

**Responses of Scott M. Matheson, Jr.
Nominee to be United States Circuit Judge for the Tenth Circuit
to the Written Questions of Senator Jeff Sessions**

1. **In a speech you gave to the Women’s State Legislative Council in 1987, you examined the question of whether our Constitution is a living document and quoted Justice Oliver Wendell Holmes, who wrote that**

“[w]hen we are dealing with words . . . like the Constitution of the United States, we must realize that they have called into life a being, the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism.”

- a. **Do you agree with Justice Holmes that the Constitution should be read as a living document, “the development of which could not have been foreseen completely by the most gifted of its begetters”?**

Response: In context, the speech quoted Holmes and several others to offer perspectives to the audience. I do not regard the Constitution as a “living document.” The Constitution established the structure and powers of the federal government, the relationship between the federal and state governments, and principles regarding the relationship between the government and individuals. It can be changed only through the constitutional amendment process. The Framers meant the Constitution to endure and to apply to changing circumstances “which could not have been foreseen completely.”

- b. **If yes, who will decide what this living document means at any given moment?**

Response: Please see previous response.

2. **For your spring 2010 Constitutional Law course, you assigned a book written by Professors Geoffrey R. Stone, Louis M. Seidman, Cass Sunstein, and Pamela Karlan.**

- a. **In *Judicial Activism & Ideology*, 6 GREEN BAG 2d 281 (2003), Professor Stone referred to “the principle of ‘original intent,’ which we all found so entertaining in the 1980s” and claimed that “[a]s fifteen years of judicial experience have amply demonstrated, the core methodology of those justices who purport to seek the original intent of the framers is to ask what they would have intended had they been framers, and -- presto! -- there it is.” Do you agree with Professor Stone’s description of originalism?**

Response: No.

- b. **Professor Seidman wrote a paper entitled “Our Unsettled Ninth Amendment: An Essay on Unenumerated Rights and the Impossibility of Textualism,” which stated:**

“the Ninth Amendment states a truth that we would have to deal with whether or not it was part of the original text: No matter how comprehensive, no text can control the force of ideas and commitments that lie outside the text. This simple truth leaves the status of liberal constitutionalism permanently and inevitably unsettled. The day of final reckoning will never arrive.”

Do you agree with Professor Seidman that, because of the Ninth Amendment, we can never truly know what our Constitution means?

Response: No.

- c. **Writing about the First Amendment, Professor Sunstein, who is now a close advisor to President Obama, has written:**

“Our existing liberty of expression owes much of its content to the capacity of each generation to rethink and to revise the understandings that were left to it. . . . The conception of free speech in any decade of American history is often quite different from the conception twenty years before or after.” (Cass R. Sunstein, *Speech in the Welfare State: Free Speech Now*, 59 U. CHI. L. REV. 255 (1992)).

Do you agree with Professor Sunstein that our First Amendment free speech rights are subject to being rethought and revised by each generation?

Response: No. Most Supreme Court First Amendment free speech cases were decided in the last one hundred years and applied speech and press protections to a significant variety of circumstances and changing technologies.

3. **In your book *Presidential Constitutionalism in Perilous Times*, you argued that “the presidency requires a constitutional conscientiousness that was lacking in the George W. Bush Administration and that must be inculcated in the future.” Do you think President Obama exhibited “constitutional conscientiousness” when he pressed Congress to pass the healthcare bill despite serious constitutional concerns about the individual mandate?**

Response: A central point of the book is for the President to work with Congress when national security policies may affect individual liberties. It is important for the President and Congress to address constitutional concerns about proposed legislation. I do not

know the extent that occurred with the health care legislation. As a nominee, it would not be appropriate for me to attempt to address the constitutionality of the health care legislation because it or a similar issue may come before me if I am confirmed as a judge. If that were to occur, I would approach the issues with an open mind and apply applicable Supreme Court precedent.

4. **In your book *Presidential Constitutionalism in Perilous Times*, you claimed that “[t]he relatively more assertive Supreme Court during the Bush years may in part have been the product of the infinite character of the war on terror.” Do you believe judges should be more aggressive or active when they believe the problem before them poses particularly grave concerns that have not been addressed by the other branches of Government? Please explain your answer.**

Response: The quoted statement is a descriptive observation (the passage uses the word “indefinite” rather than “infinite”). Justice Kennedy wrote in *Boumediene*: “Because our Nation's past military conflicts have been of limited duration, it has been possible to leave the outer boundaries of war powers undefined. If, as some fear, terrorism continues to pose dangerous threats to us for years to come, the Court might not have this luxury. This result is not inevitable, however. The political branches, consistent with their independent obligations to interpret and uphold the Constitution, can engage in a genuine debate about how best to preserve constitutional values while protecting the Nation from terrorism.” 128 S.Ct. at 2277.

The quote from the book was not intended to suggest that judges should ever substitute their policy preferences for those of the democratically elected branches. Federal courts should only decide cases that are properly before them as a matter of Article III justiciability and statutory jurisdiction, and judges should apply and follow Supreme Court precedent.

5. **You also wrote:**

“When President Bush issued his November 13, 2001, military commission order, he claimed lawmaking, adjudicating, and prosecuting authority, conflating separation of powers under the Commander-in-Chief mantle. . . . Historically, this ‘blending of executive, legislative, and judicial powers in one person or even in one branch of the government is ordinarily regarded as the very acme of absolutism.’”

- a. **Do you contend that a President, in the exercise of his authority as commander-in-chief of our armed services, is required to seek Congress’ approval when dealing with foreign enemy combatants on foreign soil?**

Response: The quote referred to separation of powers concerns regarding the military commissions. The Supreme Court recognized these concerns when it

struck down the administration's military commissions in *Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (2006). Justice Kennedy wrote, "Trial by military commission raises separation of powers concerns of the highest order. Located within a single branch, these courts carry the risk that offenses will be defined, prosecuted, and adjudicated by executive officials without independent review Concentration of power puts personal liberty in peril of arbitrary action by officials, an incursion the Constitution's three-part system is designed to avoid." *Id.* at 2800 (concurring).

b. You also argued:

"[t]he executive's claim that it could arrest and lock up individuals suspected of terrorist ties without charge, without counsel, without due process, and without any prospect of release until the war on terror is over evaded the rule of law in a war that is supposed to preserve the rule of law."

Do you contend that criminal charges, provision of counsel, and some prospect of release is required by Due Process for foreign terrorists captured on the battlefield and detained outside the United States?

Response: The answer depends on the particular circumstances. For example, the Supreme Court held in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), that a citizen could be detained as an enemy combatant but had been denied an adequate due process opportunity to contest his detention with the prospect of release if the detention was in error. Further, in *Boumediene v. Bush*, 128 S.Ct. 2229 (2008), the Court held that the Guantanamo detainees have a constitutional right to habeas corpus review of their detentions. The United States Court of Appeals for the District of Columbia Circuit recently held in *Al Maqaleh v. Gates* that *Boumediene* does not extend to the Bagram air base in Afghanistan. Cases continue to be litigated on these issues, and I do not think it would be appropriate to comment further as a judicial nominee. If confirmed, I will follow and apply applicable precedent if any such issues come before me.

6. You have written:

"The Bill of Rights does not require constitutionally guaranteed health care, housing, employment or education. Those basic needs are left to our economy and the political process and the legislative and executive branches at the federal, state and local levels to provide. Nonetheless, there is an unmistakable link between our established constitutional values and basic human needs. Freedom of speech is a diminished guarantee to the uneducated, and freedom of one's home from unreasonable searches means nothing to those without a home. As Sen. Harris Wofford of Pennsylvania

recently noted, if an individual accused of crime has a fundamental right to a lawyer, is it not just as important that a sick person have access to a doctor? In this bicentennial year of the first 10 amendments to the Constitution, in addition to all the other compelling reasons for a progressive domestic agenda, the Bill of Rights supplies perhaps the most powerful inspiration of all.”

- a. **Do you believe that courts should read the Constitution as requiring health care, housing, employment and education?**

Response: No. These are matters for the political branches to address as a matter of public policy.

- b. **Another of President Obama’s judicial nominees, Professor Goodwin Liu, has argued that the Fourteenth Amendment guarantee of national citizenship also guarantees all the education and social services that are necessary to participate meaningfully as a citizen. He has said that “the duty of government cannot be reduced to simply providing the basic necessities of life . . . the main pillars of the agenda would include . . . expanded health insurance, child care, transportation subsidies, job training, and a robust earned income tax credit.” Without commenting on what Professor Liu may or may not have meant, please answer whether you agree with his statement.**

Response: I have not read the Constitution as requiring government to provide these benefits. The Supreme Court has not done so. As a judge, I would follow and apply Supreme Court precedent.

7. **You wrote an opinion article challenging a program that would have provided a tax credit for expenditures on tuition, textbooks and transportation on behalf of dependents who do not attend public school. You claimed this initiative likely violated the Establishment Clause and was “vulnerable to a constitutional attack.”**

- a. **Do you believe that any government program that may have some effect of supporting a religious organization violates the Establishment Clause? Please explain your answer.**

Response: No. In fact, in my Senate Judiciary Committee Questionnaire, I describe an Establishment Clause case in which I was involved in defending a federal government program that provided educational benefits to children attending religious schools. The article was intended to explain why a particular proposal might have raised an Establishment Clause concern, and it did not reach a firm conclusion on that question.

- b. What standard would you apply to determine whether the program violated the Establishment Clause? If your answer is that you would follow applicable precedent, please identify such precedents.**

Response: Recent Supreme Court precedents on government programs include *Agostini v. Felton*, 521 U.S. 203 (1997); *Mitchell v. Helms*, 530 U.S. 793 (2000); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). Relevant precedents depend on the particular case. If confirmed, I would follow and apply the applicable Supreme Court cases.

- 8. In your article, *Federal Legislation to Elevate and Enlighten Political Debate: A Letter and Report to the 102d Congress about Constitutional Policy*, you concluded that the Clean Campaign Act of 1989 likely impermissibly burdened free speech and associational rights under the First Amendment. Specifically, you determined that disclosing the identity of the group that was advertising, refusing independent advertisers from political dialogue, and requiring free response time to a political candidate violated the Constitution.**

- a. Do you still adhere to this belief?**

Response: The article does not reach final conclusions on the constitutionality of the legislative proposals that it discussed. As a judicial nominee, it would not be appropriate for me to address the constitutionality of these or other legislative proposals because, if confirmed, I may face these issues as a judge.

- b. What factors do you consider when evaluating the constitutionality of different free speech restrictions?**

Response: The Supreme Court has produced an extensive body of First Amendment free speech case law that addresses different forms of government regulation, speech settings, and remedies. For example, Supreme Court precedent distinguishes between speech regulation that is content-based as opposed to content neutral, between speech that occurs in a public forum as opposed to certain other locations, and between prior restraint remedies as opposed to damages. If confirmed, I would follow and apply the precedent that is applicable to a particular case.

- c. Do you believe that the Supreme Court's decision in *Citizens United v. FEC* was correctly decided? I am asking for your views and not whether if confirmed you would follow Supreme Court precedent.**

Response: I do not think it would be appropriate for me to express an opinion on the correctness of this decision because I may need to apply it in cases that come

before me if I become a judge. I would, as you indicate, follow and apply the *Citizens United* precedent if I am confirmed.

9. **In May 1994, the *Salt Lake Tribune* reported that the number of indictments since you became U.S. Attorney for the District of Utah had “decreased substantially.” The paper reported that from January 1 to April 11, 1993, 225 people were charged in federal court; during the same time period in 1994 (your tenure), only 88 individuals were charged. In February 1996, the *Deseret News* similarly reported that in his first two and half years as U.S. Attorney, you prosecuted a quarter fewer cases than your predecessor. According to the media reports, some federal law enforcement officers complained that you delayed or refused to prosecute certain good cases. Please take this opportunity to comment on those allegations or explain the reasons for the lower rate of prosecutions during your tenure.**

Response: Law enforcement and prosecutorial resources are a major determinant of case filings. When I became U.S. Attorney, budget constraints limited the availability of both law enforcement agents and prosecutors. Also, in the period preceding my appointment, the office had filed a number of complex, multi-defendant telemarketing fraud cases that consumed significant time of AUSA’s as the cases moved to trial over the next year. This factor also distorted the statistical comparison in the article, which was limited to comparing two three-month periods in which different activity was emphasized. The article also failed to mention that a substantial number of cases were filed just after the end of the second three-month period. As my time in the office proceeded, the case filings increased, especially toward the end when more attorney and law enforcement staff became available. During my final year in 1997, the office was on track to reach one of its highest annual case filing rates. As for case filing decisions, we developed a consistent set of prosecution guidelines, followed the U.S. Attorney’s Manual, and, in performing our prosecutor gatekeeping role, filed most cases that were presented to us.

10. **During your 2004 gubernatorial campaign, you opposed a proposed state constitutional amendment that defined marriage as the union between a man and a woman, and stated that no other domestic union may be recognized as a marriage or given the same or substantially equal legal effect.**
- a. **Did you ever express a view on the constitutionality of the measure? If so, what view did you express?**

Response: I do not recall expressing a view on the constitutionality of the measure. The second part provided that “No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equal legal effect.” I was concerned about the possible impact of this part on matters such as hospital visitation and medical decision-making if it became a state constitutional provision, but my opposition was not based on the constitutionality of the measure.

- b. Was your opposition based in any way on the constitutionality of the measure?**

Response: Please see my previous response.

- 11. During your 2004 gubernatorial campaign, you stressed that you would prioritize diversity in your judicial and commission appointments. You stated that**

“[d]iversity would be a factor in my judicial appointments because the bench should reflect the constituencies it serves and also include various viewpoints. I would seek diversity through encouragement of qualified and diverse women and men to apply and by considering diversity among many other factors in making appointment decisions.”

- a. Do you believe an individual’s background should affect the outcome of a judicial decision?**

Response: No.

- b. Why do you think it is important for the judiciary to reflect diversity?**

Response: As with educational, workplace, and other institutional settings, diversity enhances learning and working environments and deepens mutual understanding. It gives hope to individuals of all backgrounds that they and their children can pursue opportunities and develop their full potential. With respect to the judiciary, diversity provides role models for students and young lawyers, breaks down stereotypes about who can be a judge, builds confidence in the community about the system of justice, and sends a message of inclusion and equal opportunity.

- c. How can litigants know that they are being treated fairly if a judge’s background, rather than the application of the law to the facts, affects legal decisions?**

Response: A judge’s role is to adhere to the rule of law, and his or her background should not affect legal decisions or the application of law to fact.

- 12. For your Spring 2010 Constitutional law course, you assigned *Mr. Meese, Meet Mr. Madison*, by Jack N. Rakove, which harshly criticizes the notion of “originalism.” The article states: “[t]here is no reason to believe that the framers thought their intentions should guide later interpretations of the Constitution.”**

a. **Do you agree with this statement?**

Response: No.

b. **How do you believe the Constitution should be interpreted?**

Response: The Constitution should be interpreted through careful reading of the text, an understanding of its structure and history, and application of Supreme Court precedent. A judge should not substitute his or her personal or policy preferences for what the Constitution requires.

c. **During your hearing, you stated that you “don’t see the structure or principles [of the Constitution] changing; [you] see circumstances that have to be confronted as changing.” Please explain whether you believe your statement conforms to or conflicts with the following assertion by Rakove and why:**

“Rather than recover the ‘static meaning’ that the Constitution had ‘in a world that is dead and gone,’ judges must trace the distance between the framers’ time and our own, and then apply the great underlying principles of the Constitution to the modern problems that our litigious society asks the courts to resolve. And while judges should ordinarily defer to the expressed will of the legislature, they cannot make majority rule the only basis of decision. For within the larger scheme of our system the great duty of the judiciary is to protect individual and minority rights against improper actions by popular majorities.”

Response: Whether or not the statements can be reconciled, my view is that courts are presented with cases today about issues that the Framers did not and could not have anticipated, but, as I said at my hearing, the structure of the Constitution and the principles it embodies do not change. The challenge is to apply the Constitution to modern problems consistent with those principles.

I mentioned at my hearing Justice Scalia’s response in *District of Columbia v. Heller* to the claim that only arms that existed in the eighteenth century are protected by the Second Amendment: “We do not interpret constitutional rights that way. Just as the First Amendment protects modern forms of communications, and the Fourth Amendment applies to modern forms of search, the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.” 178 S.Ct. at 2791 (citations omitted).

- d. Do you believe “judges must trace the distance between the framers’ time and our own, and then apply the great underlying principles of the Constitution to the modern problems that our litigious society asks the courts to resolve”?**

Response: Please see my previous response.

- e. Do you believe that the notion of “originalism” is inherently flawed?**

Response: No. I think the original understanding of the Constitution is an important and legitimate source for constitutional interpretation.

- 13. Please describe with particularity the process by which these questions were answered.**

Response: I prepared draft responses. The White House Counsel’s Office reviewed them. I then completed the final responses.

- 14. Do these answers reflect your true and personal views?**

Response: Yes.

**Responses of Scott M. Matheson, Jr.
Nominee to be United States Circuit Judge for the Tenth Circuit
to the Written Questions of Senator Grassley**

1. During the 2008 presidential campaign, President Obama described the kind of judge that he would nominate to the federal bench as follows: “We need somebody who’s got the heart, the empathy, to recognize what it’s like to be a young teenage mom. The empathy to understand what it’s like to be poor, or African-American, or gay, or disabled, or old. And that’s the criteria by which I’m going to be selecting my judges.”

a. Without commenting on what President Obama may or may not have meant by this statement, do you believe that you fit the President’s criteria for federal judges, as described in this quote?

Response: When the President nominated me on March 3, 2010, he made the following statement: “Scott Matheson is a distinguished candidate for the Tenth Circuit court. Both his legal and academic credentials are impressive and his commitment to judicial integrity is unwavering. I am honored to nominate this lifelong Utahn to the federal bench.” I do not have further information on the basis for his decision, but I am honored that he believes I am qualified to serve. I hope my experience, training, and background will meet both the President’s and the Senate’s standards for this appointment.

b. During her confirmation hearing, Justice Sotomayor rejected this so-called “empathy standard” stating, “We apply the law to facts. We don’t apply feelings to facts.” Do you agree with Justice Sotomayor?

Response: Yes.

c. Do you believe that it is ever appropriate for judges to indulge their own subjective sense of empathy in determining what the Constitution and the laws mean? If so, under what circumstances?

Response: No.

d. Do you believe that it is ever appropriate for judges to indulge their empathy for particular groups or certain people? For example, do you believe that it is appropriate for judges to favor those who are poor? Do you believe that it is appropriate for judges to disfavor corporations?

Response: No to all three questions.

e. After Justice Stevens announced his retirement, President Obama stated that he would select a Supreme Court nominee with “a keen understanding of

how the law affects the daily lives of the American people.” Do you believe that judges should base their decisions on a desired outcome?

Response: No.

2. What, in your view, is the role of a judge? Please describe your judicial philosophy.

Response: The role of a judge is to decide cases within the court’s jurisdiction based on the law and the facts. A judge must be committed to the rule of law, apply the law impartially, follow procedural fairness, and approach each case with an open mind. A judge should be deferential to the other branches of government, and a federal appeals court judge should follow Supreme Court precedent. A judge should not substitute his or her personal or policy views for the law in deciding cases.

3. How do you define “judicial activism”?

Response: Judicial activism can include a judge acting beyond the court’s jurisdiction, applying personal or policy preferences instead of the law, relying on facts outside the record, according insufficient deference to the legislative or executive branches, or basing decisions on considerations other than the applicable constitutional, statutory, or regulatory provisions or case law precedent.

4. Could you identify three recent Supreme Court cases that you believe are examples of “judicial activism”? Please explain why you believe these cases are examples of “judicial activism”.

Response: It would not be appropriate for me to attempt to identify recent decisions as examples of “judicial activism” that I, if confirmed as a judge, may need to apply as Supreme Court precedent.

5. How do you define “judicial restraint”?

Response: A judge exercises judicial restraint by deciding cases within the constraints of the court’s jurisdiction, the applicable law and facts, the precedents established by the U.S. Supreme Court and, for the court to which I have been nominated, the precedents of the U.S. Court of Appeals for the Tenth Circuit. A judge also exercises judicial restraint by deciding only those issues that are necessary to resolve the case before the court.

6. Could you identify three recent Supreme Court cases that you believe are examples of “judicial restraint”? Please explain why you believe these cases are examples of “judicial restraint”.

Response: It would not be appropriate for me to attempt to identify recent decisions as examples of “judicial restraint” that I, if confirmed as a judge, may need to apply as Supreme Court precedent.

- 7. Do you believe that it is ever appropriate for judges to indulge their own values and/or policy preferences in determining what the Constitution and the laws mean? If so, under what circumstances?**

Response: No.

- 8. Should the courts, rather than the elected branches of government, ever take the lead in creating a more “just” society?**

Response: Debate over what constitutes a “just society” and decisions on what policies should be adopted to achieve it are the province of the elected branches of government, and courts should respect those policy choices. Courts have a limited but important constitutional role in protecting individual rights and liberties from government infringement in particular cases and in applying the law fairly and impartially in all cases. Federal courts should decide only those matters that present a justiciable case or controversy under Article III of the Constitution.

- 9. In your opinion, what is the proper role of foreign law in U.S. court decisions, and is citation to or reliance on foreign law ever appropriate when interpreting the U.S. Constitution and statutes?**

Response: Foreign law should not have a binding effect on and should not influence a judge’s interpretation and application of U.S. law.

- 10. Does the silence of the U.S. Constitution on a legal issue allow a federal court to use foreign law as an authority for judicial decision-making? When is it not appropriate to look to foreign law for legal guidance or legal authority?**

Response: No. Please see my previous response.

- 11. I would like to get a better understanding of how you would interpret statutes and what your judicial method would be if you were confirmed to be a judge on the Tenth Circuit.**

- a. In cases involving a close question of law, what would you look to when determining which way to rule?**

Response: I would carefully study the text, history, and case law precedent regarding the applicable legal authorities and would accord deference to choices made by the democratically accountable branches.

- b. Would you agree that the meaning of a statute is to be ascertained according to the understanding of the law when it was enacted?**

Response: Yes.

- c. How would you use legislative history when interpreting a statute? What kind of weight would you give legislative history, if any, when interpreting a statute?**

Response: The starting point for interpreting a statute is the text. The plain meaning of the words of the statute should govern. If the text is not clear as applied to a particular case, the legislative history may assist in understanding legislative intent and how the statute should apply, but a judge must be careful to understand the legislative record objectively and avoid reliance on legislative history to reach a preferred result.

**Responses of Scott M. Matheson, Jr.
Nominee to be United States Circuit Judge for the Tenth Circuit
to the Written Questions of Senator Jon Kyl**

1. **At your hearing, Senator Cardin said that in your book, *Presidential Constitutionalism in Perilous Times*, “you analyze presidents, as I understand it, Lincoln, Wilson, Franklin Roosevelt, Truman and George W. Bush. That was all three that you were -- all five, I guess, that you were comparing.” You testified that your book “is . . . about several presidents that faced security and liberty interests in times of war and national security threat.” However, you devoted one chapter, “Presidents and Constitutionalism” (51 pages) to four presidencies – Lincoln, Wilson, FDR and Truman – and one chapter, “George W. Bush and Constitutionalism” (63 pages) solely to the Bush administration. Do you maintain that your book was a balanced discussion of all five presidents mentioned therein?**

Response: More pages were devoted to President Bush because of the contemporary interest in his administration’s executive power claims and practices. The book provides a critical analysis of all five presidents on how they handled security and liberty issues during wartime.

2. **Please provide examples of instances in which you believe that Bush administration lacked “a constitutional conscientiousness.”**

Response: My book concentrates on three examples: coercive interrogation, electronic surveillance, and detention.

3. **At your hearing, I asked you whether you agreed with a statement in *Keeping Faith with the Constitution*, which was co-authored by Professor Pamela Karlan, who also co-authored the case book that you assigned for your Spring 2010 Constitutional law class. In *Keeping Faith with the Constitution*, Professor Karlan wrote:**

“interpreting the Constitution . . . requires adaptation of its broad principles to the conditions and challenges faced by successive generations. The question . . . is not how the Constitution would have been applied at the founding, but rather how it should be applied today . . . in light of changing needs, conditions, and understandings of our society.”

As part of your answer, you stated: “I suppose my initial reaction to it is that I understand what changed circumstances are, but I’m not sure I understand what a changed need is.”

In a 1987 speech at the March of Dimes Constitutional Ball you stated:

“We have come to recognize that part of the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone,

but in the adaptability of its great principles to cope with current problems and current needs.”

- a. **Given your statements in 1987, please take this opportunity to clarify your statement from the hearing regarding “what a changed need is.”**

Response: I still am not sure what a “changed need” or “changing need” is as that phrase is used in the book, and, accordingly, continue to be reluctant to agree with the passage.

- b. **Please explain what you meant by your statement from the March of Dimes speech regarding “current problems and current needs.”**

Response: That was twenty-three years ago, but I hope I meant something similar to what I said at the hearing, which stated my position after many years of studying constitutional law. My view is that courts are presented with cases today about issues that the Framers did not and could not have anticipated, but, as I said at the hearing, the structure of the Constitution and the principles it embodies do not change. The challenge is to apply the Constitution to modern issues consistent with those principles.

I mentioned at my hearing Justice Scalia’s response in *District of Columbia v. Heller* to the claim that only arms that existed in the eighteenth century are protected by the Second Amendment: “We do not interpret constitutional rights that way. Just as the First Amendment protects modern forms of communications, and the Fourth Amendment applies to modern forms of search, the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.” 128 S.Ct. at 2791 (citations omitted).

4. **On page 134 of your book *Presidential Constitutionalism in Perilous Times*, you write, “[w]hen President Bush issued his November 13, 2001, military commission order, he claimed lawmaking, adjudicating, and prosecuting authority, conflating separation of powers under the Commander-in-Chief mantle. . . . Historically, this ‘blending of executive, legislative, and judicial powers in one person or even in one branch of the government is ordinarily regarded as the very acme of absolutism.’”**

In contrast to your description, Harvard law professor Jack Goldsmith provided the following description of the November 13, 2001 military commissions order on page 109 of his book *The Terror Presidency*:

“Military commissions were used extensively in World War II, the Spanish-American War, the Civil War, the War of 1812, and the Revolutionary War. Relying on legal advice provided by Patrick

Philbin in OLC, Bush’s military commission order was modeled on Roosevelt’s order creating the commission that tried eight Nazi saboteurs. The Supreme Court had unanimously approved the commission trial of the out-of-uniform Nazis, which included one American. This was a powerful precedent for trying out-of-uniform alien enemy fighters in a military commission on Guantanamo. ‘We relied on the same language in FDR’s order, the same congressional statute that FDR did, and we had a unanimous Supreme Court decision on point,’ Brad Berenson, a White House lawyer who worked on the commission in the fall of 2002, later told me.”

- a. Do you agree with Jack Goldsmith’s description of the precedent for the November 13, 2001 military commission order? If not, please explain.**

Response: I have no reason to question that the OLC relied on these examples, and I mention in my book (page 130) that the order tracked President Roosevelt’s 1942 proclamation.

- b. Was it improper for Bush Administration legal advisors to rely upon previous executive and Supreme Court precedent to craft the November 13, 2001 military commission order?**

Response: There has been much debate about whether the history and precedent relied upon was sufficient to support the military commissions. The Supreme Court decided in *Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (2006), that it was not.

- c. Given that President Bush’s November 13, 2001 military commission order was modeled on the similar order issued by President Roosevelt during World War II, do you believe President Roosevelt was also acting at “the very acme of absolutism” when he created a similar military commission system?**

Response: Both orders were significant exercises of executive power, and they arose in different circumstances. The *Hamdan* Court distinguished *Ex Parte Quirin*, 317 U.S. 1 (1942), which upheld President Roosevelt’s military commission for the eight German saboteurs, from President Bush’s military commissions.

- d. Do you believe that any provision of the Military Commissions Act is unconstitutional? If so, please explain.**

Response: The Supreme Court’s decision in *Boumediene v. Bush*, 128 S.Ct. 2229 (2008), addressed constitutional issues regarding the availability of habeas corpus

review for the Guantanamo detainees under the Military Commissions Act and the Detainee Treatment Act. If confirmed, I would follow the *Boumediene* precedent.

- e. **At any time, have you expressed a view that any provision of the Military Commissions Act is unconstitutional?**

Response: My book discusses the *Boumediene* decision but does not otherwise express such a view.

5. **Before they were hired as deputies within the Office of Legal Counsel, then-Professors Marty Lederman and David Barron published two law review articles in the *Harvard Law Review* in January 2008 in which they questioned the exclusivity of the President’s Commander-in-Chief powers relative to the legislature. In their articles, they expressly reject as “unwarranted” the “view expressed by most contemporary war scholars – namely that our constitutional tradition has long established that the Commander in Chief enjoys substantive powers that are preclusive of congressional control, especially with respect to the command of forces and the conduct of [military] campaigns[.]”**

- a. **As an academic, do you share the views of Mr. Barron and Mr. Lederman regarding the limited power of the Executive Branch in wartime?**

Response: My recollection is their articles focused on the “lowest ebb” category of Justice Jackson’s *Youngstown* analysis of executive authority and that they did not find substantial historical evidence or Supreme Court precedent for executive power to exceed congressional limits. My views on executive power are set forth in my book and in the following responses.

- b. **As an academic, do you agree with Mr. Barron and Mr. Lederman’s rejection of “the argument that tactical matters [in wartime] are for the President alone[?]”**

Response: Their article states that “the evidence of original understanding . . . accords . . . with the conclusion that the Founders contemplated congressional control of military operations, and betrays little evidence of a consensus assumption that tactical matters were reserved for the President alone.” 121 Harv. L. Rev. at 1106.

I think there are probably some limits on Congress in this area. My book explains that whether or not the legislative and judicial branches are active participants on national security and liberty issues, “significant executive prerogative will remain.” Page 5. “The analysis offered here reaffirms the primacy of the executive in responding to threats.” Page 2. “Because the executive is designed

to act more promptly and decisively on national security matters than Congress or the courts, the President occupies a constitutionally strategic position to determine the security and liberty balance.” Page 158.

c. Do you believe Congress has the constitutional authority to prescribe legislatively the military’s tactics during wartime?

Response: I think there are probably some limits on Congress depending on the circumstances. For example, I wrote in my book, “In the President’s role as Commander in Chief, congressional attempts to direct particular battlefield operations or to appoint military officials outside the chain of command arguably would interfere with constitutional executive authority.” Page 158.

d. Setting aside the constitutional considerations, do you believe Congress has the ability – both in terms of information and nimbleness – to legislate tactics during a military campaign?

Response: I think there are practical limits on Congress’s ability. Please see my response to 5.b. above.

e. Do you believe the President has any meaningful authority to act contrary to congressional authorization under the formula articulated by Justice Jackson in his *Youngstown Steel*? Put another way, do you believe there are any types of actions the President may take at the so-called “lowest ebb”? If so, please describe them and your views in this area.

Response: The *Youngstown* category of “lowest ebb” describes the President’s authority when Congress has legislated to limit or prevent executive action. Justice Jackson contemplated that the President may nonetheless have authority to act in that circumstance: “When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.” 343 U.S. at 637.

Justice Jackson’s *Youngstown* analysis was recently reaffirmed in *Hamdan* as leading precedent on executive and separation of powers questions. As a judicial nominee, I do not think it is appropriate for me to attempt to specify what the “lowest ebb” powers may be, but, if confirmed, I would follow *Youngstown* and other relevant precedents.

6. In your view, to what extent does the Fourth Amendment’s warrant requirement apply to surveillance activities directed toward non-U.S. persons overseas?

Response: Although my book raised general Fourth Amendment concerns about President Bush's warrantless wiretapping program without reaching a final conclusion, I do not think it would be appropriate to express a view on this specific question as a judicial nominee because this or a similar issue may come before me if I am confirmed.

7. **To what extent do you believe the Fourth Amendment's warrant requirement applies to overseas surveillance designed to secure foreign intelligence and other national security information, including when non-U.S. persons subject to surveillance communicate with U.S. citizens in the United States?**

Response: I do not think it would be appropriate to express a view on this specific question as a judicial nominee because this or a similar issue may come before me if I am confirmed.

8. **Do you believe that any provision of the FISA Amendments Act of 2008 is unconstitutional?**

Response: I do not think it would be appropriate to express a view on this specific question as a judicial nominee because this or a similar issue may come before me if I am confirmed.

9. **At any time, have you expressed a view that any provision of the FISA Amendments Act of 2008 is unconstitutional?**

Response: I do not recall expressing such a view. I provide a brief description of the Act in my book.

10. **At page 104 of your book, you write: "In the case of torture during the Bush administration, it is highly unlikely that any form of retroactive judgment will condone its executive power coercive interrogation claims or activities."**

- a. **What was "the case of torture" during the Bush administration?**

Response: This phrase was not a reference to any particular case and would have been clearer if it had said "With respect to torture."

- b. **Please explain what you mean by "any form of retroactive judgment."**

Response: The book uses several analytical frameworks, including "retroactive judgment." It describes the Congress giving after-the-fact approval to unilateral presidential action. The passage suggests that Congress is unlikely, through

legislation, to approve certain coercive interrogation claims or practices that occurred during the Bush administration.

- c. **In this context, under what circumstances do you believe it appropriate for government lawyers to be prosecuted?**

Response: I would leave that question to the judgment of the Department of Justice.

**Responses of Scott M. Matheson, Jr.
Nominee to be United States Circuit Judge for the Tenth Circuit
to the Written Questions of Senator Tom Coburn, M.D.**

1. During your campaign for Governor of Utah, you said in a public debate that you would oppose allowing law-abiding citizens who held concealed carry licenses from taking concealed handguns into schools and churches.

a. Do you personally agree with the Supreme Court’s decision in *District of Columbia v. Heller* that the Second Amendment protects an individual’s right to keep and bear arms?

Response: I agree, based on the Supreme Court’s decision in *Heller*, that the Second Amendment protects an individual right to keep and bear arms. If confirmed, I will follow and apply that holding.

b. Do you believe that holding would have any effect on laws that restrict the places a duly-licensed person can possess a firearm?

Response: In his majority opinion in *Heller*, Justice Scalia wrote that “nothing in our opinion should 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 laws imposing conditions and qualifications on the commercial sale of arms.” 128 S.Ct. at 2816-17. However, the specific issue raised in your question was not before the Court in *Heller*. As a judge, I would keep an open mind on any such issue and follow applicable precedent.

2. In a 5-4 majority opinion, the U.S. Supreme Court recently held in *District of Columbia v. Heller*, 554 U.S. ___ (2008), that the Second Amendment of the United States Constitution “protects an individual right to possess a firearm unconnected to service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home.” As Justice Scalia’s opinion in *Heller* pointed out, Sir William Blackstone, the preeminent authority on English law for the Founders, cited the right to bear arms as one of the fundamental rights of Englishmen. Do you personally believe the right to bear arms is a fundamental right?

Response: The Supreme Court will decide this issue in *McDonald v. City of Chicago* in the next few weeks. If confirmed, I will follow and apply that holding.

a. Do you believe that explicitly guaranteed substantive rights, such as those guaranteed in the Bill of Rights, are also fundamental rights? Please explain why or why not.

Response: The Supreme Court has recognized that almost all of the rights enumerated in the Bill of Rights are applicable to the states through the Due Process Clause of the Fourteenth Amendment and are fundamental rights.

- b. Is it your understanding of Supreme Court precedent that those provisions of the Bill of Rights that embody fundamental rights are deemed to apply against the States? Please explain why or why not.**

Response: Please see my previous response.

- c. *Heller* further stated that “it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right.” Do you believe that the Second Amendment, like the First and Fourth Amendments, codified a pre-existing right? Please explain why or why not.**

Response: This statement in Justice Scalia’s majority opinion in *Heller* is based on the Supreme Court’s historical analysis of the period leading to the ratification of the Second Amendment. The conclusion that the Second Amendment codified a pre-existing right stands as Supreme Court precedent, which I would follow as a judge.

- d. Some have criticized the Supreme Court’s decision in *Heller* saying it “discovered a constitutional right to own guns that the Court had not previously noticed in 220 years.” Do you believe that *Heller* “discovered” a new right, or merely applied a fair reading of the plain text of the Second Amendment?**

Response: As noted in the previous response, the Supreme Court did not “discover” a new right in *Heller*. The *Heller* case was the Court’s first opportunity to address the meaning of the Second Amendment at length. Through a textual and historical analysis, the Court held there is an individual right to keep and bear arms under the Second Amendment.

- 3. While running for governor, you stated that a 2004 Utah ban on late-term abortions should include an exception for fatally deformed fetuses. Can you please explain what you meant by that statement?**

Response: The *Deseret Morning News* candidate questionnaire asked the following question: “As we saw recently, a family had to seek an abortion for a severely deformed fetus (which could not survive outside the womb) from a clinic because her hospital refused to perform the late-term abortion because a law passed by the 2004 Legislature restricts funding for entities that perform abortions. The new law doesn’t make allowances for the health of the fetus or the mother. In light of these problems, do you still favor or still oppose the new law? If oppose, how should the law be changed?”

My response to this question was as follows: “When this bill was being debated, my running mate, Sen. Karen Hale, proposed an amendment that would have provided an exception for fetuses known by competent medical authority to have fatal defects. As the author of the original bill acknowledged, the bill should permit an exception for fatally deformed fetuses.”

My Republican opponent, Jon Huntsman, Jr., took the same position in answer to the same questionnaire. He supported “changes to include abortion for fatal fetal abnormalities” as an “appropriate remedy [for] the concerns raised by the current law.”

a. How do you define “fatally deformed fetuses”?

Response: The definition contained in the question: a severely deformed fetus that could not survive outside the womb, as determined by competent medical authority.

b. Please explain how such an exception would comply with the federal Partial Birth Abortion Ban?

Response: If confirmed and if presented with this issue as a judge, I would closely examine the text of the state and federal statutes as well as the factual record, and I would apply the applicable law and Supreme Court and Tenth Circuit precedents to the case.

4. What principles of constitutional interpretation would you look to in analyzing whether a particular statute infringes upon some individual right?

Response: Whether a statute infringes an individual right depends on proper understanding of both the statute and the Constitution. The starting point is the text of the statute and the plain meaning of its words. If the text is not clear, the next step is examination of the legislative history to determine legislative intent. Case law precedent interpreting and applying the statute should be considered. The constitutional analysis calls for careful consideration of the relevant textual provision, history, and case precedent. This legal analysis would be applied to the factual record in the case. I would follow Supreme Court precedent for principles of constitutional interpretation.

5. Please describe in your own words the criteria and legal methodology the Supreme Court employs to determine whether a right is a “fundamental right?”

Response: The Supreme Court in a series of decisions has determined whether individual rights, including the rights enumerated in the Bill of Rights, are incorporated and protected under the Due Process Clause of the Fourteenth Amendment. In *Duncan v. Louisiana*, the Supreme Court summarized the criteria for deciding whether a provision of the Bill of Rights is incorporated: “The question has been asked whether a right is among those ‘fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,’ whether it is ‘basic in our system of jurisprudence,’ and whether it is a ‘fundamental right, essential to a fair trial.’” 391 U.S. 145, 148-49 (1968) (citations omitted). The Court will address the criteria and legal methodology again in *McDonald v. City of Chicago* in the next few weeks. If confirmed, I would follow and apply the Court’s precedents.

6. **Some people refer to the Constitution as a “living” document that is constantly evolving as society interprets it. Do you agree with this perspective of constitutional interpretation?**

Response: No. The Constitution established the structure and powers of the federal government, the relationship between the federal and state governments, and principles regarding the relationship between the government and individuals. It can be changed only through the constitutional amendment process. The Framers meant the Constitution to endure and to apply to changing circumstances, but not to evolve “as society interprets it.”

7. **Since at least the 1930s, the Supreme Court has expansively interpreted Congress’ power under the Commerce Clause. Recently, however, in the cases of *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000), the Supreme Court has imposed some limits on that power.**

- a. **Do you believe *Lopez* and *Morrison* consistent with the Supreme Court’s earlier Commerce Clause decisions?**

Response: Yes. The Supreme Court in *Lopez* and *Morrison* discussed earlier Commerce Clause decisions and did not overturn them.

- b. **Why or why not?**

Response: The Constitution conferred enumerated powers on the federal government. As an enumerated power, the Commerce Clause both authorizes Congress to act but also limits what Congress can do. The *Lopez* and *Morrison* decisions reaffirmed the principle of limits on enumerated powers.

8. **In *Roper v. Simmons*, 543 U.S. 551 (2005), Justice Kennedy relied in part on the “evolving standards of decency” to hold that capital punishment for any murderer under age 18 was unconstitutional. I understand that the Supreme Court has ruled on this matter, but do you agree with Justice Kennedy’s analysis?**

Response: As a judge, I would be bound to follow and apply the holding in *Roper* whether or not I agree with it.

- a. **How would you determine what the evolving standards of decency are?**

Response: I would follow Supreme Court precedent and apply the analysis that the Court has held should be applied.

- b. **Do you think that a judge could ever find that the “evolving standards of decency” dictated that the death penalty is unconstitutional in all cases?**

Response: The Supreme Court has held that the death penalty is constitutional as a general matter. If confirmed, I would follow and apply that precedent.

c. What factors do you believe would be relevant to the judge's analysis?

Response: I would follow Supreme Court precedent to determine the relevant factors.

9. In your view, is it ever proper for judges to rely on contemporary foreign or international laws or decisions in determining the meaning of the Constitution?

Response: No.

a. If so, under what circumstances would you consider foreign law when interpreting the Constitution?

Response: Please see my previous response.

b. Do you believe foreign nations have ideas and solutions to legal problems that could contribute to the proper interpretation of our laws?

Response: Foreign law should not have a binding effect on and should not influence a judge's interpretation and application of U.S. law.

c. Would you consider foreign law when interpreting the Eighth Amendment? Other amendments?

Response: No.