

**Nomination of John K. Bush  
to be Judge on the United States Court of Appeals for the Sixth Circuit  
Questions for the Record  
Submitted June 21, 2017**

**QUESTIONS FROM SENATOR WHITEHOUSE**

1. You have written a number of blog posts on the environment and climate change. These have included statements such as: “Republicans shouldn’t ‘cow-tow’ to the ‘environmental lobby’s opposition to drilling in ANWR and offshore at the expense of all of us at the gasoline pump’.” You also wrote that “[s]aving the world from ‘climate change’ will just have to wait until we go to bed victorious after the U of L-North Carolina game.”
  - a. Please explain why you chose to place “climate change” in quotation marks in this post.

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

- b. Canon 3(C)(1)(a) of the Code of Conduct for United States Judges requires a judge to disqualify himself from “a proceeding in which the judge’s impartiality might reasonably be questioned.” Given your comments about the “environmental lobby,” will you commit to recusing yourself from any cases that come before you on the Sixth Circuit where such environmental interests are litigants? If not, how can a party to such a case have faith that you are capable of fairly and impartially considering the merits of their case?

If 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.

2. In a March 7, 2009 symposium at the University of Louisville, you gave a speech in which you criticized the Supreme Court’s jurisprudence in the *New York Times v. Sullivan* case.
  - a. How can this Committee rely upon you to uphold cases involving *Sullivan* when you have publicly declared your opposition to that ruling?

My personal views on any Supreme Court precedent are irrelevant to the position for which I have been nominated. If confirmed to the Sixth Circuit, I would faithfully apply *New York Times v. Sullivan*, along with any other binding precedent. As I noted in the same speech, judges should respect precedent.

3. On your Senate questionnaire asking for a list of the ten most significant cases in your 28-year legal career, you included your fairly minor role on the defense case of Stacey Koon – one of the police officers who beat Rodney King in 1992.
  - a. Why was a case where you were a law firm associate who helped brief a sentencing appeal listed as one of the ten most significant cases of your entire career?

I listed the case because I read the question to call for the cases of greatest public significance in which I had been involved during my legal career. I believed that the case, which undoubtedly involved an issue of great public significance, qualified under that standard. In addition to involving facts that had transfixed the nation, the *Koon* case involved a legal question of significant import—the appropriate standard of appellate review of downward departures from the then-mandatory U.S. Sentencing Guidelines, a standard that would have affected appeals far beyond that case.

4. You testified at your hearing that “there are some things I’ve written on the post or the blog that I wish I could phrase differently or had said differently at this point.” You also said: “I made some posts that I today would not do.”
  - a. Please list each blog posting of yours that you wish you could phrase or say differently at this point, or that today you “would not do.” For each such posting, please explain why you would not do it, or would phrase or say it differently today. This will allow the Committee to assume that any blog posting you do not provide in response to this question, you would not phrase differently today.

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.

5. Some of your blog postings cited websites, such as World News Daily, that have alleged that President Obama was not born in the United States. At your hearing, you testified that “I never made that allegation” and “I am not endorsing any of the birther viewpoints of that particular person.”
  - a. Do you believe that President Obama was born in the United States?

Yes.

- b. Senator Franken asked you repeatedly if you believe World News Daily is a credible source, but you refused to answer. Please indicate whether you today believe World News Daily is a credible source. If you respond in the affirmative, is it a source that you would be content to have your law clerks cite to, if confirmed to the bench?

My personal views on the credibility of World News Daily are irrelevant to the position to which I have been nominated. 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.

6. As referenced in Question Five, Senator Al Franken asked you about several posts you wrote about President Obama's Kenyan heritage, citing to articles from radical, alt-right websites, including WorldNetDaily, that promote white nationalism and debunked conspiracy theories. You responded, "I was certainly not intending to endorse any views of another group, as far as birtherism goes."

- a. How does reading alt-right websites such as WorldNetDaily inform your views on legal and social issues?

I do not recall having read any articles from WorldNetDaily other than those few cited in my blog posts. WorldNetDaily is not a website I have ever regularly visited.

In any event, my personal views on legal and social issues are irrelevant to the position for which I have been nominated. If confirmed to the Sixth Circuit, 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 to resolve each case that comes before me.

- b. How do you distinguish between fact and theory? Does the source of the information matter to you? How much weight should consensus in a field of study be given when deciding whether to treat something as a disputed matter of fact? For example, do you consider it to be a disputed matter of fact whether gay and lesbian people are equally well-suited to parent as straight people?

My personal views on this subject are irrelevant to the position for which I have been nominated. If 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.

As for fact finding in a case, a federal appellate judge generally must defer to the finder of fact at the district court level, who is either the district judge or the jury. The usual rule is that a district judge's findings of fact may be reversed only if they are clearly erroneous.

7. At your confirmation hearing, you committed to Senator Feinstein under oath to follow Supreme Court precedent in the *Roe v. Wade* line of cases, despite a 2008 blog post in which you compared *Roe* to *Dred Scott*, widely regarded as the worst Supreme Court decision in history.
  - a. In light of your 2008 blog post, do you think your "impartiality might reasonably be questioned," as that term is used in Canon 3(C)(1) of the Code of Conduct for United States Judges, in cases involving abortion? If not, why not?

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.

- b. In your view, what is the significance of *Whole Woman's Health v. Hellerstedt*, 136 S.Ct. 2292 (2016) on the *Roe* doctrine?

I have not had occasion to consider the significance of *Whole Woman's Health* in detail. If confirmed to the Sixth Circuit, I would carefully evaluate that decision in light of any other applicable Supreme Court precedents and with the assistance of briefing from the parties and counsel from my law clerks and colleagues. As with any other Supreme Court precedent, I would faithfully apply *Whole Woman's Health*.

- c. Under the *Whole Woman's Health* standard, what would you look to in evaluating a law that propounded regulations for the medical facilities offered by abortion clinics?

Because regulations of this sort are the subject of active litigation, it would be ethically improper for me to opine on this subject. See Canon 3(A)(6).

- d. Do you understand *Gonzales v. Carhart*, 550 U.S. 124 (2007) to overrule *Stenberg v. Carhart*, 530 U.S. 914 (2000)? Please explain your understanding of the interaction between these two cases in the current Supreme Court jurisprudence.

I have not had occasion to study this issue in detail, and it would be improper for me to opine upon any issue that could come before me as a Sixth Circuit judge. See Canon 3(A)(6).

8. You testified at your hearing that you believe *Roe v. Wade* was a tragedy because it “divided our country” and has “created such a division in our country.” When Senator Durbin asked you whether *Brown v. Board of Education* also divided our country, you stated: “I wasn’t alive at the time of *Brown* but I don’t think it did.”
  - a. Do you stand by your answer? In light of the massive resistance to school integration in the aftermath of the *Brown* decision please explain in detail, including with specific reference to the Southern Manifesto, why you believe *Brown* did not divide our country?

*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 enough to attend racially integrated public school in Little Rock for all of my secondary education.

9. Your wife has been active in fundraising efforts through the 501(c)(4) “Kentucky Opportunity Coalition” that raised millions of dollars benefitting Senator Mitch McConnell’s 2014 reelection bid. If you or your wife solicited others to contribute money to this group, please identify the names of those you or she solicited, the date on which you made the solicitation, and the amount contributed.

I did not solicit donations for the Kentucky Opportunity Coalition, and I was not involved with or aware of any solicitation efforts undertaken by my wife in that regard.

10. You stated that on February 23, 2017, you interviewed with White House and Justice Department officials, and that you interviewed again with White House officials on March 2, 2017. Your nomination was made on May 8, 2017. Over the past several years you have published hundreds of blog postings under the pseudonym “G. Morris.”

- a. On what date did you reveal and submit your blog postings to:

- i. White House or Justice Department officials?

I do not recall a specific date I submitted blog posts to the White House or Justice Department, but I disclosed them during the course of the nomination process.

- ii. Senator McConnell’s office?

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

- iii. Senator Paul’s office?

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

- b. Why did you publish your blog postings under an assumed name 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 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”.

11. In 2005, you gave a speech in which you used an offensive and homophobic slur for gay people. You indicated that you were quoting Hunter Thompson but did not condemn Thompson’s use of this pejorative, instead labelling him among a group of “great writers.”

- a. Why did you choose to quote this offensive slur? Have you ever used that word on other occasions?

As I sought to explain at the hearing, I did not condone in the speech Thompson's use of the slur, and I certainly did not quote Thompson as a joke. Rather, I believed that the quotation served as a powerful example of literary criticism of Louisville. Indeed, I noted in the speech that Thompson used the slur to "target" Louisville. I did not agree with the implication of Thompson's quote that Louisville is an intolerant place, and I do not consider Thompson to be a "great writer", though he perhaps aspired to be. Other writers I discussed in the same speech, in contrast to Thompson, I do consider great: F. Scott Fitzgerald, William Faulkner, John Steinbeck and Mark Twain, for example. I am deeply sorry to those who I offended by quoting Hunter Thompson's use of the slur. I have not used that word on other occasions and would not do so.

- b. Do you understand why your use of this epithet in a public speech would be deeply offensive to members of the LGBTQ+ community?

Please see my response to Question 11(a) above.

- c. Do you understand the responsibility that one has when quoting from other sources not to rely simply on a "he said it, not me" defense?

Please see my response to Question 11(a) above.

- d. How can you assure members of the LGBTQ+ community that you will be impartial in any case that may come before you?

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.

12. In a 2007 blog posting, you criticized the use of stem cell research. You wrote: "A more recent liberal pet peeve has been the ongoing scientific research into alternatives for embryonic stem cell research. Progress on that front would, of course, take away from the false Democratic talking point that the sick are being denied new medical cures because the Republicans keep insisting on protecting embryonic life."

- a. Are you opposed to the use of stem cell research?

My personal views are irrelevant to the position for which I have been nominated, and I cannot ethically opine on political questions of this sort 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.”).

- b. What is the basis for your belief that it is a “false Democratic talking point” to say that opposing stem cell research denies new medical cures?

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.

- c. If presented with a case concerning stem cell research, do you think your “impartiality might reasonably be questioned,” as that term is used in Canon 3(C)(1) of the Code of Conduct for United States Judges? If not, why not?

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.

- 13. In October 2008, you published a blog post featuring a photograph of a handwritten lawn sign that read: “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!!!”

- a. Were you condoning the use of deadly force against people who steal political lawn signs?

No, I posted a picture of the sign because I thought it would be of interest to the readership of the blog.

- b. If you were not condoning such violence, how is it appropriate for someone seeking a federal judgeship to make jokes about such use of deadly force?

I did not make any joke about the use of deadly force. I posted a picture of the sign because I thought it would be of interest to the readership of the blog. I understood the sign’s message to be political hyperbole and did not seriously threaten any physical harm.

- 14. In a 2016 paper, you criticized the Kentucky Supreme Court for departing from precedent and the will of the legislature when it “immunized consensual sodomy from criminal prosecution under the state constitution.”

- a. How do you maintain this view alongside the Supreme Court’s ruling in *Lawrence v. Texas*? Please explain how your view co-exists with that ruling.

I did not criticize the Kentucky Supreme Court’s decision. Rather, I used that decision as an example of the Kentucky Supreme Court’s willingness to find protection for rights under the

state Constitution above and beyond that afforded by the federal Constitution: “By the early 1990s, in contrast, the Kentucky Supreme Court had embraced an expansive view [of the right to privacy] under the Kentucky Constitution. Indeed, Kentucky was the first state whose highest court immunized consensual sodomy from criminal prosecution under the state constitution in the wake of a contrary holding of the U.S. Supreme Court under the federal Constitution.” “*Eight Ways to Sunday*” at 5 (citing *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992)). The Kentucky Supreme Court’s decision predated *Lawrence v. Texas* by more than a decade.

- b. What, if anything, do you understand to remain of the *Bowers v. Hardwick* holding in the Supreme Court’s current jurisprudence?  
In your view, what limits (if any) are there on the government’s ability to intrude upon personal decisions regarding the creation of personal relationships, family formation and procreation?

The Supreme Court has expressly overruled *Bowers*. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003). In resolving any question concerning the government’s ability to intrude upon the personal decisions you mention, I would faithfully apply all relevant Supreme Court and Sixth Circuit precedents.

- 15. *Carolene Products* footnote 4 establishes the criteria that the Supreme Court has used to determine whether a law targeting a particular group should trigger strict scrutiny. However, Justice Scalia indicated that only laws using explicit racial classifications should trigger such scrutiny. As a result, Justice Scalia expressed doubt that gender classifications would trigger heightened scrutiny. His views have been described as the “originalist viewpoint on this matter.”

- a. What reliance do you place upon *Carolene Products* footnote 4 in determining what laws should be subject to strict scrutiny?

I have not had occasion to study the application of *Carolene Products* footnote 4. If confirmed to the Sixth Circuit, I would carefully evaluate that footnote in light of any other applicable Supreme Court precedents and with the assistance of briefing from the parties and counsel from my law clerks and colleagues.

- b. Do you agree with Justice Scalia that state action differentiating between people based on gender would not be subject to strict scrutiny under an originalist understanding of the 14<sup>th</sup> Amendment?

I have not had occasion to study the matter. The Supreme Court has held that, “[f]or a gender-based classification to withstand equal protection scrutiny, it must be established at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objections.” *Tuan Anh Nguyen v. INS*, 533 U.S. 53, 60 (2001). If confirmed to the Sixth



Circuit, I would be bound to apply that—and any other applicable—precedent of the Supreme Court in assessing state action differentiating between people based on gender.

- c. Do you agree with the “simple test” for sex discrimination that the Supreme Court laid out in *City of Los Angeles v. Manhart*: “treatment of a person in a manner which, but for that person’s sex, would be different”?

My personal views of any test announced by the Supreme Court 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 all applicable Supreme Court and Sixth Circuit precedent in cases involving sex discrimination.

- d. Do you understand there to be more than three categories of heightened scrutiny, as commonly understood, in 14<sup>th</sup> Amendment jurisprudence?

I have not studied the issue, but would faithfully apply all applicable Supreme Court and Sixth Circuit precedent in any 14<sup>th</sup> Amendment challenge, if I am fortunate enough to be confirmed.

- e. Do you consider rational basis review to be a single standard, or a dual standard, comprised of rational basis and rational basis with teeth? If the former, how do you then explain the Supreme Court’s holding in *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985)?

Please see my response to Question 15(d) above.

- f. What is your understanding of the significance of animus as a legal concept relevant to Equal Protection Clause cases?

Please see my response to Question 15(d) above.

16. When the marriage equality case *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), was before the Sixth Circuit, Judge Sutton wrote that the question should not be decided by the courts but should be left to the legislative process.

- a. Do you agree with the opinion authored by Judge Sutton in *DeBoer v. Snyder* that it should have been left to the political process to determine whether same-sex couples have the same right as different-sex couples to marry?

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 *Obergefell*, and I would do so faithfully, just as I would apply any precedent of the Supreme Court.

- b. Do you believe that the Supreme Court overstepped its precedent in declaring in *Obergefell v. Hodges* that the Fourteenth Amendment requires every state

to perform and recognize marriages between individuals of the same sex, rather than leaving the issue to individual states?

Please see my response to Question 16(a) above.

17. In a brief that you authored in the *VMI* case, you presented legal arguments that were grounded in views about the “different developmental needs of most young girls.”

- a. How do your views about the “different developmental needs of most young girls” accord with the legal precedent established in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), which held that treating employees differently in the workplace based on whether they conform to sexual stereotypes is a form of sex discrimination prohibited by Title VII?

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.

- b. Do you agree with the majority of the Supreme Court in *VMI* that “a plan to afford a unique educational benefit only to males is not equal protection”?

My personal views of the correctness of any Supreme Court opinion 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 *VMI*, as I would any precedent of the Supreme Court.

- c. How do you understand the Supreme Court’s jurisprudence, following *VMI* and *Nguyen v. INS*, 533 U.S. 53 (2001) to require circuit courts, such as the Sixth Circuit, to proceed when faced with an apparent “real difference” upon which a legal distinction is made?

I have not had the opportunity to study the issue. Should the issue come before me as a Sixth Circuit judge, 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 to resolve the case.

18. You are a member of the Pendennis Club, a private club in Louisville that is well known for its exclusionary history. The club does not have restrictions today, but when it was first established it did not allow blacks, women, or Jews to become members.

- a. The Senate Judiciary Committee questionnaire requires that judicial nominees indicate the discriminatory history of clubs to which they belong, including before the time of their membership. You failed to do so. Please explain why.

I understood the question to ask whether the clubs to which I belong or have belonged to 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. As I disclosed in my supplemental answers, the Pendennis Club has had women members since the 1980s and African American members since at least the early 1990s. One of the founders of the Club in the 1880s was Jewish.

b. When did you join the Pendennis Club?

2006.

c. Were you aware at the time you joined of the Club's discriminatory history? If not, why not? If so, why did you choose to join nonetheless?

At the time I joined the Club, I was generally aware that during some period in the past it had not had women or African American members. I was not aware of the Club's existence until 1996, when I moved to Louisville, and I have no personal experience of any discrimination at the Club. Before joining the Club, I confirmed that it did not discriminate in its membership policies. I would not have joined the Club had it had any discriminatory membership practices when I joined.