

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

For questions with subparts, please answer each part separately.

1. In your view, what constitutes the appropriate judicial temperament?

Appropriate judicial temperament constitutes the ability to decide cases without being influenced by one's personal views or opinions regarding the law, the facts, the parties, or their counsel. Put another way, it constitutes the ability to decide cases exclusively based on (i) the law, as established by the Constitution, statute, regulation, and judicial precedent, and (ii) the facts, as determined by the submissions of the parties and the rules of evidence and procedure.

2. Do you believe that you possess the appropriate judicial temperament?

Yes. I solemnly pledge to all members of the Judiciary Committee that, if I am confirmed and appointed as a Judge of the Court of Federal Claims, I will set aside any personal views or opinions that I may have about any matter that may come before me, and decide such matter based solely on the law and the facts, as discussed in my answer to Question 1.

3. Do you regret any statements you have posted on your blog? If so please list each statement that you regret posting.

I regret the blog post, "Kennedy as the most powerful justice?", the language and tone of which were intemperate and uncharitable.

I also regret the blog post "Teaching gayness" because it has given the absolutely and categorically false impression that I was or am opposed to anti-bullying curricula for LGBT children, or that I favor legal disabilities for LGBT persons.

As a more general matter, I regret the tongue-in-cheek tone of many of the blog posts and the extent to which my thoughts on various topics could be viewed as being uncharitable towards individuals.

4. In a 2007 post on your blog, you said the following about Supreme Court Justice Anthony Kennedy: "It would seem that Justice Kennedy is, and please excuse the language, a judicial prostitute, selling his vote as it were to four other Justices in exchange for the high that comes from aggrandizement of power and influence, and the blandishments of the fawning media and legal academy."

You say in your questionnaire that you contacted an official in the White House Counsel's office on February 6 this year to express your interest in serving on the Court of Federal Claims.

a. Who was the official you contacted?

Robert Luther

b. When did you inform a person at the White House Counsel's office about your 2007 blog post in which you made your comments about Justice Kennedy?

I informed the White House Counsel's office about the blog post on May 26, shortly after the first media reports on the post were published. Prior to those articles I had forgotten about the post, which I had written nearly a decade ago on a blog that has been defunct for nearly as long. Although I reviewed my blog posts prior to their submission to the Judiciary Committee, I did not notice that post and it was not brought to my attention.

c. What was the response of the person at the White House Counsel's office after you informed that person of your comments about Justice Kennedy?

The official noted that I should be prepared to answer questions about the post during the committee hearing.

5. You have been a member of the Federalist Society since 2007. Why did you join the Federalist Society?

I joined the Federalist Society because I shared its commitment to (i) fostering vigorous but nevertheless civil debate on a variety of significant legal and policy issues, as well as (ii) Hamilton's view in *The Federalist* No. 78 that the judiciary exercises neither force nor will but only judgment.

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

To the extent that such views are consistent with those set forth in my answer to Question 5, yes.

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

To the extent that such views are consistent with those set forth in my answer to Question 5, yes.

8.

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

Respectfully, my personal views would not be relevant to my role as a judge. If confirmed, I would decide all matters strictly according to the law and the facts.

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

Please see my response to Question 8.a.

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

Please see my response to Question 8.a.

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

Please see my response to Question 8.a.

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

I have not attended the Federalist Society's annual national convention.

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

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

Please see my response to Question 8.a.

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

Please see my response to Question 8.a.

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

I am not aware of any donations made to support my nomination. If confirmed and appointed as a Judge for the Court of Federal Claims, I would resolve any potential recusal issue by adhering to the Code of Conduct for United States Judges, 28 U.S.C. § 455, and all applicable policies and procedures of the United States Courts generally and of the Court of Federal Claims in particular.

12. In a 2008 blog post you said “I urged that a reinvigorated constitutional jurisprudence, emanating from the judiciary, could well be the catalyst to real reform” and that “the Supreme Court, with just five votes, can overturn precedents upon which many of the unconstitutional excrescences of the New Deal and Great Society eras depend.” **What precedents were you calling for the Supreme Court to overturn in this statement?**

I do not recall the particular decisions I had in mind when I wrote that blog post. Should I be confirmed and appointed as a Judge of the Court of Federal Claims, I solemnly pledge to apply all precedents of the Supreme Court from all periods of history, including from the New Deal and Great Society eras. To the extent that the question seeks my personal views on any such precedents, please see my response to Question 8.a.

13. You have said that environmentalists “push an agenda that has more to do with stifling productive human activity than fostering ecological balance.” You also wrote an article in February entitled “Environmental Law – A Good Place to Start for Trump to Make America Great Again,” in which you said that the Clean Water Act and Clean Air Act “are enforced not for the public’s benefit but to stop productive activity that activists or bureaucrats dislike.”

- a. Do you agree with President Trump’s 2014 statement that “Global warming is an expensive hoax”?**

Please see my response to Question 8.a.

- b. Do you believe that human activity is changing our climate, and do you believe that there is a public interest in addressing climate change?**

Please see my response to Question 8.a.

14. In a 2011 law review article, you said the United States “has a sordid history when it comes to dealing with issues involving race.” You then mentioned the *Dred Scott*, *Plessy v. Ferguson*, and *Korematsu* cases before saying “*Grutter v. Bollinger* should also be recognized as one of the Supreme Court’s mistakes.” The *Grutter* decision held that diversity was a compelling interest and that universities could consider race as a factor in admissions. **Do you understand why it is troubling that your writings appear to equate *Grutter* with cases such as *Dred Scott*, *Plessy* and *Korematsu*?**

The referenced law review article draws a parallel between *Grutter*, on the one hand, and *Dred Scott*, *Plessy*, and *Korematsu*, on the other hand, only in this sense: that all of these cases dealt with race and the Constitution, and that all of these cases are wrongly decided.