

Senator Mazie K. Hirono

*Questions for the Record following the hearing on May 14, 2017 entitled:
“Nominations”*

John K. Bush

1. In 1992, in *Planned Parenthood v. Casey*, the Supreme Court re-affirmed the core holding of *Roe* that the right to an abortion is constitutionally protected. In a 2008 blog post, you stated that abortion is one of “the two greatest tragedies in our country,” along with slavery, and that *Roe* was a decision by “activist justices” that relied on “similar reasoning” to *Dred Scott*, the nineteenth century decision which said that African-Americans could not be citizens.

- a. Do you believe that the Constitution protects a woman’s right to choose to get an 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 *Casey*, *Roe*, and any other binding precedents of the Supreme Court and Sixth Circuit concerning abortion.

- b. *Dred Scott* is widely considered the worst decision every made by the Supreme Court, and its holding that African-Americans could never be citizens of the United States was rejected by Americans in the Civil War and in the Constitutional Amendments that followed. In contrast, the core holding of *Roe*, as reaffirmed in *Casey*, is the law of the land, and based on the Constitution’s protections for making intimate and personal decisions. Given your clearly stated view that *Roe* was wrongly decided and a tragedy on part with the worst decision in the Supreme Court’s history, how can you assure us that would you be able to apply this important legal precedent if 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. In that capacity, 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.

- c. During your hearing, in seeking to explain your comparison of *Roe* to *Dred Scott*, you testified that *Roe* was a tragedy because it divided the country. This seems in contrast with an objective reading of your blog post. In addition, you drew a contrast between *Roe* and *Brown v. Board*, which you testified did not divide the country. That view of *Brown* seems to be in contradiction with the history of the aftermath of *Brown* and the long tenured and significant resistance that decision

received necessitating federal intervention, a history with which you claimed familiarity having grown up in Little Rock. I would like to give you an opportunity to clarify your answer now. Why do you think the *Roe* decision was a tragedy on par with *Dred Scott*? Is divisiveness the only reason for your comparison? Should the public popularity of a decision factor into a judge's decision-making and how do you square that view with the courts' important role of protecting minority rights?

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. I would not consider *Brown* to be similar to those two decisions; *Brown* united, not divided, our country when it brought an end to the physical division of the races under the pernicious practice of segregation. Because of President Eisenhower's enforcement of *Brown* at Central High School in Little Rock, Arkansas, I was fortunate to attend racially integrated public schools in Little Rock for all of my secondary education.

If I am fortunate enough to be confirmed as a Sixth Circuit judge, I would study the relevant texts and precedents, consider the arguments of the parties, and consult with my law clerks and colleagues to decide the cases presented to me. I do not believe that public popularity should be a factor in that analysis.

- d. What neutral criteria could we use to determine whether or not a judge is an "activist"? Are there any decisions by conservative justices or a conservative majority of the Supreme Court you would characterize as "activist" and subject to your critique?

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.").

2. In the same 2008 blog post, you also stated that you agreed with Senator Mitch McConnell, whose past campaigns you've supported, that the appointment of judges could preserve "the anti-abortion agenda." As a judge, would it be your aim to preserve "the anti-abortion agenda"?

If I am fortunate enough to be confirmed as a Sixth Circuit judge, my only aim would be to study the relevant texts and precedents, consider the arguments of the parties, and consult with my law clerks and colleagues to decide the cases presented to me.

3. In *Hobby Lobby*, the corporation made claims about contraception based on religious beliefs which are directly contravened by scientific research. Are there any limits—and what are the limits—on what a corporation may claim as a belief in justifying its denial of health care for its employees?

It would be inappropriate for me to comment 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.”).

4. You co-authored an *amicus* brief in the Virginia Military Institute case, arguing that VMI should be able to continue excluding women because of the “different developmental needs of women and men” and because women “tend to respond more favorably to a cooperative setting.” The Court ruled against VMI in that case. Do you continue to believe that women are not suited to particular educational styles, and that they work better in “cooperative” settings?

In the *VMI* case, I did not advance my own views, but those of my clients, Women’s Washington Issues Network, Women for VMI, Frank F. Hayden, and Oscar W. King III. My personal views are irrelevant to the position for which I have been nominated. If confirmed to the Sixth Circuit, I would be bound to apply faithfully any applicable precedents of the Supreme Court and Sixth Circuit.

5. In a 2008 blog post criticizing an Obama campaign fundraiser, you wrote that “[t]he price of the ticket in exchange for access to a presidential candidate brought to mind” the movie “Indecent Proposal.”
 - a. If, as you put it, the exchange of campaign donations for access is “indecent,” then doesn’t the government have a compelling interest in limiting donations to prevent donors from paying for access to political candidates?

It would be inappropriate for me to comment 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.”).

- b. In 2014, the Kentucky Opportunity Coalition, a dark money (c)(4) group on whose board your wife was serving at the time, spent \$7.1 million on that year’s Senate race in Kentucky. Was that an attempt to exchange donations for access?

No.

- c. Do the activities of dark money groups like the Kentucky Opportunity Coalition violate federal disclosure laws, which the Supreme Court upheld in *Citizens United*?

Please see my response to Question 5(a) above.

6. When Congress reauthorized the key expiring provisions of the landmark Voting Rights Act in 2006, it did so with a nearly unanimous vote. Before reauthorizing the protections of Section 5 in jurisdictions with a long history of discrimination in voting, the Judiciary Committee alone held 9 hearings on the Voting Rights Act. The thousands of pages of material the Senate reviewed, together with the record developed in a dozen hearings in the House, clearly established the continuing need for Section 5. And yet, in *Shelby County*, the Court ignored this evidence and the Court's long precedent, made its own determination about the value of the extensive evidence reviewed by Congress. Does the *Shelby County* decision raise concerns about the limits of judges as policy-makers and the problems that arise when a Court steps outside of the judicial role and acts as a legislative body?

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 faithfully *Shelby County*, along with any other applicable precedents of the Supreme Court.

7. In 2010, you wrote a blog post in response to the Presbyterian Church (USA) adopting a resolution on foreign aid to Israel. You stated that the church, which has over 1.7 million members, had "diss[ed] Israel," "alienated themselves...from most Americans," and "add[ed] to the perception of a religious denomination that is far outside the mainstream."
 - a. Could a member of this church, or any religious denomination you deem to be "outside the mainstream," expect to get a fair hearing in your courtroom?

Yes. 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.

- b. If required to make a decision regarding First Amendment free exercise of religion, would you allow your personal political beliefs to influence your treatment of religious beliefs or practices?

No.

- c. If required to make a decision regarding First Amendment establishment of religion, would you permit government support of religious practices that conform to your political views?

My personal views would be irrelevant to my assessment of any challenge involving the Establishment Clause. If confirmed to the Sixth Circuit and presented with such a challenge, I would study the relevant texts and precedents, consider the arguments of the parties, and consult with my law clerks and colleagues to decide the case.

8. In 2009, you stated that *New York Times v. Sullivan*, the landmark case in which the Supreme Court held that malicious intent is necessary in a libel suit, was wrongly decided under an originalist understanding of the First Amendment. As a Sixth Circuit judge, would you attempt to narrow the holding in *New York Times* or otherwise reduce the standards in libel suits?

No. As I stated in the same speech in 2009 in which I discussed *New York Times v. Sullivan*, I believe judges should respect precedent. If I am fortunate enough to be confirmed to the Sixth Circuit, I will faithfully apply *New York Times* and all other controlling Supreme Court precedents.

9. During your hearing, you were asked about a number of the blog posts you published, including posts that made clear references to race-baiting “birther” conspiracies about President Obama. You answered that you would not write several of these posts today and, in effect, that you regretted the some of your choices of language, although you seemed unprepared to discuss specific posts.

- a. Please identify which blog posts you would not make today, and explain why you would not make them.

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.

Also, I must express disagreement with a premise that might be implied by your question. I did not make reference to any “birther” conspiracies, and I never engaged in “race-baiting” in any of my blog posts. In fact, in my writings, I expressed just the opposite view, such as in my May 21, 2010 letter to the editor in the *Courier-Journal*, where I pointed out that a person’s race should not be relevant for evaluating the merits of that person’s views.

- b. Generally, is the reason you would not make these posts today because you have changed your mind and now disagree with their contents, or because you think they reflect poorly on you as a judicial nominee?

Please see my response to Question 9(a) above.

- c. In light of the deeply troubling nature of some of your blog posts, how can you reassure us that you have the appropriate temperament to be a federal judge, one that all litigants could trust would fairly apply the law?

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.

10. As we’ve seen from your record, you’ve expressed deeply conservative views, participated in numerous Republican political campaigns, and spread critical and even conspiratorial stories about Democrats and their policies. Do you believe that you will be able to separate your ideological and partisan views from judging? Do you believe generally that life experiences and unconscious biases play a role in judging?

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 guard against any personal biases that might affect my decisionmaking and recuse myself where required under the applicable statutes, canons, and practices.

As a Republican I did engage in political writing and participate in campaigns. But as you know, there is a long history in our country of persons involved in party politics who later served in the federal judiciary without bias to the political party with which those persons were not affiliated before joining the bench: the Republican President, and later Chief Justice, William Howard Taft; the Republican Governor, and later Chief Justice, Earl Warren; and the Federalist Congressman and Secretary of State, and later Chief Justice, John Marshall, to name a few. These individuals were able to separate their ideological and partisan views from judging and will be role models for me if I am fortunate enough to be confirmed.

11. In July of last year, after listening to Senator McConnell’s speech at the Republican National Convention, you posted that “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 brainier [sic].” Why in your view does the decision about who is president matter for who is selected to be judges and justices?

President Trump had identified the characteristics he would look for in nominating a Supreme Court Justice to replace Justice Scalia and, in an unprecedented move, submitted a list to the American people of candidates he would consider for that replacement. He selected from that list when he nominated Justice Gorsuch to his seat on the Supreme Court.