

**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.

Senator Richard Blumenthal
June 21, 2017
Questions for the Record for John Kenneth Bush

1. From 2007 to 2016, you wrote under a pseudonym on the political blog “Elephants in the Bluegrass.” Why did you choose to use a pseudonym for these blog posts?

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

2. In several of your blog posts you cited to unreliable news sources to support your views. For example, you cited a piece published in World Net Daily and others written by Jack Cashill and Thomas Lifson, both noted proponents of “birtherism,” the theory that President Obama was not born in the United States. During your confirmation hearing, Senator Franken asked you if you “felt free to put posts out that cited sources that you knew were not credible.” You replied: “I’m not saying that. I’m saying that as a blogger, I was making political statements.”

- How do you vet news sources when you compose blog posts or other pieces of writing?

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. 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. Also, I do not recall ever reading any article from *World News Daily* or any writing of Jack Cashill or Thomas Lifson other than the specific pieces cited in my blog posts.

- Do you believe political statements should be supported by accurate facts?

That is my personal belief, but my personal beliefs are irrelevant to the position for which I have been nominated. The Supreme Court has repeatedly afforded First Amendment protection to even false statements of fact. *See, e.g., United States v. Alvarez*, 567 U.S. 709 (2012); *New York Times v. Sullivan*, 376 U.S. 254 (1964). If confirmed to the Sixth Circuit, I would faithfully apply *Alvarez*, *New York Times*, and all other controlling Supreme Court and Sixth Circuit precedents.

3. In a 2008 blog post published on “Elephants in the Bluegrass,” you wrote: “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.” During your confirmation hearing, you tried to clarify that statement, saying: “I believe that it was a tragedy in the sense that it divided our country. There are people on

both sides, and it was a tragedy in that it has created such a division in our country.” When asked to explain the statement a second time, you replied: “The point I’m trying to make is there are millions of Americans who have a different viewpoint about Roe.”

- Do you believe that abortion is a “tragedy” in any sense other than what you described at your hearing?

My personal views are irrelevant to the position for which I have been nominated. If confirmed as a Sixth Circuit judge, I will be bound to follow all controlling precedents of the Supreme Court and Sixth Circuit concerning abortion, and I will faithfully do so.

- Do you believe that all divisive judicial decisions are tragedies? If not, what made Roe a tragedy?

Again, my personal views are irrelevant to the position for which I have been nominated. But as I explained at the hearing, *Roe* has been the subject of unique controversy and division in our country for more than 40 years. Proponents and opponents of the right to abortion have criticized *Roe* on this ground, just as I did in my blog post.

- Under what circumstances should a judge make a decision that “millions of Americans” might disagree with? Does Roe fit these circumstances?

My personal views about the correctness or prudence of any particular Supreme Court opinion are irrelevant to the position for which I have been nominated. If I am fortunate enough to be confirmed as a Sixth Circuit judge, my job 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.

- In Senator Feinstein’s words, before Roe, “women did not have access to safe, legal abortion, and some of them died.” Do you believe the pre-Roe status quo was also divisive to our country?

Please see my response to the first and third subparts of this Question.

- Do you believe it is a tragedy when women are unable to access safe, legal reproductive care?

Please see my response to the first and third subparts of this Question.

4. During your confirmation hearing, you said: “There are absolutely no circumstances in which I would decline to follow precedent if confirmed... I would follow *Roe v. Wade*, *Casey*, and all of the decisions that have come after that important decision.”

- Do you believe that there are any unanswered questions relevant to a woman’s right to an abortion that are not covered by existing precedent?

It would be inappropriate for me to opine on a question that could come before me if confirmed to the Sixth Circuit. *See* Canon 3(A)(6).

- If so, what might some of those unsettled questions be?

Please see my response to the first subpart of this Question.

5. Many important Supreme Court decisions—including *Griswold v. Connecticut*, *Roe v. Wade*, *Planned Parenthood v. Casey*, and *Lawrence v. Texas*—rely on and reaffirm a constitutional right to privacy originating from a theory of substantive due process.

- Do you believe that the Constitution protects rights not enumerated in the text?

My personal views on this issue are irrelevant to the position for which I have been nominated. If confirmed to the Sixth Circuit, I will be bound to apply all controlling Supreme Court and Sixth Circuit precedents, and I will faithfully do so.

- Do you believe the Supreme Court correctly decided that the right to privacy is an aspect of substantive due process?

My personal views on this issue are irrelevant to the position for which I have been nominated, and I have not had occasion to study *Griswold* in detail. If confirmed to the Sixth Circuit, I will be bound to apply all controlling Supreme Court and Sixth Circuit precedents, and I will faithfully do so.

- Chief Justice John Roberts said at his confirmation hearing that he believed *Griswold v. Connecticut* was decided correctly. Do you agree with Justice Roberts that this case was decided correctly?

My personal views on this issue are irrelevant to the position for which I have been nominated. If confirmed to the Sixth Circuit, I will be bound to apply all controlling Supreme Court precedent, including *Griswold*, and I will faithfully do so.

- In your own words, could you explain the constitutional underpinnings to the right to an abortion?

My understanding is that the Supreme Court has located constitutional protection for the right to an abortion in the substantive component of the Due Process Clauses of the Fifth and Fourteenth Amendments. *See Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 846 (1992); *see also Gonzales v. Carhart*, 550 U.S. 124, 146 (2007) (applying *Casey* to regulation by the Federal government).

6. Many constitutional questions involve weighing competing interests.

- How do you weigh competing interests when both are constitutionally protected?

If fortunate enough to be confirmed to the Sixth Circuit, I would carefully review the relevant legal texts and precedents guiding such weighing of interests, consider the arguments of the parties on both sides, and consult with my law clerks and my colleagues to resolve the case.

- How do you think about assigning value to a constitutionally protected interest?

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

7. In an article you co-authored, “Eight Ways to Sunday: Which Direction, Kentucky Supreme Court?” you write about two anti-choice rulings from the 2000s, which, in your words, “provide precedent for the Court to distance itself from its perceived hostility in Leibson era towards the state’s efforts to regulate in favor of unborn life.” Do you believe that a judge should try to support a “state’s efforts to regulate in favor of unborn life”

I believe a judge should carefully review and apply the relevant legal texts and precedents, after considering the arguments of the parties on both sides and consulting with his or her law clerks and colleagues.

8. How did the Supreme Court’s decision in *Whole Woman’s Health v. Hellerstedt* clarify the undue burden standard for pre-viability abortion regulation? Under the test articulated in this decision, how would you determine whether an abortion regulation is unconstitutional?

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*.

9. In a 2007 blog post on “Elephants in the Bluegrass,” you indicated that you supported former presidential candidate Mike Huckabee for his “no-compromise yet adroitly articulated positions,” including that he “strongly disagree[s] with [activists] on the idea of same-sex marriage.” Do you think LGBT-parties who might appear in front of you as a judge should trust that you will treat them fairly, despite knowing your publically-posted views on same- sex marriage?

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. Also, if I am fortunate enough to be confirmed, I will follow *Obergefell* just as I will follow every other precedential opinion of the Supreme Court.

10. In a 2016 blog post published on “Elephants in the Bluegrass,” 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 brainier.”

- What did you mean by that statement?

I was articulating one reason I decided to support President Trump in the 2016 presidential election.

- What characteristics did you believe President Trump would look for in nominating a new Supreme Court Justice to replace Justice Scalia?

President Trump 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. I believed he would select from that list if elected, as he in fact did.

- Do you think you share those characteristics?

I was not on President Trump’s list to replace Justice Scalia.

11. In 2008, again on the blog “Elephants in the Bluegrass,” you posted a picture of a 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!!!”

- Why did you decide to publish a photo of this sign?

I thought the sign 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.

- What is your understanding of the protections afforded individual homeowners under the 2nd Amendment to the Constitution?

My understanding is that the Supreme Court has held that “the Second Amendment protects the right to keep and bear arms for the purpose of self-defense,” including in one’s home. *McDonald v. Chicago*, 561 U.S. 742, 749 (2010).

12. Several times in your “Elephants in the Bluegrass” blog posts, you put the terms “climate change” and “global warming” in quotation marks, appearing to insinuate that climate change does not exist. Do you believe that human greenhouse gas emissions are primarily responsible for global climate change?

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.”).

13. In 2009, you participated in a panel discussion on originalism sponsored by the Louisville Lawyers Chapter of the Federalist Society, The Alexander Hamilton Historical Society of Kentucky, and the League of Women Voters of Kentucky. At that panel, you stated: “I would submit that from an originalist perspective that *New York Times v. Sullivan* probably wasn’t correctly decided.”

- Do you still hold this view?

Yes. I also still hold the view, which I expressed in the 2009 panel discussion, that judges should respect precedent. If I am fortunate enough to be confirmed, I will follow *New York Times v. Sullivan* and all other Supreme Court precedent.

- Were you asked about this statement at any point during your confirmation process before the June 14, 2017 hearing?

Yes.

- In February 2016, then-candidate Trump made the following campaign promise at a rally in Fort Worth, Texas: “One of the things I’m going to do if I win,” Donald Trump said last year, is “I’m going to open up our libel laws so when they write purposely negative and horrible and false articles, we can sue them and win lots of money.” Were you aware of this statement when you sought a judicial nomination?

Not as far as I am aware.

- What do you believe is meant by “open up our libel laws”? Would current doctrine allow such an ‘opening up’ to occur?

I do not know what President Trump meant by that statement.

**Nomination of John Kenneth Bush to be
United States Circuit Judge for the Sixth Circuit
Questions for the Record
Submitted June 21, 2017**

QUESTIONS FROM SENATOR COONS

1. With respect to substantive due process, what factors do you look to when a case requires you to determine whether a right is fundamental and protected under the Fourteenth Amendment?

I would look to any factors identified by the applicable Supreme Court and Sixth Circuit precedents.

- a. Would you consider whether the right is expressly enumerated in the Constitution?

Please see my response to Question 1 above.

- b. Would you consider whether the right is deeply rooted in this nation's history and tradition? If so, what types of sources would you consult to determine whether a right is deeply rooted in this nation's history and tradition?

Please see my response to Question 1 above.

- c. Would you consider whether the right has previously been recognized by Supreme Court or circuit precedent? What about the precedent of another court of appeals?

Please see my response to Question 1 above.

- d. Would you consider whether a similar right has previously been recognized by Supreme Court or circuit precedent?

Please see my response to Question 1 above.

- e. Would you consider whether the right is central to "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life"? See *Planned Parenthood v. Casey*, 505 U.S. 833, 581 (1992); *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (quoting *Casey*).

Please see my response to Question 1 above.

- f. What other factors would you consider?

Please see my response to Question 1 above.

2. You have 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. In his opinion for the unanimous Court in *Brown v. Board of Education*, 347 U.S. 483 (1954), Chief Justice Warren wrote that although the “circumstances surrounding the adoption of the Fourteenth Amendment in 1868 . . . cast some light” on the amendment’s original meaning, “it is not enough to resolve the problem with which we are faced. At best, they are inconclusive. . . . We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.” 347 U.S. at 489, 490-93. Do you consider *Brown* to be consistent with originalism even though the Court in *Brown* explicitly rejected the notion that the original meaning of the Fourteenth Amendment was dispositive or even conclusively supportive?

I have not studied the issue, but I am aware that others have argued that *Brown* is consistent with originalism. See Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 Va. L. Rev. 947 (1995). I believe that Justice John Marshall Harlan’s dissent in *Plessy v. Ferguson*, rather than the majority opinion in *Plessy* overruled in *Brown*, better reflected the original meaning of the Fourteenth Amendment.

- b. How do you respond to the criticism of originalism that terms like “‘the freedom of speech,’ ‘equal protection,’ and ‘due process of law’ are not precise or self-defining”? Robert Post & Reva Siegel, *Democratic Constitutionalism*, National Constitution Center, <https://constitutioncenter.org/interactive-constitution/white-pages/democratic-constitutionalism> (last visited June 21, 2017).

I have not studied this issue. If I am fortunate enough to be confirmed to the Sixth Circuit, my assessment of such terms will be guided by binding Supreme Court and Sixth Circuit precedent.

3. Does your approach to judicial interpretation lead you to conclude that the Fourteenth Amendment’s promise of “equal protection” guarantees equality across race and gender, or does it only require racial equality?

The Supreme Court has held that the Equal Protection Clause applies to classifications other than race. See *Obergefell v. Hodges*, 135 S. Ct. 3584 (2015); *United States v. Virginia*, 518 U.S. 515 (1996). But because the scope of protection afforded by the Clause is the subject of active litigation, I cannot comment further. 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.”).

- a. If you conclude that it does require gender equality under the law, how do you respond to the argument that the Fourteenth Amendment was passed to address certain forms of racial inequality during Reconstruction, and thus was not intended to create a new protection against gender discrimination?

Please see my response to Question 3 above.

- b. If you conclude that the Fourteenth Amendment has always required equal treatment of men and women, as some originalists contend, why was it not until 1996, in *United States v. Virginia*, 518 U.S. 515 (1996), that states were required to provide the same educational opportunities to men and women?

Please see my response to Question 3 above.

- c. Does the Fourteenth Amendment require that states treat gay and lesbian couples the same as heterosexual couples? Why or why not?

Please see my response to Question 3 above.

- d. Does the Fourteenth Amendment require that states treat transgender people the same as those who are not transgender? Why or why not?

Please see my response to Question 3 above.

4. During your hearing, you acknowledged that the Supreme Court has recognized there is a constitutional right to privacy, including a right to privacy rooted in the Fourteenth and Fifth Amendments.

The Supreme Court has recognized that the Constitution protects the specific rights mentioned in the subparts of this Question. See *Lawrence v. Texas*, 539 U.S. 558 (2003); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992); *Eisenstadt v. Baird*, 405 U.S. 438 (1972). If confirmed to the Sixth Circuit, I would faithfully apply those and any other binding precedents of the Supreme Court and Sixth Circuit.

- a. Do you agree that the right to privacy protects a woman's right to use contraceptives?

Please see my response above.

- b. Do you agree that the right to privacy protects a woman's right to obtain an abortion?

Please see my response above.

- c. Do you agree that the right to privacy protects intimate relations between two consenting adults, regardless of their sexes or genders?

Please see my response above.

- d. If you do not agree with any of the above, please explain whether these rights are protected or not, and which constitutional rights or provisions encompass them.

Please see my response above.

5. In *United States v. Virginia*, 518 U.S. 515, 536 (1996), the Court explained that in 1839, when the Virginia Military Institute was established, “Higher education at the time was considered dangerous for women,” a view widely rejected today. In *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600-01 (2013), the Court reasoned, “As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. . . . Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser.” This conclusion rejects arguments made by campaigns to prohibit same-sex marriage based on the purported negative impact of such marriages on children.

- a. When is it appropriate to consider evidence that sheds light on our changing understanding of society?

I have not had the opportunity to study this issue, but, if confirmed, would follow all precedents of the Supreme Court and Sixth Circuit that guide consideration of evidence by appellate judges.

- b. What is the role of sociology, scientific evidence, and data in judicial analysis?

I have not had the opportunity to study this issue, but, if confirmed, would follow all precedents of the Supreme Court and Sixth Circuit that guide consideration of evidence by appellate judges.

6. You testified in your hearing before the Senate Judiciary Committee, “There are some things that I have written on the post or the blog that I wish I could phrase differently or said differently at this point.”

- a. Which things would you like to have said differently, and how would you have rephrased 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.

- b. Please explain how you chose what topics to write about, what language to use, and which sources to rely on in writing your posts.

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. 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. Why did you choose to use a pseudonym when publishing your blog posts?

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".

- d. Your testimony suggests that while you regret the phrasing of your posts, you do not regret their substance. Please identify the posts that you regret writing because of their substance, if any; also, explain why you thought these posts were appropriate at the time and why you have come to regret them.

Please see my response to Question 6(a) above.

- e. During the entire judicial selection process, from beginning to end, did any White House staff or Justice Department staff raise any concerns about your posts? If so, please identify the individuals who raised concerns, the posts discussed, and the nature of the concerns raised.

I disclosed my blog posts with attorneys from the White House Counsel's Office and the Department of Justice during the judicial selection process. We discussed the content of the blog posts and potential concerns that might be raised about them during the confirmation process.

7. In a blog post, you wrote, "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*." During your hearing you testified that "millions of Americans" disagree with the Supreme Court's decision in *Roe v. Wade*.
 - a. Are you one of the Americans who disagrees with how *Roe v. Wade* was decided?

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.

- b. Please explain how the reasoning in *Roe v. Wade* and *Dred Scott* is similar.

As commentators from across the spectrum have acknowledged, *Roe* and *Dred Scott* share a similarity in methodology, in that both decisions relied upon reasoning based in the substantive component of due process.

- c. Please explain why you characterized the seven justices in the majority in *Roe v. Wade* as “activist justices.”

I used that language to comment upon the breadth of a decision that many commentators, including Justice Ruth Bader Ginsburg, have described as going too far, too fast.

- d. Do you believe that any of the current justices are “activist justices”?

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 all precedents of the Supreme Court, and I would faithfully do so.

- e. How does your conclusion that a justice – past or present – is an “activist” affect your view of that justice’s decisions?

Please see my response to Question 7(d) above.

- f. Why have you not edited or removed this post, which is still available as of June 21, 2017 at <https://elephantsinthebluegrass.blogspot.com/2008/01/legacy-from-dr-kings-dream-that.html>?

I did not deem it proper to remove or alter anything on the blog that the Committee might desire to review during the pendency of my nomination.

8. During your hearing, you testified that the blogging you engaged in was political activity and that you would not bring politics to the bench but would merely apply the law. In the same blog post mentioned above, you quoted Senator McConnell stating, in the context of abortion, “It makes a difference who wins elections . . . It makes an awful lot of difference who appoints judges -- an awful lot of difference.”

- a. Do you agree with Senator McConnell that it makes a difference who – Republicans or Democrats – appoints judges? Why or why not?

It would be inappropriate for me to opine on this political question. *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. How do you reconcile Senator McConnell’s statement with your promise to not bring politics to the bench?

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

9. In a 2007 blog post, you wrote, “A more recent liberal pet peeve has been the ongoing scientific research into alternatives for embryonic stem cell research. Progress on this front would, of course, take away the false Democratic talking point that the sick are being denied new medical cures because the Republicans keep insisting on protecting embryonic life.”
 - a. Do you believe that the Constitution protects embryonic life?

My personal views are irrelevant to the position for which I have been nominated. If confirmed to the Sixth Circuit, I will faithfully apply any relevant precedents of the Supreme Court and Sixth Circuit on this subject.

- b. On what evidence did you base your determination that it is “false” to state that opposing stem cell research denies new medical cures to the sick?

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.

10. In another 2007 blog post, you criticized the Log Cabin Republicans for attacking Mitt Romney and quoted Mike Huckabee’s statement that he “strongly disagree[s] with [gay rights advocates] on the idea of same-sex marriage.” You wrote that this was one of Huckabee’s “no-compromise yet adroitly articulated positions.” What evidence can you point to that would assure a party relying on a precedential opinion recognizing a constitutional right to same-sex marriage that you will be a fair and neutral arbiter?

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. Also, if I am fortunate enough to be confirmed, I will follow *Obergefell* just as I will follow every other precedential opinion of the Supreme Court.

11. Have you ever posted on any blog or website other than Elephants in the Bluegrass?

A few articles I wrote appear on my law firm’s website. I did not post them myself. Those have been disclosed on my Senate Judiciary Questionnaire.

12. Have you ever used a pseudonym other than “G. Morris”?

No.

13. Have you ever reviewed, edited, or contributed to any blog posts on Elephants in the Bluegrass that are not posted with the name “G. Morris”? If so, please provide copies of all such posts.

No.

14. Have you ever reviewed, edited, or contributed to any blog posts on a website other than Elephants in the Bluegrass? If so, please provide copies of all such posts.

No.

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

For questions with subparts, please answer each subpart separately.

Questions for John Bush

1. You say in your questionnaire that you were a co-founder of the Louisville Lawyers Chapter of the Federalist Society in 1997 and that you have been president of that chapter for most of the chapter's existence. **Why did you join the Federalist Society?**

I believed that membership in the Federalist Society would help me to learn about interesting legal topics that I might not otherwise encounter in my practice.

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

In my experience, the Federalist Society does not espouse views on any particular legal issues. Rather, it is an open debate society that encourages participation from across the political spectrum.

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

Please see my response to Question 2 above.

4.
 - 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?**

It would be inappropriate for me to opine on this political question. *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. **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 4(a) above.

- 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 4(a) above.

5. 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.**

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

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

As best as I can recall, I attended the Federalist Society's annual national convention in 2000, 2001, 2005, 2006, 2007, 2008, 2010, 2011, 2012, 2014 and 2016.

7. 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?**

I have not sought, and I am not aware of, any such donations in support of my nomination.

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

Please see my response to Question 7(a) above.

- 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?**

Please see my response to Question 7(a) above.

8. You have given us insight into your personal views through your writings on the blog "Elephants in the Bluegrass," which you posted under a pseudonym. Among your writings, you said in a blog post on January 23, 2008 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*."

a. Do you believe the *Roe* decision is similar to the *Dred Scott* decision?

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.

b. Do you believe that the *Dred Scott* case was wrongly decided?

Yes.

c. Do you believe the *Roe* case was wrongly decided?

As noted above, I believe it would be both inappropriate and irrelevant for me to opine on my personal views of any binding Supreme Court precedent. If fortunate enough to be confirmed, I would faithfully apply *Roe*, along with any other binding Supreme Court precedents.

d. You say in your questionnaire that you met with Majority Leader Mitch McConnell in November 2016 and expressed your interest in serving as a federal judge. On what date did you first disclose to Leader McConnell or his staff your blog posts on the “Elephants in the Bluegrass” website?

I believe it would be inappropriate for me to reveal the substance of my communications with Majority Leader McConnell, who is not officially involved in the nomination decision.

9. In a blog post during the 2016 Republican National Convention, you wrote: “Time to roll with the changes. Time to roll with Trump.”

a. What did you mean by this statement?

I was encouraging Republicans who had not supported President Trump in the presidential primaries to support him in the general election. I believe the song “Roll with the Changes”, by REO Speedwagon, was playing at the Convention when I wrote this post.

b. Do you regret writing this statement?

No.

10. In a 2008 blog post entitled “Thanks, Mama Pelosi, For That 700 Point Stock Market Plunge!” you said that someone should “gag the House speaker,” referring to then-House Speaker Nancy Pelosi.

a. What did you mean by this statement?

I was lamenting the injection of partisan politics into the debate over legislation to address the 2008 financial crisis and urging Congress to move beyond it.

b. Do you regret writing this statement?

Yes, I regret using that intemperate language.

11. During your hearing you were asked “If you get to be a Circuit judge, how does that change your political life?” You responded, “Well, it’s already changed my life. I took a sticker off my truck- a political sticker.”

a. What did this sticker say?

There were actually two stickers I removed: “McConnell 2014” and “Rand.”

b. Why did you take it off of your truck?

Because it is not ethically appropriate for judicial nominees to weigh in on political questions, and a political bumper sticker could certainly be seen as doing so. *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.”).

12. I believe it is important for judicial nominees to demonstrate that they will be independent of President Trump. One of the ways to demonstrate this independence is for nominees to answer honestly whether they believe in the President’s most outrageous assertions.

Do you agree, as a factual matter, with President Trump’s claim that 3 to 5 million people voted illegally in the 2016 election?

Again, I cannot ethically opine on questions that are the subject of political debate. *See* Canon 5, Code of Conduct for United States Judges.

13. In several of your blog posts, you criticized Democratic opposition to the nomination of Hans von Spakovsky to the Federal Election Commission. Von Spakovsky is widely known as a proponent of voter ID laws that have deprived many Americans of their right to vote. **Do you believe Mr. von Spakovsky was a good nominee for this position?**

Because I am a judicial nominee, the Code of Conduct for United States Judges precludes my addressing any political views you express regarding Mr. von Spakovsky.

14. In 2008 you wrote a blog post criticizing a bill I wrote, the Fair Elections Now Act. You said that public financing of campaigns “runs afoul of constitutional guarantees by forcing taxpayers to subsidize candidates’ political speech in contravention of those taxpayers’ First Amendment rights.” You have also argued in a blog post that public financing of campaigns is “constitutionally dubious.” **Do you believe that the 13 states that currently provide some type of public financing for their campaigns are in violation of the Constitution?**

It would be inappropriate for me to opine on a question that could come before me if confirmed to the Sixth Circuit. *See* Canon 3(A)(6).

15. In 1886, the Supreme Court noted that the right to vote “is regarded as a fundamental political right, because [it is] preservative of all rights,” a quote which Chief Justice Roberts paraphrased at his confirmation hearing. References to the right to vote appear five times in the Constitution.

a. Do you believe that the right to vote is fundamental?

The Supreme Court has repeatedly held that it is. *See, e.g., Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966).

b. Do you believe that laws that make it more difficult for Americans to exercise this right must be scrutinized very closely by the courts?

If confirmed to the Sixth Circuit, I would faithfully apply Supreme Court and Sixth Circuit precedent governing the standard of review for such laws.

c. Is it preferable for this judicial scrutiny to take place before the law goes into effect so that, if the law is unconstitutional, it will not have done irreparable harm by preventing someone from voting?

If confirmed to the Sixth Circuit, I would faithfully apply Supreme Court and Sixth Circuit precedent governing the timing of judicial review.

16. Do you believe that systemic racial discrimination still exists in America today?

Unfortunately, racial discrimination still exists in America today.

17. Chief Justice Roberts wrote in the case *Parents Involved in Community Schools v. Seattle School District No. 1* that “the way to stop discrimination on the basis of race is to stop discriminating on the basis of race.” He used this rationale to rule against school districts that took race into account in trying to integrate public school systems.

In her dissent in *Schuette v. Coalition to Defend Affirmative Action* Justice Sotomayor wrote:

The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination. As members of the judiciary tasked with intervening to carry out the guarantee of equal protection, we ought not sit back and wish away, rather than confront, the racial inequality that exists in our society.

Do you agree with Justice Sotomayor’s statement, or are your views closer to Chief Justice Roberts’ statement in *Parents Involved*?

My personal views are irrelevant to the position for which I have been nominated. If confirmed to the Sixth Circuit, I would faithfully apply *Parents Involved*, along with any other binding Supreme Court or Sixth Circuit precedents.

18. Do you believe that courts should interpret the Constitution according to its original public meaning?

My personal views on constitutional interpretation will be largely 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.

19. Do you believe that the original public meaning of the Constitution evolves or changes over time?

Please see my response to Question 18 above.

20. What is your understanding of the original meaning of the Foreign Emoluments Clause in Article I, Section 9, Clause 8, of the Constitution?

It would be inappropriate for me to comment upon the meaning of the Foreign Emoluments Clause, which could 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.”).

21. Do you believe that this original public meaning of the Foreign Emoluments Clause should be adhered to by courts in interpreting and applying the Clause today?

Please see my response to Question 20 above.

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.

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 par with the worst decision in the Supreme Court’s history, how can you assure us that you would 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.

Senator Thom Tillis
Questions for the Record

John Kenneth Bush
Nominee, United States Circuit Judge for the Sixth Circuit

1. At your hearing, we briefly discussed the proper role of a judge. I would like you to elaborate on how you view the role of a judge and a party's expectation that he or she will be before a judge who is fair and impartial?

Fairness and impartiality on the part of a judge is an absolute expectation that every litigant deserves and that all judges should aspire to meet. Judges should guard against any personal biases that might affect their decisionmaking and must recuse themselves "in any proceeding in which [their] impartiality might reasonably be questioned." 28 U.S.C. § 455. They must also recuse themselves in certain circumstances specified by statute that present a similar threat to their impartiality.

2. Are there any circumstances when impartiality is *not* an absolute expectation for someone serving on the bench?

No.

3. Will you commit to being fair and impartial to all parties who come before you, regardless of their station in life, beliefs, or affluence?

Yes.

4. What is judicial activism?

Judicial activism occurs when a judge relies on his or her political preferences, rather than faithfully following the applicable legal texts and precedents, to determine the outcome of a case.

- a. Would you ever consider judicial activism appropriate?

No.

**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 14th 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 objectives.” *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 14th Amendment jurisprudence?

I have not studied the issue, but would faithfully apply all applicable Supreme Court and Sixth Circuit precedent in any 14th 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.