a matter that might 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.”).

- **In light of your past statement that abortion is one of the “two greatest tragedies in our country,” do you believe that litigants challenging a restriction on access to abortion might reasonably question your impartiality in such a proceeding?**

My personal views on this issue are not relevant. If confirmed to the Sixth Circuit, 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.

Question 14. On September 12, 2008, writing as “G. Morris,” you posted a photograph that shows then-Senator Obama in the ocean off the coast of Hawaii. You titled the post, “What Kind of Stroke Is That????” (see G. Morris, *What Kind of Stroke Is That????*, ELEPHANTS IN THE BLUEGRASS (Sept. 12, 2008), <https://elephantsinthebluegrass.blogspot.com/2008/09/what-kind-of-stroke-is-that.html>).

- **What point were you trying to make in this post?**

As the father of three competitive swimmers, I was trying to highlight a photograph that I thought might be of interest to the readership of the blog.

Question 15. During your hearing, Senator Tillis expressed concern about your blog posts. You stated that, “If I could do some of them over today, I would do them over.” After Senator Tillis asked whether you would have “phrased them differently or simply not have waded into the waters,” you replied, “I would have phrased some of them very differently.”

- **Which of the posts you authored as “G. Morris” would you have phrased differently, given the opportunity? How would you have phrased 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.

- **Are there any blog posts that, in retrospect, you would choose not to publish? If so, which posts?**

Please see my response to the first subpart of this question above.

- **For each post that you would either rephrase or not publish, please explain what about each post causes you to question its appropriateness today?**

Please see my response to the first subpart of this question above.

- **what was the nature of their concern?**

I do not understand this subpart. I believe it may be a typographical error.