

**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.