

**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.