

**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.