Senator Grassley
Questions for the Record

Suzanne Mitchell
Nominee, U.S. District Judge for the Western District of Oklahoma

1. In 2007 you were a contributing author to Judge Friot's paper before a law and policy conference in which he discussed the social and economic rights located within the Constitution. In his paper, he concludes:

"[A]lthough some may say the U.S. Constitution lacks affirmative social and economic rights, such a statement is far from true . . . [t]he Constitution was deliberately designed [not to overlook] the social and economic and moral obligations to guide public policy to satisfy the many dimensions of human well-being. Many foreign constitutions contain explicit positive rights . . . American constitutional law differs, on its face . . . [h]owever, the history of the U.S. Constitution, which empowers an independent judiciary with the authority of interpretation, has proven to be a system that many other nations have emulated."

a. Please explain the sentiment behind this statement.

Response: Judge Stephen P. Friot, a U.S. District Judge in the Western District of Oklahoma, who has served since September 2001, was the primary author of this paper. At the time he wrote it, I was serving as a career law clerk to another judge. Judge Friot served as the host judge welcoming various foreign delegations to our court, and I voluntarily provided programming assistance. In conjunction with such efforts, he asked me to conduct research for this paper.

My read of this excerpt is that Judge Friot intended to convey his opinion about the differences between how the U.S. Constitution approaches various rights and how other democracies approach rights in their constitutions or other governing documents.

b. In your belief, do federal judges protect positive rights under the U.S. Constitution?

Response: I am not aware of a uniformly accepted definition of the term "positive rights." The role of federal judges is to apply binding precedent to constitutional or statutory questions that come before them.

2. What is the most important attribute of a judge, and do you possess it?

Response: The most important attribute of a judge is integrity, which necessitates a scrupulous adherence to the rule of law. This requires the ability to apply the law to the

facts, without regard to one's personal opinions. I believe my record as a U.S. Magistrate Judge demonstrates that I possess such integrity.

3. Please explain your view of the appropriate temperament of a judge. What elements of judicial temperament do you consider the most important, and do you meet that standard?

Response: An appropriate temperament of a judge requires impartiality, intelligence, patience, industriousness, ability to control the courtroom, and a strong sense of humility. Of these, I believe humility – understanding one's role as a public servant, meting out justice impartially to all those who appear before the court, and listening and understanding the arguments the parties raise – is the most important. I believe my record as a U.S. Magistrate Judge demonstrates that I possess the appropriate temperament of a judge.

4. In general, Supreme Court precedents are binding on all lower federal courts and Circuit Court precedents are binding on the district courts within the particular circuit. Please describe your commitment to following the precedents of higher courts faithfully and giving them full force and effect, even if you personally disagree with such precedents?

Response: As a U.S. Magistrate Judge, I have always followed binding precedent, regardless of any personal opinion. If confirmed to serve as a federal district judge, I will continue to do so.

5. At times, judges are faced with cases of first impression. If there were no controlling precedent that was dispositive on an issue with which you were presented, to what sources would you turn for persuasive authority? What principles will guide you, or what methods will you employ, in deciding cases of first impression?

Response: I would first consider the text and structure of the constitutional provision, statute, or regulation. If the language is clear, I would follow its plain meaning. If the language is ambiguous, I would follow the other canons of statutory interpretation prescribed by the Supreme Court. I would also carefully consider what other courts, in decisions not binding on the Tenth Circuit, have said about the issue for their persuasive value, as well as precedents on closely related issues.

6. What would you do if you believed the Supreme Court or the Court of Appeals had seriously erred in rendering a decision? Would you apply that decision or would you use your best judgment of the merits to decide the case?

Response: As a U.S. Magistrate Judge, I have always followed binding precedent, regardless of any personal opinion as to whether I believe a court "erred." If confirmed to serve as a federal district judge, I will continue to do so.

7. Under what circumstances do you believe it appropriate for a federal court to declare a statute enacted by Congress unconstitutional?

Response: Statutes are presumed to be constitutional. That said, a federal court must declare a statute unconstitutional if it exceeds Congress's constitutional authority or if it encroaches upon constitutional rights. If the constitutionality of a statute is squarely before a federal court in a justiciable action, and when a court cannot, applying the canon of constitutional avoidance, read the statute so as to avoid the constitutional defect through another avenue, it must declare the statute unconstitutional.

8. In your view, is it ever proper for judges to rely on foreign law, or the views of the "world community", in determining the meaning of the Constitution? Please explain.

Response: No.

9. What assurances or evidence can you give this Committee that, if confirmed, your decisions will remain grounded in precedent and the text of the law rather than any underlying political ideology or motivation?

Response: Political ideology or motivation should play no part in a federal judge's decision-making process. My reputation as a U.S. Magistrate Judge establishes a faithful application of binding precedent and the text of the law. A judge has a solemn responsibility to adhere to the rule of law, and my record demonstrates just that.

10. What assurances or evidence can you give the Committee and future litigants that you will put aside any personal views and be fair to all who appear before you, if confirmed?

Response: In my three plus years as a U.S. Magistrate Judge, I have taken great care to put aside any personal view and to handle each case litigant with an overarching adherence to the rule of law. As an Assistant United States Attorney, I zealously represented the United States of America without regard to my personal views. And I particularly appreciated well-prepared jurists who took the time to understand the factual, legal, and procedural nuances of each case. If I am confirmed, I will continue to put aside any personal opinions and decide any matters that come before me based solely upon the application of the controlling law as applied to the facts. I will also continue to treat each party appearing before me with respect and fairness.

11. If confirmed, how do you intend to manage your caseload?

Response: As a U.S. Magistrate Judge, I take an active role in justly, efficiently, and effectively managing my docket, through scheduling conferences and close adherence to the Federal Rules of Civil Procedure. If confirmed, I will continue to utilize case management schedules and our court's internal monitoring system to actively develop and adhere to reasonable but firm deadlines. As to priority, the Speedy Trial Act requires

criminal cases receive higher priority. In addition, those cases seeking some forms of injunctive and/or declaratory relief may require priority. I would also delegate matters to magistrate judges to the full extent of their authority under 28 U.S.C. § 636.

12. Do you believe that judges have a role in controlling the pace and conduct of litigation and, if confirmed, what specific steps would you take to control your docket?

Response: I believe judges play a crucial role in moving cases along fairly and efficiently. If confirmed as a federal district judge, I will take the steps outlined in Question 11.

13. As a judge, you have experience deciding cases and writing opinions. Please describe how you reach a decision in cases that come before you and to what sources of information you look for guidance.

Response: As a U.S. Magistrate Judge, I carefully review the pleadings and case law to confirm the case is a justiciable one that is properly before the Court. If so, I thoroughly examine the claims, arguments, and defenses presented and develop a comprehensive knowledge of the factual record and the legal arguments. I weigh the arguments of all sides and consider the evidence of record. I will engage in questioning witnesses if questions remain unanswered, giving each side an opportunity to weigh in when I have completed my questions. I will complete any additional legal research the case may require, paying close attention to the Constitution, relevant statutes or regulations, and binding U.S. Supreme Court and Tenth Circuit precedent. Then I fairly and impartially apply the law to the facts in reaching my decision.

14. President Obama said that deciding the "truly difficult" cases requires applying "one's deepest values, one's core concerns, one's broader perspectives on how the world works, and the depth and breadth of one's empathy . . . the critical ingredient is supplied by what is in the judge's heart." While you may not be familiar with the context of this statement, do you agree with the statement?

Response: As a U.S. Magistrate Judge, I decide cases based on binding precedent, not based on any personal feelings about the issues in the case or the litigants or the issues.

15. Please describe with particularity the process by which these questions were answered.

Response: I received the questions on April 28, 2016, via email from the Office of Legal Policy of the Department of Justice. I prepared my responses and submitted my draft responses on May 2, 2016, to the Office of Legal Policy for review and comment. After finalizing my answers, on May 6, 2016, I submitted them to the Office of Legal Policy and authorized their submission on my behalf.

16. Do these answers reflect your true and personal views?

Response: Yes.

Questions for Judicial Nominees
Senator Ted Cruz

Suzanne Mitchell
Nominee, U.S. District Judge for the Western District of Oklahoma

Judicial Philosophy

1. Describe how you would characterize your judicial philosophy.

Response: I would characterize my judicial philosophy as one of ensuring that the parties receive a full and fair hearing of all of their claims. I approach the rule of law as a solemn responsibility and my approach is systematic. After ensuring the case is properly before the court, I begin with the plain fair language of the statute or constitutional provision before me. That is most often where I end. If needed, I will look to the principles of statutory construction and other guiding legal principles, and arrive in good faith to an outcome that I believe to be directed by the law. It is a process of reasoning and arriving at a conclusion that is in accordance with the principles of law.

2. How does a responsible judge interpret constitutional provisions, such as due process or equal protection, without imparting his own values to these provisions?

Response: A judge should not allow one's personal opinions to overcome one's commitment to the rule of law. The application of binding precedent ensures predictability, stability, and an even-handed application of the law. If I am fortunate enough to be confirmed, I will continue to adhere to binding precedent from the Supreme Court and the Tenth Circuit with respect to constitutional provisions.

3. With the assumption that you will apply all the law announced by the Supreme Court, please name a Warren Court, Burger Court, and Rehnquist Court precedent that you believe was wrongly decided—but would nevertheless faithfully apply as a lower court judge. Why do you believe these precedents were wrongly decided?

Response: Under the Code of Conduct for United States Judges, Canon 2, as

a sitting judge, it would be inappropriate for me to opine on "wrongly decided" binding precedent.

4. Which sitting Supreme Court Justice do you most want to emulate?

Response: Each sitting Supreme Court Justice demonstrates an exemplary dedication to public service and is exceedingly qualified for his or her position. As a sitting judge and nominee for an Article III judgeship, it would be inappropriate for me to select a sitting Supreme Court Justice I would most want to emulate. I have personally been inspired and mentored by several judges from the U.S. Court of Appeals for the Tenth Circuit and in the Western District of Oklahoma, and strive to emulate their dedication to upholding the rule of law.

5. Do you believe originalism should be used to interpret the Constitution? If so, how and in what form (i.e., original intent, original public meaning, other)?

Response: If confirmed, I will continue to adhere to Supreme Court and Tenth Circuit precedent, and will use the methodologies utilized in those courts to interpret the Constitution. For example, in *District of Columbia v. Heller*, 554 U.S. 70 (2008), the Supreme Court interpreted the Second Amendment based on its ordinary public meaning of words as they were understood at the time of ratification. If I am fortunate enough to be confirmed, I will continue to adhere to Supreme Court and Tenth Circuit precedent.

6. What role, if any, should the constitutional rulings and doctrines of foreign courts and international tribunals play in the interpretation of our Constitution and laws?

Response: The constitutional rulings and doctrines of foreign courts and international tribunals should play no role in the interpretation of our Constitution and laws.

7. What are your views about the role of federal courts in administering institutions such as prisons, hospitals, and schools?

Response: If confirmed I will continue to adhere to Supreme Court and Tenth Circuit precedent. With regard to prisons, the Tenth Circuit has stated

"any assessment [of whether a prison placement decision implicates a liberty interest] must be mindful of the primary management role of prison officials who should be free from second-guessing or micro-management from the federal courts." *Estate of DiMarco v. Wyo. Dep't of Corr.*, 473 F.3d 1334, 1342 (10th Cir. 2007) (citation omitted); *see also Lowe v. Indep. Sch. Dist. No. 1 of Logan Cty.*, 363 F. App'x 548, 557 n.6 (10th Cir. 2010) (same, as to schools) (quoting *Estate of DiMarco*, 473 F.3d at 1342).

8. What are your views on the theory of a living Constitution, and is there any conflict between the theory of a living Constitution and the doctrine of judicial restraint?

Response: To the extent the theory of a living Constitution encompasses courts changing the words or meaning of the Constitution, I do not agree with that theory. In interpreting a constitutional provision, a judge should apply its plain express language and the pertinent constitutional structure.

The Constitution's parameters provide the basis of judicial restraint. The Constitution contains a mechanism to change it through Article V's amendment process. And Article III, § 2 of the Constitution restricts federal courts to deciding "Cases" and "Controversies," thus creating courts of limited jurisdiction. If confirmed I will continue to follow the precedents of the Supreme Court and the Tenth Circuit.

9. What is your favorite Supreme Court decision in the past 10 years, and why?

Response: I do not have a favorite Supreme Court decision. And, as a sitting judge, it would be inappropriate for me to opine on "favorite" U.S. Supreme Court decisions, as they serve as binding precedent.

10. Please name a Supreme Court case decided in the past 10 years that you would characterize as an example of judicial activism.

Response: Although there are varying definitions of the term "judicial activism," my general take is that judicial activism occurs when ideology, sympathies and/or personal opinion play a role in a federal jurist's determination of a legal decision. To uphold a scrupulous adherence to the rule of law, judicial activism is never appropriate – a federal jurist's role is to apply, not make, law. I cannot identify a case that I would characterize as

an example of judicial activism. As a sitting judge, it would be inappropriate for me to opine on binding precedent.

11. What is your definition of natural law, and do you believe there is any room for using natural law in interpreting the Constitution or statutes?

Response: My understanding of natural law is that it is a system of rights or justice recognizing the existence of laws and rights that preceded the creation of the state. The Supreme Court has stated "the fact that a right is not defeasible by statute means only that it is protected by the Constitution, not that it derives from natural law." *Alden v. Maine*, 527 U.S. 706, 734 (1999). If I am fortunate enough to be confirmed, I would not rely on natural law to interpret the Constitution or statutes.

Congressional Power

12. Explain whether you agree that "State sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power." *Garcia v. San Antonio Metro Transit Auth.*, 469 U.S. 528, 552 (1985).

Response: This language comes from the Supreme Court's majority opinion in *Garcia v. San Antonio Metro Transit Auth.*, 469 U.S. 528, 552 (1985). The Tenth Circuit Court of Appeals relied on this quoted passage from *Garcia* to uphold the constitutionality of 7 U.S.C. § 1926(b). *Glenpool Utility Servs. Auth. v. Creek Cty. Rural Water Dist. No. 2*, 861 F.2d 1211, 1215 n.1 (10th Cir. 1988). I believe it would be inappropriate for me to comment on the excerpted language. If confirmed, I would be bound by the Supreme Court's ruling in *Garcia* and the Tenth Circuit's holding in *Glenpool* as well as more current rulings that place limitations on Congressional power.

13. Do you believe that Congress' Commerce Clause power, in conjunction with its Necessary and Proper Clause power, extends to non-economic activity?

Response: The Supreme Court has articulated "three general categories of regulation in which Congress is authorized to engage under its commerce

power." *Gonzales v. Raich*, 545 U.S. 1, 16 (2005). These are "the channels of interstate commerce"; "the instrumentalities of interstate commerce, and persons or things in interstate commerce"; and "activities that substantially affect interstate commerce." *Id.* Regarding the Necessary and Proper Clause, a court inquires "whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power." *United States v. Comstock*, 560 U.S. 126, 134 (2010). The Supreme Court has not addressed whether Congress' Commerce Clause power, in conjunction with its Necessary and Proper Clause power, extends to non-economic activity, except in a concurrence by the late Justice Scalia. *See also Gonzales*, 545 U.S. at 40 (Scalia, J., concurring in the judgment) ("That simple possession is a non-economic activity is immaterial to whether it can be prohibited as a necessary part of a larger regulation."). If confirmed I will continue to adhere to Supreme Court and the Tenth Circuit precedent.

14. What limits, if any, does the Constitution place on Congress's ability to condition the receipt and use by states of federal funds?

Response: The Spending Clause places limits on Congress's ability to condition the receipt and use by states of federal funds. The Supreme Court has discussed these limitations on Congress's power under the Spending Clause. *South Dakota v. Dole*, 483 U.S. 203 (1987). First, any exercise of the spending power must be for the "general welfare." *Id.* at 207 (internal quotation marks omitted). "In considering whether a particular expenditure is intended to serve general public purposes, courts should defer substantially to the judgment of Congress." *Id.* Second, Congress may condition the states' receipt of federal funds, but it must do so "unambiguously, enabling the States to exercise their choice knowingly, cognizant of the consequences of their participation." *Id.* (brackets, ellipses, and internal quotation marks omitted). Third, the conditions must be related "to the federal interest in particular national projects or programs." *Id.* And fourth, other constitutional principles may independently bar the condition of federal funds. *Id.* at 208; *see also NFIB v. Sebelius*, 132 S. Ct. 2566, 2579 (2012).

15. Is Chief Justice Roberts' decision in *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012), on the Commerce Clause and Necessary and Proper Clause binding precedent?

Response: The Tenth Circuit has held:

> As the Eighth Circuit has noted, *NFIB* provides, "no controlling opinion on the issue of whether provisions of the Affordable Care Act violated the Commerce Clause." *United States v. Anderson*, 771 F.3d 1064, 1068 n.2 (8th Cir. 2014); *see also United States v. Robbins*, 729 F.3d 131, 135 (2d Cir. 2013) ("It is not clear whether anything said about the Commerce Clause in *NFIB*'s primary opinion—that of Chief Justice Roberts—is more than dicta, since Part III–A of the Chief Justice's opinion was not joined by any other Justice and, at least arguably, discussed a bypassed alternative, rather than a necessary step, in the Court's decision to uphold the Act."). Ordinarily we would apply the opinion of Chief Justice Roberts because his opinion articulated the narrowest grounds for upholding the individual mandate. *Id.*; *see Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" (internal quotation marks omitted)). But because none of the opinions in *NFIB* affect our analysis [here], we leave for another day the precise scope of *NFIB*'s holding.

United States v. White, 782 F.3d 1118, 1124 n.3 (10th Cir. 2015).

Presidential Power

16. What are the judicially enforceable limits on the President's ability to issue executive orders or executive actions?

Response: The President's ability to issue executive orders must "stem either from an act of Congress or from the Constitution itself." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952). Justice Jackson's "familiar tripartite scheme" articulated in *Youngstown* "provides the accepted framework for evaluating executive action." *Medellin v. Texas*, 552 U.S. 491, 524 (2008). Under that framework, presidential authority is at its "maximum" when done "pursuant to an express or implied authorization of Congress." *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring). At the other end of the spectrum, presidential power is "at its

lowest ebb" when the President "takes measures incompatible with the expressed or implied will of Congress." *Id*. at 637. In between those two poles, there is a "zone of twilight" in which the President may have "concurrent authority" with Congress, or "in which distribution is uncertain." *Id*. If confirmed, and if presented with a matter that required me to consider the limits of presidential authority, I would follow the binding decisions of *Youngstown* and *Medellin*, as well as any other relevant Supreme Court and Tenth Circuit precedent.

17. Does the President possess any unenumerated powers under the Constitution, and why or why not?

Response: In *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. Ct. 579, 584 (1952), the Supreme Court held that the President's power to issue an order "must stem either from an act of Congress or from the Constitution itself."

Individual Rights

18. When do you believe a right is "fundamental" for purposes of the substantive due process doctrine?

Response: The Supreme Court has defined fundamental rights as those that are "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937)). The Court further observed that the Due Process clause "specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition.'" *Id*. at 720-21 (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion)).

19. When should a classification be subjected to heightened scrutiny under the Equal Protection Clause?

Response: "[E]qual protection analysis requires strict scrutiny of a legislative classification only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class." *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 (1976) (footnote omitted); *see also City of Cleburne, Tex. v.*

Cleburne Living Ctr., 473 U.S. 432, 438 (1985) (holding "strict scrutiny" applies to classifications based on "race, alienage, or national origin" or when "laws impinge on personal rights protected by the Constitution" and also stating that otherwise "heightened" review applies for classifications based on gender and illegitimacy).

20. Do you "expect that [15] years from now, the use of racial preferences will no longer be necessary" in public higher education? *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

Response: If confirmed, I would continue to adhere to Supreme Court and the Tenth Circuit precedent. I do not believe it would be appropriate to disagree with a majority opinion of the Supreme Court. I do not have any expectations on this issue.

21. To what extent does the Equal Protection Clause tolerate public policies that apportion benefits or assistance on the basis of race?

Response: In *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003), the Supreme Court held that "all racial classifications imposed by government 'must be analyzed by a reviewing court under strict scrutiny.'" (internal citations omitted). "This means that such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests." *Id.* The Supreme Court later explained that "[s]trict scrutiny is a searching examination, and it is the government that bears the burden to prove 'that the reasons for any racial classification are clearly identified and unquestionably legitimate.'" *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2419 (2013) (internal citations omitted). The Court has similarly held strict scrutiny applies in other cases involving the use of race to prefer minorities for other benefits of limited availability. *See, e.g.*, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94 (1989) (statutory incentives to government contractors to favor minorities); *United States v. Paradise*, 480 U.S. 149, 153 (1987) (racial preferences in the hiring and promotion of government workers); *Bush v. Vera*, 517 U.S. 952, 965-67 (1996) (redistricting efforts directed at carving out enclaves of minority voters). If confirmed, I would continue to adhere to binding Supreme Court and Tenth Circuit precedent.

22. Does the Second Amendment guarantee an individual right to keep and bear arms for self-defense, both in the home and in public?

Response: In *District of Columbia v. Heller*, the Court determined that the challenged statute, which completely barred possession of handguns in the home and required that any lawful firearm be kept in an inoperable condition, failed "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights." *Peterson v. Martinez*, 707 F.3d 1197, 1207-08 (10th Cir. 2013) (quoting *Heller*, 554 U.S. at 628); *see McDonald v. City of Chicago*, 561 U.S. 742 (2010). I am not aware of any Supreme Court or Tenth Circuit precedent addressing an individual's right to keep and bear arms for self-defense, in public. This issue could come before me if I am fortunate enough to be confirmed. As such, it would be inappropriate for me to state an advisory opinion on this issue.

Written Questions of Senator Jeff Flake
U.S. Senate Committee on the Judiciary
Judicial Nominations
April 20, 2016

Suzanne Mitchell
Nominee, U.S. District Judge for the Western District of Oklahoma

---

1. What is your approach to statutory interpretation? Under what circumstances, if any, should a judge look to legislative history in construing a statute?

Response: I first look to the plain language of the statutes and its structure, as these are most frequently the best indicators of legislative intent. If the text is unambiguous, the inquiry ends there. If needed, I will consider binding precedent from the United States Supreme Court and the Tenth Circuit applying that statutory provision, and I will look to the canons of statutory construction and other guiding legal principles that the U.S. Supreme Court and/or the Tenth Circuit have approved. Occasionally, legislative history may be helpful. In such a case, I would follow applicable Supreme Court and Tenth Circuit precedents with regard to legislative history and how to discern it.

2. What is the proper scope of the 10th Amendment to the Constitution? In what circumstances should a judge apply it?

Response: The Tenth Amendment provides: The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people. U.S. Const., amend. X. The Supreme Court has held the "Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory provision." *Printz v. United States*, 521 U.S. 898, 935 (1997); *see New York v. United States*, 505 U.S. 144, 188 (1992) ("The Federal Government may not compel the States to enact or administer a federal regulatory program.").

A judge should apply the Tenth Amendment when it is properly raised in a justiciable matter before the Court. To attempt to enumerate such circumstances in a comprehensive list would be impossible.

3. Does current standing doctrine foster or impede the ability of litigants to obtain relief in our legal system?

Response: Article III, § 2 of the United States Constitution restricts federal courts to deciding "Cases" and "Controversies," thereby imposing what has become known as the "irreducible constitutional minimum of standing," *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). If any one element of the standing equation is missing, there is no case or controversy over which the district court can exercise subject matter jurisdiction. *See id.* at 561 (stating that "each element [of standing] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof"). "[A] court must raise the standing issue sua sponte, if necessary, in order to determine if it has jurisdiction." *United States v. Colo. Sup. Ct.*, 87 F.3d 1161, 1166 (10th Cir. 1996). Whether the standing doctrine fosters or impedes a litigant is of no matter – Article III of the Constitution gives courts limited jurisdiction, and the standing doctrine is a component of the case or controversy requirement.

Questions for the Record
Senate Judiciary Committee
Senator Thom Tillis

Questions for Judge Suzanne Mitchell

1. **Some individuals have argued that the United States Constitution is a "living document," subject to different interpretations as society changes. Do you subscribe to this point of view?**

   Response: To the extent the theory of a living Constitution encompasses courts changing the words or meaning of the Constitution, I do not agree with that theory. In interpreting a constitutional provision, a judge should apply its plain language and consider the pertinent constitutional structure.

2. **What role, if any, should societal pressure or popular opinion play in interpreting statutes or the United States Constitution?**

   Response: None.

3. **Please define judicial activism. Is judicial activism ever appropriate?**

   Response: Although there are varying definitions of this term, my general understanding is that judicial activism occurs when ideology, sympathies and/or personal opinion play a role in a jurist's determination of a legal decision. To uphold a scrupulous adherence to the rule of law, judicial activism is never appropriate – a federal jurist's role is to apply, not make, law.

4. **When, if ever, is it appropriate for a federal court to rule that a statute is unconstitutional?**

   Response: Statutes are presumed to be constitutional. That said, a federal court must declare a statute unconstitutional if it exceeds Congress's constitutional authority or if it encroaches upon constitutional rights. If the constitutionality of a statute is squarely before a federal court in a justiciable action, and when a court cannot, applying the canon of constitutional avoidance, read the statute so as to avoid the constitutional defect through another avenue, it must declare the statute unconstitutional.

5. **What is a fundamental right? From where are these rights derived?**

Response: The Supreme Court has defined fundamental rights as those liberties that are "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937)). As to their derivation, the Court further observed that the Due Process clause "specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition.'" *Id.* at 720-21 (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion)).

6. Do you believe the First Amendment or any other provision of the United States Constitution protects private citizens and businesses from being required to perform services that violate their sincerely held religious beliefs?

Response: The Supreme Court is currently considering closely related issues in *Little Sisters of the Poor Home for the Aged, v. Burwell*, No. 15–105. To my knowledge, apart from lower court decisions at issue in or closely related to the above Supreme Court case, the Tenth Circuit has not reached the issue of whether the First Amendment or any other provision of the United States Constitution protects private citizens and businesses from being required to perform services that violate their sincerely held religious beliefs. This issue could come before me, if I am fortunate enough to be confirmed. As a result, it would be inappropriate for me to comment or offer an advisory opinion on the scope of the First Amendment's protections. If confirmed, I will continue to adhere to binding precedent from the Supreme Court and the Tenth Circuit.

7. What level of scrutiny is constitutionally required when a statute or regulation related to firearms is challenged under the Second Amendment of the United States Constitution?

Response: In *District of Columbia v. Heller*, the Supreme Court "declin[ed] to establish a level of scrutiny for evaluating Second Amendment restrictions."

Although the *Heller* Court did not specify what level of scrutiny should be applied to a challenged law, other than indicating that rational basis would generally be inappropriate, the Tenth Circuit applies intermediate scrutiny to federal firearm laws. *See United States v. Reese*, 627 F.3d 792, 801-03 (10th Cir. 2010) (discussing *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010) and *United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010) (en

banc)). If confirmed, I will continue to adhere to binding precedent from the Supreme Court and the Tenth Circuit.

8. Do you believe it is constitutional for states to require voters to show photo identification before being eligible to cast their vote?

Response: Over a dozen states require voters to show photo identification before being eligible to cast their vote. Several of these state laws are undergoing legal challenges. The Supreme Court upheld a facial constitution challenge to an Indiana voter identification law in *Crawford v. Marion Cty. Election Bd.,* 553 U.S. 181, 200 (2008). Should I be fortunate enough to be confirmed, this issue may come before me, so it would be inappropriate to comment or state an advisory opinion on this issue. If confirmed, I will continue to adhere to binding precedent from the Supreme Court and the Tenth Circuit.

9. One challenge you will face as a federal judge is managing a demanding caseload. If confirmed, how will you balance competing priorities of judicial efficiency and due process to all litigants involved in the cases on your docket? Will you give certain cases priority over others? If so, please describe the process you will use to make these decisions.

Response: As a magistrate judge, I take an active role in justly, efficiently, and effectively managing my docket, through scheduling conferences and close adherence to the Federal Rules of Civil Procedure. If confirmed I will continue to utilize case management schedules and our court's internal monitoring system to actively develop and adhere to reasonable but firm deadlines. As to priority, the Speedy Trial Act requires that criminal cases receive higher priority. In addition, those cases seeking some forms of injunctive and/or declaratory relief may require priority. I would also delegate matters to magistrate judges to the full extent of their authority under 28 U.S.C. § 636.

10. Do you believe the death penalty is constitutional? Would you have a problem imposing the death penalty?

Response: The Supreme Court has held that the death penalty is constitutional under some circumstances, including in cases such as *Gregg v. Georgia*, 428 U.S. 153 (1976). If confirmed, I will continue to adhere to binding precedent from the Supreme Court and the Tenth Circuit.