

AFJ NOMINEE REPORT

JOHN

K. BUSH

*U.S. Court of Appeals for the  
Sixth Circuit*

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# INTRODUCTION

On February 28, 2017, Judge Danny Boggs took senior status, and on May 8, 2017, President Trump nominated John K. Bush to fill the vacancy on the United States Court of Appeals for the Sixth Circuit. Alliance for Justice strongly opposes Bush's nomination to the United States Court of Appeals for the Sixth Circuit.

Examined on his own merits, Bush is a deeply flawed candidate with a history of offensive writings and statements that under ordinary circumstances would quickly disqualify him for a role on the federal bench. Not the least of these is a talk he gave to a private Louisville club in which, stunningly, he chose, according to his written notes, to recite and apparently condone a quote by another author that employs an anti-gay slur: "I come here every year, and let me tell you one thing I've learned—this is no town to be giving people the impression you're some kind of faggot." Bush also has likened a woman's right to decide whether to have an abortion to slavery, peddled discredited conspiracy theories about President Barack Obama, called for Nancy Pelosi to be "gag[ged]" when she made comments he disagreed with, and decried a change to passport forms that accounted for same-sex parents.

Despite his obvious lack of fitness for a lifetime appointment to the federal bench, Bush's significant ties to Senate Majority Leader Mitch McConnell appear to have greased the skids for his nomination. Most notably, Bush's wife, Bridget, has been extremely active in fundraising efforts that netted millions of dollars to benefit Senator McConnell's 2014 reelection bid. In addition, in 2002 Bush authored an amicus brief on McConnell's behalf in a case involving Kentucky's campaign finance laws. And, in

paperwork he submitted to the Senate Judiciary Committee, Bush explained that in November 2016, presumably after the presidential election, he met with Senator McConnell in Louisville where Bush "expressed [his] interest in serving as a federal judge."<sup>1</sup> Bush said that he has "been in contact with Leader McConnell and representatives from his office since that time."<sup>2</sup>

It's also notable that President Trump nominated Bush only two months after a vacancy arose on the Sixth Circuit, leapfrogging vacancies on other courts that have existed for years. When a vacancy opened on the Sixth Circuit in 2013, Senators McConnell and Rand Paul refused to reach an agreement with President Obama on a nominee. The seat sat vacant for over 1,200 days after McConnell and Paul refused to return their blue slips on the unanimously well-qualified jurist Obama eventually put forward.<sup>3</sup>

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While this report covers Bush's legal views and highlights of his private practice, as is customary, it also focuses on his extraordinary and prolific blogging history, which provides many of the most egregious examples of the offensive views and statements that disqualify him for service on the bench. These blog posts

<sup>1</sup> Sen. Comm. on the Judiciary, 115th Cong., John Kenneth Bush: Questionnaire for Judicial Nominees 45, <https://www.judiciary.senate.gov/imo/media/doc/Bush%20SJC.pdf>.

<sup>2</sup> *Id.*

<sup>3</sup> See Press Release, The White House, President Obama Nominates Justice Lisabeth Tabor Hughes to Serve on the United States Court of Appeals (Mar. 17, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/03/17/president-obama-nominates-justice-lisabeth-tabor-hughes-serve-united>; Joseph Gerth, *McCannell rejects Obama choice of Ky judge*, COURIER-JOURNAL (Mar. 18, 2016), <http://www.courier-journal.com/story/news/politics/2016/03/18/mcconnell-says-he-kill-6th-circuit-nomination/81971446/>; Jennifer Bendery, *Republicans Aren't Even Pretending They Want To Confirm Judges Anymore*, THE HUFFINGTON POST (June 28, 2016), [http://www.huffingtonpost.com/entry/senate-republicans-obama-judges\\_us\\_576426b6e4b0853f8bf0a4fa](http://www.huffingtonpost.com/entry/senate-republicans-obama-judges_us_576426b6e4b0853f8bf0a4fa).

provide a unique window into his views and temperament. Given that Bush wrote these pieces—over 400 in total—under a pseudonym, it’s reasonable to assume that he used blogging as an outlet to express his unvarnished opinions.

These writings are significant for several reasons. They not only reveal his character but also show Bush’s adherence to a fixed, ultraconservative political ideology. Most importantly, they leave the unmistakable impression that Bush would be incapable of serving as a fair-minded jurist, and of maintaining public confidence in the justice system’s ability to dispense even-handed justice to all. It is one thing to embrace extreme political views, which Bush certainly does. It is another matter entirely to employ the crude and distasteful rhetoric Bush uses when writing under a pseudonym, when he presumably believes his identity is shielded. His writing reveals a genuinely shocking lack of civility and respect for individuals with whom he disagrees politically as well as those of different ethnicities, genders, or sexual orientations. The American people would be gravely at risk as a result of confirming this individual to a lifetime appointment to one of the most influential courts in the country.

## BIOGRAPHY

At first blush, John K. Bush appears to have some of the professional credentials one would expect of a prospective federal judge: He received his undergraduate degree from Vanderbilt University and his law degree from Harvard Law School in 1989.<sup>4</sup> After law school, Bush clerked for Judge J. Smith Henley on the United States Court of Appeals for the Eighth

Circuit.<sup>5</sup> Bush then joined Gibson, Dunn & Crutcher LLP in Washington, D.C. as an associate.<sup>6</sup> After six years at Gibson, Dunn & Crutcher, Bush joined Bingham Greenbaum Doll.<sup>7</sup> However, as this report outlines in following sections, Bush’s resume only tells part of the story. Professional credentials aside, his deep-seated prejudices and lack of judicial temperament render him unqualified for a lifetime position on the federal bench.

Bush is currently employed as a partner at Bingham Greenbaum Doll LLP, where he serves as the Litigation Department Co-Chair and Team Leader of the Antitrust and Financial Institution Litigation.<sup>8</sup> During his time in private practice, Bush has primarily represented large corporate clients in matters involving anti-trust, securities, intellectual property, and product liability.<sup>9</sup> Bush has represented large tobacco companies in disputes over the Master Settlement Agreement (“MSA”). The MSA arose out of litigation about tobacco companies’ “advertising strategies, which allegedly misled consumers as to the harmful and addictive effects of tobacco and inappropriately targeted underage consumers.” *VIBO Corp. d/b/a General Tobacco v. Conway*, 669 F.3d 675, 680 (6th Cir. 2012). Under the MSA, major tobacco companies made large settlement payments, agreed to future annual monetary disbursements, and agreed to restrict certain advertising practices. *Id.* at 680–81. In one case, Bush represented General Tobacco, a large tobacco company, in a lawsuit alleging

<sup>4</sup> John K. Bush, BINGHAM GREENBAUM DOLL LLP, <https://www.bgdlegal.com/professionals/866/john-k.-bush/>.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Sen. Comm. on the Judiciary, 115th Cong., John Kenneth Bush: Questionnaire for Judicial Nominees 2, <https://www.judiciary.senate.gov/imo/media/doc/Bush%20SJQ.pdf>.

<sup>8</sup> John K. Bush, BINGHAM GREENBAUM DOLL LLP, <https://www.bgdlegal.com/professionals/866/john-k.-bush/>.

<sup>9</sup> *Id.*

that the MSA violated several provisions of the Constitution, including the Equal Protection and Due Process Clauses, and ran afoul of antitrust law. See *id.* at 683. The Sixth Circuit rejected all of General Tobacco's claims. See *id.* at 692.

Bush also has represented numerous corporate clients in challenging punitive damage awards, frequently arguing that punitive damage awards are excessive and not properly controlled by the judiciary.<sup>10</sup>

In addition, Bush has handled several notable non-corporate matters. For example, he was a member of the legal team that represented Stacy Koon, a police officer involved in beating Rodney King, at the Supreme Court.<sup>11</sup> The *Koon* case was one of only two identified criminal cases that Bush has worked on. In the second, [Price v. Commonwealth, No. 2016-CA-000865-MR, 2017 Ky. App. Unpub. LEXIS 319 \(May 5, 2017\)](#), Bush defended a former pastor who was found guilty of sexual abuse and rape. Bush also represented Ronald Reagan during the Iran-Contra investigation; he filed a brief against efforts to allow women into the Virginia Military Academy; he represented Mitch McConnell in an effort to invalidate campaign finance laws in Kentucky; and he represented a Connecticut lawmaker, Mark Nielson, in a lawsuit seeking to compel the Connecticut General Assembly to pass legislation that would give effect to a constitutional spending cap.<sup>12</sup> Bush co-authored an amicus brief on behalf of the Louisville Area Chamber of Commerce supporting the student assignment plan adopted by the Jefferson County School Board, which

was designed to maintain racial diversity in Louisville-area schools after the district court dissolved the original desegregation decree from 1975.<sup>13</sup> The Supreme Court struck down the student assignment plan in [Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 \(2007\)](#).

Since 1997 Bush has served as the president of the Louisville Lawyers' Chapter of The Federalist Society.

From 2006 to 2011, Bush also was a member of the Pendennis Club of Louisville. The Pendennis Club was founded in 1881 as an all-white, all-male private social club.<sup>14</sup> For most of its history, the club was closed to people of color, women, and Jewish people.<sup>15</sup> The club has been described in the past as an "all-white, all-male bastion of old-line money and influence,"<sup>16</sup> "whose members clung to old notions of Southern white privilege for decades after the end of Jim Crow."<sup>17</sup> In 1978, when the City of Louisville "renamed a major downtown street Muhammad Ali Boulevard," the Pendennis Club, which "fronted on the newly renamed street, changed its address to an out-of-the-way side door on Second Street."<sup>18</sup> In 1999, the club was named in a discrimination lawsuit for refusing admission to African Americans.<sup>19</sup> In 2004, the Supreme Court of Kentucky ordered the club to make its

<sup>10</sup> See, e.g., Brief Amici Curiae of Phillips Petroleum Co., United Services Automobile Association, and Allstate Insurance Co. in Support of Petitioner, TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443 (1993) (No. 92-279), 1993 U.S. S. Ct. Briefs LEXIS 129; Brief Amici Curiae of Life Insurance Company of Georgia, ITT Corporation and American General Life and Accident Insurance Company in Support of Petitioner, BMW of North America, Inc. v. IRA Gore, 517 U.S. 559 (1996) (No. 94-896), 1995 U.S. S. Ct. Briefs LEXIS 201.

<sup>11</sup> See Brief for Petitioner, Koon v. United States, 518 U.S. 81 (1996) (No. 94-1664), 1995 U.S. S. Ct. Briefs LEXIS 529.

<sup>12</sup> See *Nielson v. State*, 670 A.2d 1288, 1290 (Conn. 1996); see also Jack Ewing, *Frustrated lawmaker asks court for assist; Lawmaker sues fellow lawmakers*, HARTFORD COURANT, Sept. 11, 1993, at B1.

<sup>13</sup> Brief Amici Curiae of the Louisville Area Chamber of Commerce, Inc. (D/B/A Greater Louisville Inc.) and Louisville Metro Mayor Jerry E. Abramson in Support of Respondents, Meredith v. Jefferson Cnty. Bd. Of Educ., 551 U.S. 701 (2007) (No. 05-915), 2006 U.S. S. Ct. Briefs LEXIS 1052.

<sup>14</sup> JAMES C. KLOTTER, KENTUCKY: PORTRAIT IN PARADOX 1900-1950 10 (1996).

<sup>15</sup> THE ENCYCLOPEDIA OF LOUISVILLE 697 (John E. Kleber, ed., Univ. Press of Ky. 2001).

<sup>16</sup> Raad Cawthon, *Louisville, Ali Setting Things Right: The Boxer's Birthplace Hopes Its Big Plans End Hard Feelings*, PHILADELPHIA ENQUIRER, Nov. 27, 1999, at A1.

<sup>17</sup> Krissah Thompson, *Segregated clubs in Kentucky raise issues for private business, civil rights law*, WASH. POST (June 2, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/06/01/AR2010060103918.html>.

<sup>18</sup> Cawthon, *supra* note 16.

<sup>19</sup> Sheldon S. Shafer, *Country club gets first black member*, COURIER-JOURNAL, Feb. 20, 2006, at 1B.

membership rolls available to human-rights investigators to determine whether the club had engaged in discriminatory practices.<sup>20</sup> When the Senate Judiciary Committee asked whether any of the organizations he has been affiliated with “currently discriminate or formerly discriminated on the basis of race, sex, religion, or national origin,” Bush did not answer the question, noting only that “no organization listed . . . invidiously discriminates, or has invidiously discriminated during any period of my membership.”<sup>21</sup>

In addition, Bush failed to disclose that he is a member of a second group, The Society of Colonial Wars in the Commonwealth of Kentucky, that currently does not appear to allow female members. The group “was founded in 1893 for male descendants of ancestors who served in the military from the time of the settlement of Jamestown, Virginia, in 1607 to the Battle of Lexington in 1775.”<sup>22</sup> The Kentucky chapter’s Constitution states that membership is open to “[a]ny man above the age of twenty-one years . . .”<sup>23</sup>

As noted, Bush also has spent a decade writing inflammatory and often offensive blog posts for the website *Elephants in the Bluegrass*.<sup>24</sup> Writing under a pseudonym, G. Morris, Bush authored more than 400 entries for the ultraconservative blog run by his wife, Bridget Bush.<sup>25</sup> Over the last ten years, Bush has written entries on numerous controversial issues, both on the blog, and in other writings and speeches.

<sup>20</sup> *Id.*

<sup>21</sup> Sen. Comm. on the Judiciary, 115th Cong., John Kenneth Bush: Questionnaire for Judicial Nominees 8, <https://www.judiciary.senate.gov/imo/media/doc/Bush%20SJQ.pdf>.

<sup>22</sup> THE SOURCE: A GUIDEBOOK TO AMERICAN GENEALOGY 898 (Loretto Dennis Szucs & Sandra Hargreaves Luebking eds., 3d ed. 2006).

<sup>23</sup> KENTUCKY SOCIETY OF COLONIAL WARS: CONSTITUTION, BY-LAWS, OFFICERS, MEMBERS 16 (1919), available at <https://babel.hathitrust.org/cgi/pt?id=wu.89058617838;view=lup;eq=20>.

<sup>24</sup> ELEPHANTS IN THE BLUEGRASS, <https://elephantsinthebluegrass.blogspot.com/>.

<sup>25</sup> *Revelation of off-color blog posts render McConnell-backed nominee John K. Bush unfit for a seat on the Sixth Circuit*, JUSTICE WATCH BLOG (May 22, 2017), <http://www.afj.org/blog/revelation-of-off-color-blog-posts-render-mcconnell-backed-nominee-john-k-bush-unfit-for-a-seat-on-the-sixth-circuit>.

Finally, it bears noting that Bush’s wife, Bridget Bush, who is also an attorney in Louisville, served on the board of directors of the Kentucky Opportunity Coalition.<sup>26</sup> The Kentucky Opportunity Coalition is a 501(c)(4) organization that played a pivotal role in aiding Senator Mitch McConnell’s reelection bid in 2014.<sup>27</sup> The group raised over \$14 million during the course of the campaign, spending over \$7 million on expenditures expressly advocating for McConnell.<sup>28</sup> According to a news report at the time, “[c]ampaign finance reformers say the Kentucky Opportunity Coalition is the epitome of ‘dark money’ nonprofit groups that have little or nothing to do with promoting social welfare, as their IRS designation would suggest.”<sup>29</sup> Bridget Bush also represented Rand Paul in an amicus brief challenging the constitutionality of the individual mandate of the Affordable Care Act.<sup>30</sup>

## JUDICIAL TEMPERAMENT

More than many judicial nominees, John Bush has engaged in extracurricular writing that exposes a stunning lack of the qualities normally associated with judicial temperament. He has written numerous pieces that demonstrate that he adheres to a hyperpartisan political agenda. At the same time, while his blog posts cover a broad array of issues, one common theme runs throughout his writings: Bush displays

<sup>26</sup> Michael Beckel, *Nonprofit spends big, shields donors to boost McConnell, defeat Grimes*, LEXINGTON HERALD-LEADER, Oct. 29, 2014.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Bridget Bush*, LANDRUM & SHOUSE LLP, <http://www.landrumshouse.com/Our-Team/Bridget-M-Bush.shtml>.

an intense hostility and contempt for any issue or position he deems liberal or progressive, and a tendency to employ crude personal attacks against individuals he disagrees with. Bush's partisanship, as well as the distasteful rhetoric that reveals strong biases against groups and individuals, disqualify him for a lifetime seat on the federal bench. Indeed, it is clear that no litigant should have confidence that a Judge Bush would approach issues with an open mind, neutrally applying the law to the facts of the case.

Bush's blog posts also are troubling for another reason: In many of the posts, Bush refers to radical right-wing sources that are known for promoting inaccurate conspiracy theories as the basis for his factual assertions. Bush's reliance on these sources shows a severe lack of judgment in discerning truth from fiction and leads to dissemination of dangerous and false information. For example, he has cited articles from WorldNetDaily, an alt-right website founded by Joseph Farah that was a leading voice in promoting the "birther" theory and that the Southern Poverty Law Center has called a group "devoted to manipulative fear-mongering and outright fabrications designed to further the paranoid, gay-hating, conspiratorial and apocalyptic visions of Farah."<sup>31</sup> Bush also has relied on sources like Jack Cashill, a fringe blogger and conspiracy theorist who wrote a book called *Deconstructing Obama*, which questioned whether President Obama was the "illegitimate son of an American black"<sup>32</sup>; Thomas Lifson, who posited that President Obama was a member of a Socialist movement called the "New Party"<sup>33</sup>; and Dan Riehl, who is a frequent contributor to Breitbart.<sup>34</sup>

31 WorldNetDaily, SOUTHERN POVERTY LAW CENTER, <https://www.splcenter.org/fighting-hate/extremist-files/group/worldnetdaily> (last visited May 31, 2017).

32 Jack Cashill, *Just Who is Really Obama's Father?*, WORLDNETDAILY (Jan. 20, 2011), <http://www.wnd.com/2011/01/253097/>.

33 See G. Morris, *Obama's "New Party"—Definitely Not A Grand Old Party*, ELEPHANTS IN THE BLUEGRASS (Oct. 8, 2010, 7:54 PM), <https://elephantsinthebluegrass.blogspot.com/2008/10/obamas-new-party-definitely-not-grand.html>.

34 G. Morris, *Squirrel Alert*, ELEPHANTS IN THE BLUEGRASS (May 30, 2008, 1:38 PM), <https://>

Below is a sampling of material that demonstrates Bush's lack of fitness for a federal judgeship:

- In a talk he gave to a private Louisville club he chose, according to his written notes, to recite and apparently condone a quote by another author that employs an anti-gay slur: "I come here every year, and let me tell you one thing I've learned—this is no town to be giving people the impression you're some kind of faggot."<sup>35</sup>
- In a blog post entitled *The Legacy From Dr. King's Dream That Liberals Ignore*, Bush said that "[t]he 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."<sup>36</sup>
- In 2011 Bush criticized the State Department for modifying passport application forms to account for the possibility of same-sex parents:

Henceforth, the application will ask for 'Mother or Parent 1' and 'Father or Parent 2.' I suppose that's better than 'Thing One' or 'Thing Two', but Hillary's hybrid hardly eliminates my confusion. . . . It's just like the government to

[elephantsinthebluegrass.blogspot.com/2008/05/squirrel-alert.html](https://elephantsinthebluegrass.blogspot.com/2008/05/squirrel-alert.html).

35 John K. Bush, *A Certain Starting Place*, Address at The Forum Club of Louisville (Sept. 8, 2005), notes available at Sen. Comm. on the Judiciary, 115th Cong., John Kenneth Bush: Questionnaire for Judicial Nominees—Public Appendix 12(d), available at <http://www.afj.org/wp-content/uploads/2017/06/A-Certain-Starting-Place.pdf>.

36 G. Morris, *The Legacy From Dr. King's Dream That Liberals Ignore*, ELEPHANTS IN THE BLUEGRASS (Jan. 23, 2008, 1:13 PM), <https://elephantsinthebluegrass.blogspot.com/2008/01/legacy-from-dr-kings-dream-that.html>.



decide it needs to decide something like which parent is number one or number two. When that happens, both parents are subservient to the nanny state—more precisely, a nanny Secretary of State.<sup>37</sup>

- During the 2016 Republican National Convention Bush wrote, in commenting on Jeff Sessions' remarks that "a movement has started" and that "we will make America great again," that it is "[t]ime to roll with the changes. Time to roll with Trump."<sup>38</sup> The comment raises serious questions as to whether Bush would put the Constitution and law over his call to "roll with Trump."
- During the 2016 Republican Convention Bush authored two separate posts criticizing Ted Cruz for declining to endorse then-candidate Trump. In one piece entitled *Who Needs Cruz Anyway?*, Bush said that Cruz was "exercis[ing] remarkably poor judgment,"<sup>39</sup> and in another post he said that "Cruz's failure to announce his support for Trump made him look more like a sore loser than a future president."<sup>40</sup> In contrast, Bush had glowing reviews of two ardent Trump supporters, Rudy Giuliani and David Clarke—the controversial Milwaukee police chief: "The speakers who really were on fire were Rudy Giuliani and the Milwaukee police chief. They both gave stirring talks focusing on why blue lives matter."<sup>41</sup>

- In October 2008, Bush posted the following photograph with the headline, *Take That!*<sup>42</sup>:



Bush's post appears to condone the use of deadly force against people who engage in a petty act like taking a campaign sign from a yard.

- Bush was highly critical of President Obama during his eight years in office, often launching into personal attacks on President Obama's background as a community organizer,<sup>43</sup> his purported connections to Williams Ayers, including calling Jack Cashill's argument that Ayers co-wrote President Obama's book "intriguing,"<sup>44</sup> and President Obama's Kenyan heritage. In October 2008, Bush wrote a pair of posts asking

37 G. Morris, *A Parent 2's Outrage*, ELEPHANTS IN THE BLUEGRASS (Jan. 9, 2011, 8:01 PM), <https://elephantsinthebluegrass.blogspot.com/2011/01/parent-2s-outrage.html>.

38 G. Morris, *Senator Sessions Gets a Second Chance*, ELEPHANTS IN THE BLUEGRASS (July 19, 2016, 5:58 PM), <https://elephantsinthebluegrass.blogspot.com/2016/07/senator-sessions-gets-second-chance.html>.

39 G. Morris, *Who Needs Cruz Anyway?*, ELEPHANTS IN THE BLUEGRASS (July 20, 2016, 10:36 PM), <https://elephantsinthebluegrass.blogspot.com/2016/07/who-needs-cruz-anyway.html>.

40 G. Morris, *Cruz is a Sore Loser*, ELEPHANTS IN THE BLUEGRASS (July 20, 2016, 9:54 PM), <https://elephantsinthebluegrass.blogspot.com/2016/07/cruz-again-fails-to-endorse-trump.html>.

41 G. Morris, *The Remarkable First Day*, ELEPHANTS IN THE BLUEGRASS (July 19, 2016, 11:19 AM), <https://elephantsinthebluegrass.blogspot.com/2016/07/the-remarkable-first-day.html>.

42 G. Morris, *Take That!*, ELEPHANTS IN THE BLUEGRASS (Oct. 15, 2008, 7:33 PM), <https://elephantsinthebluegrass.blogspot.com/2008/10/take-that.html>.

43 G. Morris, *Obama's Fantasy Football v. McCain's Real Players*, ELEPHANTS IN THE BLUEGRASS (Oct. 9, 2008, 5:51 AM), <https://elephantsinthebluegrass.blogspot.com/2008/10/obamas-fantasy-football-v-mccains-real.html>; G. Morris, *Obama's Nutty Community Organizer Friends Play Fantasy Football*, ELEPHANTS IN THE BLUEGRASS (Oct. 8, 2008, 5:52 PM), <https://elephantsinthebluegrass.blogspot.com/2008/10/obamas-nutty-community-organizer.html>.

44 G. Morris, *Did Ayers Ghostwrite Obama's Book?*, ELEPHANTS IN THE BLUEGRASS (Oct. 13, 2008, 12:52 PM), <https://elephantsinthebluegrass.blogspot.com/2008/10/did-ayers-ghostwrite-obamas-book.html>; see G. Morris, *Ayers On The Agenda*, ELEPHANTS IN THE BLUEGRASS (Oct. 14, 2008, 2:43 PM), <https://elephantsinthebluegrass.blogspot.com/2008/10/ayers-on-agenda.html>; G. Morris, *Dick Morris On The Obama-Ayers Connection*, ELEPHANTS IN THE BLUEGRASS (Oct. 9, 2008, 10:37 AM), <https://elephantsinthebluegrass.blogspot.com/2008/10/dick-morris-on-obama-ayers-connection.html>; G. Morris, *"Palining" Around With Barack Obama and William Ayers*, ELEPHANTS IN THE BLUEGRASS (Oct. 6, 2008, 7:05 AM), <https://elephantsinthebluegrass.blogspot.com/2008/10/palining-around-with-barack-obama-and.html>; G. Morris, *The Questions For Obama About Ayers: What Did He Know And When Did He Know It?*, ELEPHANTS IN THE BLUEGRASS (Oct. 9, 2008, 6:29 AM), <https://elephantsinthebluegrass.blogspot.com/2008/10/questions-for-obama-about-ayers-what.html>; G. Morris, *The Recurring Question That Obama Needs To Be Asked*, ELEPHANTS IN THE BLUEGRASS (Oct. 9, 2008, 5:07 PM), <https://elephantsinthebluegrass.blogspot.com/2008/10/recurring-question-that-obama-needs-to.html>.



a person from Kenya, who had apparently been reading the blog, to identify himself: “For the last two days at least one person from Kenya has been reading this blog extensively. Yesterday, a Kenyan spent over nine minutes on the blog. That Elephants in the Bluegrass has attracted an international audience is not surprising, as our readership includes many visitors from outside the United States every day. But given Obama’s connections to Kenya, we are particularly interested in what sparked the interest of the visitor from Kenya.”<sup>45</sup> Nine days later, Bush reiterated his request for identification: “Yesterday, a visitor from Kenya spent over 14 minutes reading this blog. We are beginning to suspect it is one of Barack Obama’s relatives. Will the Kenyan please identify himself or herself?”<sup>46</sup> Citing WorldNetDaily, Bush wrote a third piece entitled “*Brother’s Keeper*” -- *As In, Keep That Anti-Obama Reporter In Jail*, claiming “that a reporter who traveled to Kenya to report on Obama’s kin has been detained by authorities.”<sup>47</sup>

- In a 2008 blog post, *Democrats’ FEC Obstructionism Benefits Senator “Moneybags” Obama*, Bush expressed strong support for Hans von Spakovsky’s nomination to the Federal Election Commission.<sup>48</sup> Von Spakovsky manages the Election Law Reform Initiative at The Heritage Foundation.<sup>49</sup> He has a strong record on voter suppression and was a leader in politicizing the Department of

<sup>45</sup> G. Morris, *Greetings to Kenya!*, ELEPHANTS IN THE BLUEGRASS (Oct. 16, 2008, 1:05 PM), <https://elephantsinthebluegrass.blogspot.com/2008/10/greetings-to-kenya.html>.

<sup>46</sup> G. Morris, *Kenya, Speak Up!*, ELEPHANTS IN THE BLUEGRASS (Oct. 25, 2008, 8:03 PM), <https://elephantsinthebluegrass.blogspot.com/2008/10/kenya-speak-up.html>.

<sup>47</sup> G. Morris, “*Brother’s Keeper*” -- *As In, Keep That Anti-Obama Reporter In Jail*, ELEPHANTS IN THE BLUEGRASS (Oct. 7, 2008, 12:16 PM), <https://elephantsinthebluegrass.blogspot.com/2008/10/brothers-keeper-as-in-keep-that-anti.html>.

<sup>48</sup> G. Morris, *Democrats’ FEC Obstructionism Benefits Senator “Moneybags” Obama*, ELEPHANTS IN THE BLUEGRASS (May 7, 2008, 9:05 PM), <https://elephantsinthebluegrass.blogspot.com/2008/05/democrats-fec-obstructionism-benefits.html>.

<sup>49</sup> See *Hans A. von Spakovsky*, THE HERITAGE FOUNDATION, <http://www.heritage.org/staff/hans-von-spakovsky> (last visited June 1, 2017).

Justice under President George W. Bush.<sup>50</sup> Ignoring Democrats’ legitimate concerns about von Spakovsky’s troubling background, the post attacks Democrats’ efforts to keep von Spakovsky off the FEC: “The Democrats’ strategy is as brilliant as it is cynical: Keep the FEC debilitated so that it has no oversight over Senator Obama, aka ‘Senator Moneybags.’”<sup>51</sup>

- In September 2008, Bush wrote a blog post entitled *Look At Me! I Just Jumped The Shark*, which contained a photo of President Obama at the beach in swim trunks and the caption “Senator Barack (‘Fonzie’) Obama.”<sup>52</sup> The post then linked to a blog called *Ichabod, The Glory Has Departed*, “[f]or thoughts on when Obama jumped the shark.” The linked blog post calls Joe Biden “a true clown” and criticizes Obama for “[p]osing at a bowling alley and looking like a girly-man.”<sup>53</sup>
- In 2008, Bush accused then-House Speaker Nancy Pelosi of destroying the chances of a Wall Street reform bill passing the House when she pinned the blame for the financial crisis on Republicans. In the title of the post he refers to Speaker Pelosi as “Mama Pelosi” and says that, next time, someone should “gag the

<sup>50</sup> *Hans von Spakovsky*, BRENNAN CENTER FOR JUSTICE (Nov. 10, 2007), <https://www.brennancenter.org/analysis/hans-von-spakovsky>.

<sup>51</sup> G. Morris, *Democrats’ FEC Obstructionism Benefits Senator “Moneybags” Obama*, ELEPHANTS IN THE BLUEGRASS (May 7, 2008, 9:05 PM), <https://elephantsinthebluegrass.blogspot.com/2008/05/democrats-fec-obstructionism-benefits.html>.

<sup>52</sup> G. Morris, *Look At Me! I Just Jumped The Shark*, ELEPHANTS IN THE BLUEGRASS (Sept. 13, 2008, 10:20 AM), <https://elephantsinthebluegrass.blogspot.com/2008/09/look-at-me-i-just-jumped-shark.html>.

<sup>53</sup> *When Did Obama Jump the Shark?*, ICHABOD, THE GLORY HAS DEPARTED (Sept. 13, 2008), <http://ichabodthegloryhasdeparted.blogspot.com/2008/09/when-did-obama-jump-shark.html>.

House Speaker.”<sup>54</sup> Bush’s language is not only demeaning but disturbingly violent, with clear misogynistic undertones.

- Bush wrote dismissively about a campaign to reduce energy consumption that asked businesses and households to turn off nonessential lights and electronics for one hour. The post suggests that Bush does not believe that climate change is a threat: “Please! This is the most ridiculous ‘energy conservation’ measure since President Jimmy Carter told us not to use any Christmas lights in the 1970s. Sorry, but I will be watching the NCAA basketball tournament at 8 p.m. ‘Saving’ the world from ‘climate change’ will just have to wait until we go to bed victorious after the U of L-North Carolina game.”<sup>55</sup>

# LEGAL AND OTHER VIEWS

## I. EXECUTIVE POWER

In the early 1990s, Bush represented former President Ronald Reagan during the Iran-Contra investigation. Bush co-authored President Reagan’s response to the independent counsel’s final report in the Iran-Contra Affair. Bush’s willingness to defend President Reagan during Iran-Contra, which involved questions of executive power, raises serious concerns today about Bush’s willingness to be a check on an increasingly out-of-control executive branch. Moreover, the response co-authored by Bush

was highly critical of Independent Counsel Lawrence E. Walsh:

[T]he Independent Counsel has permitted his investigation to become both excessive and vindictive. He has abused his authority. He has used his office to intimidate and harass individuals and otherwise to damage the lives of the persons he was given license to investigate. He and his Final Report have violated the policies of the Department of Justice that he was required by law to uphold, and he has disregarded the standards and ethics imposed uniformly on public prosecutors. The Final Report exceeds the authority given to him by law. He has used it to disseminate false and unfounded speculation, opinion and innuendo. His Final Report is not a chronicle of facts, but a prolonged justification of his own excessive investigation and a defamation of the individuals he was empowered to investigate.<sup>56</sup>

These disparaging remarks about the independent counsel suggest a bias against the legitimacy of the counsel’s work, and skepticism of the counsel’s right to challenge executive authority. They suggest that Bush may be hostile to efforts to hold the executive branch accountable.

In addition to his involvement in the Iran-Contra investigation, Bush has made other remarks about the power of the executive branch. For example, in 2012, Bush

<sup>54</sup> G. Morris, *Thanks, Mama Pelosi, For That 700 Point Stock Market Plunge!*, ELEPHANTS IN THE BLUEGRASS (Sept. 29, 2008, 3:51 PM), <https://elephantsinthebluegrass.blogspot.com/2008/09/thanks-mama-pelosi-for-that-700-point.html>.

<sup>55</sup> G. Morris, *Enviro-Do-Gooders Can’t Hold a Candle to NCAA Basketball*, ELEPHANTS IN THE BLUEGRASS (Mar. 29, 2008, 7:08 PM), <https://elephantsinthebluegrass.blogspot.com/2008/03/enviro-do-gooders-cant-hold-candle-to.html>.

<sup>56</sup> FINAL REPORT OF THE INDEPENDENT COUNSEL FOR IRAN/CONTRA MATTERS, VOLUME III: COMMENTS AND MATERIALS SUBMITTED BY INDIVIDUALS AND THEIR ATTORNEYS, RESPONSE OF FORMER PRESIDENT RONALD W. REAGAN TO FINAL REPORT OF THE INDEPENDENT COUNSEL FOR IRAN/CONTRA MATTERS, Division for the Purpose of Appointing Independent Counsel (D.C. Cir. Dec. 3, 1993), available at Sen. Comm. on the Judiciary, 115th Cong., John Kenneth Bush: Questionnaire for Judicial Nominees—Public Appendix 12(c) 158, 166.

called the idea of trying suspected terrorists in civilian courts, as opposed to military tribunals, “bone-headed.”<sup>57</sup>

## II. WOMEN’S RIGHTS

Bush has repeatedly made clear his extreme views on women’s reproductive rights. Most strikingly, in a blog post entitled *The Legacy From Dr. King’s Dream That Liberals Ignore*, Bush conflates the goals of the civil rights movement with those of the pro-life movement, concluding with the following statement: “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*.”<sup>58</sup> It is hard to imagine a statement that more offensively compares the horrors of slavery to the personal decision of a woman to have an abortion. Moreover, it draws a parallel between one of the darkest stains on American jurisprudence, *Dred Scott*, and *Roe v. Wade*. And in the process of drawing inapposite and offensive comparisons, Bush co-opts Dr. Martin Luther King’s legacy to attack a woman’s right to choose whether to have an abortion.

In 2006, Bush co-authored a paper with Paul E. Salamanca for The Federalist Society entitled *Eight Ways to Sunday: Which Direction, Kentucky Supreme Court?*, criticizing certain Kentucky judicial rulings. In their article, Bush and Salamanca argued the Kentucky Supreme Court’s abortion jurisprudence is problematic. After noting that Kentucky courts initially deferred to state law restricting abortion, Bush and Salamanca lamented that “[t]he Kentucky Supreme Court’s affirmance of the state’s efforts to protect unborn life was short-lived.”<sup>59</sup> Bush and

Salamanca criticized former Justice Charles Leibson’s opinion dismissing a murder indictment for destruction of a fetus. According to Bush and Salamanca, “Justice Leibson’s interpretation of *Roe* gave little, if any, weight to the protection of unborn life.”<sup>60</sup> Bush and Salamanca conclude, however, that later developments in Kentucky Supreme Court jurisprudence “provide precedent for the Court to distance itself from its perceived hostility in the Leibson era towards the state’s efforts to regulate in favor of unborn life.”<sup>61</sup>

In 2016, Bush wrote an amicus brief on behalf of the Center for Constitutional Jurisprudence supporting the position of the Susan B. Anthony List in its challenge to Ohio’s political defamation statute. While Bush’s brief primarily addresses First Amendment issues, the brief is remarkable for its discussion of the Affordable Care Act (“ACA”), a statute that has been critical in ensuring that women have access to contraception, pre-natal care, and maternal healthcare. In a complete departure from the substance of the argument presented in the brief, Bush called the ACA “one of the most controversial statutes of the modern era” and said that “the Affordable Care Act’s roles [sic] in historic losses suffered by the President’s party in the 2010 and 2014 midterm congressional elections are well-documented.”<sup>62</sup> Bush went on to praise the political repercussions of the ACA’s passage:

Our system of checks and balances—

57 G. Morris, *Clint’s Commanding Performance Against the Commander-in-the-Empty Chair*, ELEPHANTS IN THE BLUEGRASS (Aug. 31, 2012, 2:21 PM), <https://elephantsinthebluegrass.blogspot.com/2012/08/clints-commanding-performance-against.html>.

58 G. Morris, *The Legacy From Dr. King’s Dream That Liberals Ignore*, ELEPHANTS IN THE BLUEGRASS (Jan. 23, 2008, 1:13 PM), <https://elephantsinthebluegrass.blogspot.com/2008/01/legacy-from-dr-kings-dream-that.html>.

59 JOHN K. BUSH & PAUL E. SALAMANCA, “EIGHT WAYS TO SUNDAY”: WHICH DIRECTION, KENTUCKY SUPREME COURT? 5 (The Federalist Society for Law & Public Policy Studies 2006),

<https://www.badlegal.com/clientuploads/Publications/Publications/John%20Bush%20-%20Eight%20Ways%20to%20Sunday.pdf>.

60 *Id.* at 6.

61 *Id.* at 7.

62 Brief of Amici Curiae Center for Constitutional Jurisprudence in Support of Plaintiffs-Appellees at 1–2, *Susan B. Anthony List v. Driehaus*, 814 F.3d 466 (6th Cir. 2016) (No. 14-4008) (internal citations omitted).

in the words of Publius, “the particular structure of this government, and the distribution of this mass of power among its constituent parts”—is working with respect to the Affordable Care Act just the Founders foresaw [sic] for such a significant piece of legislation. And an indispensable part of that system of checks and balances, the “legislative department,” which “alone has access to the pockets of the people,” is listening to the People.<sup>63</sup>

Moreover, in a blog post, Bush argued that the ACA “isn’t a good value at all” and that “[i]t needs to be repealed and replaced in the new Congress under the leadership of the new President.”<sup>64</sup> In a separate post, Bush lashed out at the ACA, saying that

...individuals in America should make their own decisions as to whether they buy insurance, pay for it out of their own pockets, and not take money out of my pocket to pay for it. 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.<sup>65</sup>

Bush also has weighed in on the side of restricting educational opportunities for women. In 1993, Bush co-authored an amicus brief on behalf of a number of groups, supporting the Virginia Military Institute’s efforts to remain single sex.<sup>66</sup> VMI, which is a public institution, only admitted male students into its ranks. In the brief, Bush said that the military-style

education afforded to cadets at VMI “does not appear to be compatible with the somewhat different developmental needs of most young women” and that there was “minimal interest” from women in attending VMI.<sup>67</sup> In arguing that VMI’s admissions policy did not violate the Equal Protection Clause, Bush warned that forcing VMI to go co-ed or forcing Virginia to provide an identical educational opportunity to women would lead to a slippery slope endangering government funding of private women’s colleges, shelters for battered women, and rape crisis counseling centers.<sup>68</sup>

The Supreme Court declined to consider the case in 1993, see [VMI v. United States, 508 U.S. 946 \(1993\)](#), but later granted certiorari. In an opinion authored by Justice Ginsburg, the Supreme Court held that “the Constitution’s equal protection guarantee precludes Virginia from reserving exclusively to men the unique educational opportunities VMI affords.” [United States v. Virginia, 518 U.S. 515, 519 \(1996\)](#). In a rebuke to Bush’s position, Justice Ginsburg cautioned against relying “on fixed notions concerning the role and abilities of males and females” to deny women access to equal educational opportunity. See *id.* at 541 (internal citation and quotation marks omitted).

Finally, while live-blogging from the 2016 Republican National Convention in July, Bush reflected on the 2008 presidential election, saying that “Democrats were making history with the first serious African American candidate.”<sup>69</sup> In 2016, Bush remarked, “[t]he Democrats are trying to win with the same game plan as in 2008, only

<sup>63</sup> *Id.* at 2.

<sup>64</sup> G. Morris, *Don’t Let The Door “HIT” American Taxpayers on Obama’s Way Out*, ELEPHANTS IN THE BLUEGRASS (Sept. 25, 2016, 1:31 PM), <https://elephantsinthebluegrass.blogspot.com/2016/09/dont-let-door-hit-american-taxpayers-on.html>.

<sup>65</sup> G. Morris, *A Shout-Out For a Papa John’s “Boycot,”* ELEPHANTS IN THE BLUEGRASS (Aug. 10, 2012, 10:38 PM), <https://elephantsinthebluegrass.blogspot.com/2012/08/a-shout-out-for-papa-johns-boycot.html>

<sup>66</sup> Brief *Amici Curiae* on Behalf of Women’s Washington Issues Network, Women for VMI, Frank F. Hayden and Oscar W. King, III in Support of Petition for Writ of Certiorari, *VMI v. United States*, 508 U.S. 946 (1993) (No. 92-1213), copy available at Sen. Comm. on the Judiciary, 115th Cong., John Kenneth Bush: Questionnaire for Judicial Nominees—Public Appendix 16(e), Petition, Briefs and Memoranda of Parties of Amicus Briefs on Petition for Writ of Certiorari #3.

<sup>67</sup> *Id.* at 3, 7.

<sup>68</sup> *Id.* at 19–20.

<sup>69</sup> G. Morris, *Baring My Pre-Convention Thoughts*, ELEPHANTS IN THE BLUEGRASS (July 17, 2016, 11:58 PM), [https://elephantsinthebluegrass.blogspot.com/2016/07/baring-my-pre-convention-thoughts\\_17.html](https://elephantsinthebluegrass.blogspot.com/2016/07/baring-my-pre-convention-thoughts_17.html).

substitute woman for Black.”<sup>70</sup> In that same post, Bush dismissed protestors at the Convention: “Speaking of unguarded moments, there were more than a hundred bare naked ladies protesting something earlier today. You know Trump is onto something huge when he causes people to shed their underwear.”<sup>71</sup> Although the audio tapes of then-candidate Trump’s remarks about sexually assaulting women had not been made public at the time, Bush’s remarks followed on the heels of numerous degrading comments that Trump made about women during the course of his campaign.<sup>72</sup>

### III. LGBTQ RIGHTS

In his paper with Paul Salamanca, Bush also highlighted the Kentucky Supreme Court’s “willingness to find rights in the state constitution above and beyond those in the U.S. Constitution” in the area of privacy.<sup>73</sup> Using language that openly denigrated LGBTQ rights, Bush and Salamanca remarked, “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.”<sup>74</sup>

In 2005, Bush used a highly offensive anti-LGBTQ slur in remarks to the Forum Club of Louisville, where he serves as the group’s president.<sup>75</sup> (Bush has delivered numerous speeches to the Forum Club on a broad range of topics, including the War of 1812 and artificial intelligence.) During the speech, for which Bush provided notes, he discussed the history of the City of Louisville and

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> Claire Cohen, *Donald Trump sexism tracker: Every offensive comment in one place*, THE TELEGRAPH (Jan. 20, 2017), <http://www.telegraph.co.uk/women/politics/donald-trump-sexism-tracker-every-offensive-comment-in-one-place/>.

<sup>73</sup> BUSH & SALAMANCA, *supra* note 59, at 4.

<sup>74</sup> *Id.*

<sup>75</sup> John K. Bush, *Manning Up The Machine*, Address at The Forum Club of Louisville (Nov. 11, 2015), notes available at Sen. Comm. on the Judiciary, 115th Cong., John Kenneth Bush: Questionnaire for Judicial Nominees—Public Appendix 12(d); John K. Bush, *Forgetting An Anniversary*, Address at The Forum Club of Louisville (Apr. 19, 2012), notes available at Sen. Comm. on the Judiciary, 115th Cong., John Kenneth Bush: Questionnaire for Judicial Nominees—Public Appendix 12(d).

included this passage quoted from Hunter S. Thompson’s *The Kentucky Derby is Decadent and Depraved*: “I come here every year, and let me tell you one thing I’ve learned—this is no town to be giving people the impression you’re some kind of faggot.”<sup>76</sup>

Also, in a 2011 blog post, Bush criticized the State Department for modifying passport application forms to account for the possibility of same-sex parents in *A Parent 2’s Outrage*:

Henceforth, the application will ask for ‘Mother or Parent 1’ and ‘Father or Parent 2.’ I suppose that’s better than ‘Thing One’ or ‘Thing Two’, but Hillary’s hybrid hardly eliminates my confusion. . . . It’s just like the government to decide it needs to decide something like which parent is number one or number two. When that happens, both parents are subservient to the nanny state—more precisely, a nanny Secretary of State.<sup>77</sup>

This post both trivializes the importance of the government accounting for all family types and uses demeaning language to reference a female Secretary of State.

### IV. FIRST AMENDMENT

Bush’s nomination also seems designed to fulfill a pledge of the President’s—to weaken Constitutional protections for members of the press, whom the President

<sup>76</sup> John K. Bush, *A Certain Starting Place*, Address at The Forum Club of Louisville (Sept. 8, 2005), notes available at Sen. Comm. on the Judiciary, 115th Cong., John Kenneth Bush: Questionnaire for Judicial Nominees—Public Appendix 12(d), available at <http://www.afj.org/wp-content/uploads/2017/06/A-Certain-Starting-Place.pdf>.

<sup>77</sup> G. Morris, *A Parent 2’s Outrage*, ELEPHANTS IN THE BLUEGRASS (Jan. 9, 2011, 8:01 PM), <https://elephantsinthebluegrass.blogspot.com/2011/01/parent-2s-outrage.html>.

has called “the enemy of the people.”<sup>78</sup> Bush has expressed his belief that *New York Times v. Sullivan*, the seminal case that articulated broad protections for members of the press covering public officials and actions, was wrongly decided.

The President has not been shy about his belief that the First Amendment needs to be curtailed. In February 2016 then-candidate Trump remarked that if he became President, he would “open up our libel laws” so that “when The New York Times writes a hit piece which is a total disgrace . . . we can sue them and win money instead of having no chance of winning because they’re totally protected.”<sup>79</sup> He promised that, if elected, “we’re going to have people sue [newspapers] like you’ve never got sued before.”<sup>80</sup>

Of course, as others pointed out at the time, the Constitution does limit the President’s ability to successfully sue journalists he does not like.<sup>81</sup> In *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964), the Supreme Court held that members of the press were protected from libel actions brought by public officials unless the publisher knew or recklessly disregarded whether the statement being published was false. Justice Brennan, writing for a unanimous Court, explained that this heightened protection was necessary because of this country’s “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.” *Id.* at 270. Such debate, Justice Brennan wrote, “may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.” *Id.*

<sup>78</sup> Andrew Higgins, *Trump Embraces ‘Enemy of the People,’ a Phrase With a Fraught History*, N.Y. TIMES (Feb. 26, 2017), [https://www.nytimes.com/2017/02/26/world/europe/trump-enemy-of-the-people-stalin.html?\\_r=0](https://www.nytimes.com/2017/02/26/world/europe/trump-enemy-of-the-people-stalin.html?_r=0).

<sup>79</sup> Hadas Gold, *Donald Trump: We’re going to ‘open up’ libel laws*, POLITICO (Feb. 26, 2016), <http://www.politico.com/blogs/on-media/2016/02/donald-trump-libel-laws-219866>.

<sup>80</sup> *Id.*

<sup>81</sup> Eugene Volokh, *Donald Trump says he’ll ‘open up libel laws’*, WASH. POST (Feb. 26, 2016), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/02/26/donald-trump-says-hell-open-up-libel-laws/?utm\\_term=.f04eb5410941](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/02/26/donald-trump-says-hell-open-up-libel-laws/?utm_term=.f04eb5410941).

*Sullivan* has been celebrated as “the clearest and most forceful defense of press freedom in American history.”<sup>82</sup>

Perhaps recognizing he can’t unilaterally change the Constitution, the President has done the next best thing—nominated to the bench an individual who appears to agree with him that the press should have less protection when it seeks to hold public officials accountable. Bush made his views clear at a 2009 Federalist Society panel entitled *The Constitution and the Importance of Interpretation: Original Meaning* when, after praising originalism, he discussed originalism’s application to the First Amendment. Bush emphasized “from an originalist perspective that *New York Times v. Sullivan* probably wasn’t correctly decided.”<sup>83</sup>

Bush’s comments about *Sullivan*, while disturbing at any time, take on special significance at a time when President Trump is under a cloud of suspicion for his campaign’s ties to Russia and the fact that he has relentlessly attacked the press for investigating and reporting on the matter. Indeed, whether it is the investigation regarding Russia or any other investigative reporting by the press, the President has made clear his contempt for critical First Amendment protections. Bush’s statements raise serious doubts about whether he would uphold or correctly apply seminal Supreme Court precedent.

Interestingly, six years after Bush called *Sullivan* wrongly decided, he took a different position while defending the

<sup>82</sup> The Editorial Board, *The Uninhibited Press, 50 Years Later*, N.Y. TIMES (Mar. 8, 2014), <https://www.nytimes.com/2014/03/09/opinion/sunday/the-uninhibited-press-50-years-later.html>.

<sup>83</sup> John K. Bush, *The Constitution and the Importance of Interpretation: Original Meaning*, THE FEDERALIST SOCIETY (Mar. 7, 2009), at 48:08, <http://www.fed-soc.org/multimedia/detail/the-constitution-and-the-importance-of-interpretation-original-meaning-event-audio-video>.



Susan B. Anthony List (“SBA List”). The SBA List is a vehemently anti-choice group “investing heavily in voter education to ensure that pro-life Americans know where their lawmakers stand on protecting the unborn . . . .”<sup>84</sup> The group also has been a leading voice in the efforts to defund Planned Parenthood.<sup>85</sup>

In 2010 Ohio Congressman Steven Driehaus filed a complaint with the Ohio Elections Commission alleging that the SBA List had violated the Ohio political false-statements law when it issued a press release accusing him of voting in favor of “taxpayer-funded abortion” because of his vote in favor of the Affordable Care Act. See [Susan B. Anthony List v. Driehaus](#), 814 F.3d 466, 470–71 (6th Cir. 2016). After the Commission found probable cause that the SBA List violated the law, the SBA List sued, alleging that the political false-statements law was unconstitutional. *Id.* SBA List ultimately prevailed when the United States Court of Appeals for the Sixth Circuit struck down the law. *Id.* at 476.

While the case was pending before the Sixth Circuit, Bush wrote an amicus brief on behalf of the Center for Constitutional Jurisprudence supporting the SBA List’s position that the Ohio statute was unconstitutional. In his brief he cited *Sullivan* numerous times, concluding that “[a]llowing an agency of government to determine the truth of speech that is critical of government officials on hotly contested matters of policy is fundamentally at odds with our ‘profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . . .’”<sup>86</sup> It appears that Bush is perfectly willing to criticize seminal Supreme Court precedent until he needs it to support anti-choice

<sup>84</sup> *About Susan B. Anthony List*, SUSAN B. ANTHONY LIST, <https://www.sba-list.org/about-susan-b-anthony-list> (last visited May 26, 2017).

<sup>85</sup> *Take Action Now*, SUSAN B. ANTHONY LIST, <https://www.sba-list.org/legislative-priorities> (last visited May 26, 2017).

<sup>86</sup> Brief of Amici Curiae Center for Constitutional Jurisprudence in Support of Plaintiffs-Appellees, *supra* note 62, at 12–13 (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

causes.

## V. MONEY IN POLITICS

In 2002 Bush wrote an amicus brief on behalf of Mitch McConnell arguing that several provisions of Kentucky’s campaign finance law were unconstitutional. The Kentucky Court ultimately invalidated the provisions, but what is noteworthy is that Bush, in sentences tangential to his argument, noted: “The *Buckley* Court protected all speech, including political contributions. *But while many constitutional scholars believe the First Amendment equally protects contributions and independent expenditures*, the *Buckley* Court recognized a constitutional distinction between the two and required they be treated differently.”<sup>87</sup> Moreover, Bush stated that “*all* political speech enjoys the highest degree of First Amendment protection.”<sup>88</sup> These statements suggest that contribution limits, like expenditures, should be subject to strict scrutiny, making it nearly impossible to impose restrictions on them. This position repeatedly has been rejected by the Supreme Court. See [FEC v. Beaumont](#), 539 U.S. 146, 161 (2003); [Buckley v. Valeo](#), 424 U.S. 1, 20 (1976).

Indeed, in several blog posts, Bush makes clear his position on money in politics. He decries the notion of public financing of campaigns, saying that it “runs afoul of constitutional guarantees by forcing taxpayers to subsidize candidates’ political speech in contravention of those taxpayers’ First Amendment rights.”<sup>89</sup> Bush’s views on public financing are out

<sup>87</sup> Brief of United States Senator Mitch McConnell as Amicus Curiae in Support of Movants/Cross-Respondents at 4, *Martin v. Commonwealth*, 96 S.W.3d 38 (Ky. 2003) (No. 2000-SC-1101) (emphasis added).

<sup>88</sup> *Id.* at 3.

<sup>89</sup> G. Morris, *Barack Obama and Monica Lewinsky Change Democrats’ Minds*, ELEPHANTS IN THE BLUEGRASS (June 20, 2008, 8:23 AM), <https://elephantsinthe->

of step with the rest of the country. Thirteen states provide some type of public financing for campaigns.<sup>90</sup> In fact, Maine, Arizona, New Mexico, and Connecticut all offer a form of clean elections programs, which provide full funding for campaigns.<sup>91</sup> In Maine, the public financing option is supported by taxpayers' voluntary participation in the program.<sup>92</sup> Moreover, Bush's view of the First Amendment and its application to government speech is out of step with Supreme Court jurisprudence. See [Walker v. Texas Division, Sons of Confederate Veterans, 135 S. Ct. 2239 \(2015\)](#).<sup>93</sup>

Bush also discussed campaign finance more broadly in February 2008 when he argued that the idea "that too much is spent on political campaigns simply doesn't square with the facts put in proper perspective."<sup>94</sup> In fact, Bush questioned why less money should be spent on political speech: "The amount of money spent on such commercial speech dwarfs the relatively paltry amounts spent on political speech by candidates running for office. . . . So why shouldn't *more* money, not less, be spent on political speech, given how much is spent by advertising and commercial speech?"<sup>95</sup> He concluded by disregarding the idea that a candidate could buy an election. It is difficult to square Bush's statements with the political reality, where money is flooding elections and drowning out the voices of everyday Americans.

## CONCLUSION

John K. Bush, President Trump's nominee for the Sixth Circuit, is unsuited for the federal bench. In hundreds of blog posts as well as speeches and other writing, he has denigrated the rights of others and has used hostile and crass language to make personal attacks on people with whom he disagrees. He has a long history of firm adherence to an ultraconservative political ideology. He has demonstrated that he lacks appropriate judicial temperament, raising serious concerns about his ability to approach cases neutrally, setting aside his own personal views. Moreover, Bush has shown a willingness to accept an extremely expansive view of executive power and has said that seminal First Amendment jurisprudence protecting the free press was wrongly decided. At a time when President Trump's administration is testing the limits of legal and constitutional authority and the President himself has called for a crackdown on the free press, it is more important than ever that the judicial branch acts as a check on executive overreach and upholds critical constitutional rights including First Amendment rights.

For the foregoing reasons, Alliance for Justice strongly opposes John K. Bush's nomination to the United States Court of Appeals for the Sixth Circuit.

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[bluegrass.blogspot.com/2008/06/barack-obama-and-monica-lewinsky-change.html](http://bluegrass.blogspot.com/2008/06/barack-obama-and-monica-lewinsky-change.html).

<sup>90</sup> Overview of State Law on Public Financing, NATIONAL CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/research/elections-and-campaigns/public-financing-of-campaigns-overview.aspx> (last visited May 26, 2017).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> See also Ian Millhiser, Trump names right-wing blogger who likened abortion to slavery to powerful appeals court, THINK PROGRESS (May 23, 2017), <https://thinkprogress.org/trump-right-wing-blogger-appeals-court-59deb6b7c438>.

<sup>94</sup> G. Morris, *The Right To Put Your Money Where Your Mouth Is*, ELEPHANTS IN THE BLUEGRASS (Feb. 6, 2008, 9:24 PM), <https://elephantsinthebluegrass.blogspot.com/2008/02/right-to-put-your-money-where-your.html>.

<sup>95</sup> *Id.*