Responses of Stephen N. Six
Nominee to be United States Circuit Judge for the Tenth Circuit
to the Written Question of Senator Chuck Grassley

1. **On April 2, 2010, you issued a statement on the constitutionality of the health care law stating, "I do not believe that Kansas can successfully challenge the law. Our review did not reveal any constitutional defects, and thus it would not be legally or fiscally responsible to pursue the litigation." Since enactment of the Affordable Care Act, two federal district court judges have held the individual mandate in the Act to be unconstitutional.**

    a. **Do you stand by your determination that there are no "constitutional defects" with the health care law?**

    Response: As Attorney General I had the research attorneys in our office review and analyze each of the constitutional claims advanced in the challenges to the federal healthcare legislation. The conclusion of the attorneys in the office and my conclusion after that review was that there was little to no chance of succeeding on the constitutional challenges. However, subsequent to April 2, 2010 when I made that statement, two federal district court judges have studied the constitutionality of the law and come to different conclusions. The issue is now in the federal appellate courts and will be resolved ultimately by the Supreme Court. If confirmed and appropriate for me to hear the case under the recusal authorities, I would follow any applicable Supreme Court or Tenth Circuit precedent.

    b. **Given that you took a public stance on this issue when you served as Kansas Attorney General, will you, if confirmed, recuse yourself from hearing cases related to the constitutionality of the health care law?**

    Response: It is difficult to make a decision about recusal on hypothetical cases that may relate in some way to the federal healthcare legislation when the issues or facts are unknown. If confirmed, I would follow the recusal statutes and judicial codes of conduct. After a review of the recusal authorities and a consideration of this issue, I believe that recusal may be the result.

2. **According to a February 3, 2010 Office of Attorney General press release, your office conducted a multi-jurisdiction drug bust resulting in the arrest of 17 individuals for allegedly manufacturing and selling meth amphetamines. Unfortunately, it now appears that the prosecution of these individuals may be in jeopardy. On March 9, 2011, Judge Brazil, in *State v. Bruce*, No. 2010 CR 23 (Kan. Dist. Ct. Mar. 9, 2011) (order granting motion to suppress) (attached, for your reference), suppressed the wiretap evidence that was instrumental to the cases, holding that you failed to comply with federal law requiring the state's principal prosecutor to authorize the application for electronic wiretaps. As the state's**

Attorney General, you were the principal prosecutor, but the wiretap application was approved not by you, but an Assistant Attorney General.

a. **According to Judge Brazil, you applied for only two wiretaps during your tenure as Attorney General. The first was signed by you, but the second was not. Why did you authorize AAG Disney to sign the wiretap application, rather than signing it yourself?**

   Response: Mr. Disney was the Deputy Attorney General in charge of the criminal division. He proposed the procedure where I would authorize the wiretap but delegate the necessary steps to get the documents before the judge to him. Mr. Disney was an experienced prosecutor and I relied on his presentation in this area of criminal law.

b. **When you gave written authorization to AAG Disney to apply for *ex parte* orders authorizing the interception of wire, oral or electronic communication in this case, were you aware of the Kansas Supreme Court's decision in *State v. Farha*, 218 Kan. 394 (1975) that a prior Kansas statute was unlawful because it purported to grant authority to an assistant attorney general to make an application for a wiretapping order, rather than vesting that authority in the principal prosecuting attorney, as called for by 18 U.S.C. § 2516(2)? If you were aware of the case, how did it factor into your decision to delegate to AAG Disney?**

   Response: I do not recall being aware of this case.

c. **Were you aware of the federal statute (18 U.S.C. § 2516(2)) requiring minimum standards in authorizing the use of a wiretap in drug investigations when you gave AAG Disney authorization to apply for a wiretap? If so, how did this factor into your decision to delegate to AAG Disney?**

   Response: I participated in a briefing by Mr. Disney where the procedure described in 2a was proposed. I do not recall if he presented information on this statute. I was not independently aware of it.

d. **Even assuming that Kansas state law permitted you to delegate the authority to apply for wiretaps –**

   i. **Do you believe that 18 U.S.C. § 2516(2) permits a state to adopt more permissive wiretap authorization standards than those required by federal law?**

      Response: I have never considered that issue. If confirmed and presented with this issue I would apply the applicable Supreme Court and Tenth Circuit precedents.

ii. **Do you agree with the Kansas Supreme Court in *In re Olander*, 213 Kan. 282, 285 (1973) that both the Kansas legislature and the U.S. Congress "have carefully restricted the right to apply for the use of electronic bugging devices to a very select coterie of public officers" because "[n]o area of the law is more sensitive than that of electronic surveillance, since such activity intrudes into the very heart of personal privacy"? Please explain your answer.**

    Response: Yes. I believe that balancing the needs of law enforcement to infiltrate drug gangs with the personal privacy interests of all Americans is a very sensitive area and requires careful consideration.

e. **According to Judge Brazil, both you and AAG Disney testified that the authorization you granted was signed specifically in regard to this case, "but the authorization on its face appears to be unlimited in time and circumstance." Was it your intention to give AAG Disney unending authority to apply for wiretap orders?**

   Response: No.

f. **Is it your belief that K.S.A. 75-710, which grants general authority to assistant attorneys general to act on behalf of the attorney general, supersedes K.S.A. 22-2515, which specifically designates that the attorney general must apply for an order authorizing electronic surveillance, despite the general principle of statutory interpretation that general statutory provisions do not repeal previously enacted specific statutory provisions unless done so explicitly? In your answer, please explain your understanding of how these two statutes operate together.**

   Response: After further consideration of the statutes as a result of this case, I believe the attorney general should not delegate procedural responsibility to obtain a wiretap to a Deputy Attorney General.

g. **According to Judge Brazil's findings of fact, you made a "cursory but not full examination of the application" prior to authorizing Assistant Attorney General (AAG) Barry Disney to apply for ex parte orders. *State v. Bruce*, No. 2010 CR 23, Order Granting Mot. to Suppress at 5. Is this accurate? If so, why did you fail to give your full attention to such an important case?**

   Response: Under the procedure described in 2a, I authorized the wiretap, but delegated actions in the wiretap process to the Deputy Attorney General in charge of the criminal division. At the time I believed I fully considered the request. In hindsight I should not have delegated actions in the wiretap process to the Deputy Attorney General in charge of the criminal division.

h. **According to Judge Brazil, “there appears to have been no policy or procedure in place in the attorney general’s office to ensure compliance with federal or state wiretap legislation.” *State v. Bruce*, No. 2010 CR 23, Order Granting Mot. to Suppress at 4. Is this accurate? If so, why didn’t you have a policy to ensure compliance with the federal wiretap statute? If not, please explain the established policy or protocol and indicate whether it was followed in this instance.**

   Response: At the time I became attorney general I was not aware of any written policy in place in the Attorney General’s Office dealing with wiretaps and I am not aware of any policy that preexisted my tenure. When the application for a wiretap came before me, we followed the procedure set forth in the wiretap statute. Wiretaps were done infrequently and no one suggested and I did not think of developing a written policy.

i. **Do you disagree with Judge Brazil’s decision in this case? Why or why not?**

   Response: If I had been aware of the authorities in Judge Brazil’s opinion at the time I made the decision to authorize a wiretap I would not have delegated actions in the wiretap process to the Deputy Attorney General in charge of the criminal division. I am not critical of the Judge’s opinion.

3. **Several commentators, including Professor Goodwin Liu, previously nominated to be a Circuit Judge for the Ninth Circuit, have said that *Lopez* and *Morrison* are difficult or “incoherent” standards in outlining the limitations of the Interstate Commerce Clause. Do you believe these cases provide a workable limit on Congress’ commerce power?**

   Response: In *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000) the Supreme Court set forth the limitations on Congress’ power under the Commerce Clause and held that its power is not unlimited. I would apply those precedents and any other relevant cases of the Supreme Court if confirmed.

4. **In your final analysis of the health care law, you determined that challenges to its mandate requiring that states increase eligibility for Medicaid or risk losing funds lacked merit saying, “the U.S. Supreme Court for nearly a century has repeatedly reaffirmed the power of Congress to impose requirements on the States as a condition of the receipt of federal funds.” However, Supreme Court precedent also suggests this power is limited. In *South Dakota v. Dole*, the Court stated that, “in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which ‘pressure turns into compulsion.’” In that case, the Court found that the loss of only 5% of federal funds available was not sufficient to constitute compulsion.**

   In your view, when, if ever, could a financial inducement to the states by the federal government constitute compulsion?

Response: I do not have an opinion about when pressure would turn into compulsion. The Supreme Court has held that Congress' power is not unlimited. If confirmed and presented with this issue I would follow the precedent of the Supreme Court or any applicable Tenth Circuit decisions.

5. **In testimony before this Committee, former Solicitor General Charles Fried said the unfunded mandate posed a "constitutional worry" because the funds at issue are "huge." Is it your opinion that Mr. Fried's concerns are misplaced? Why or why not?**

   Response: I am not familiar with Mr. Fried's testimony or his analysis and have not formed an opinion. Regardless of any opinion I would hold, I would follow Supreme Court and Tenth Circuit precedent on this issue.

6. **As Attorney General, you signed onto an *amicus* brief in *Citizens United v. FEC* that argued the Supreme Court should refrain from overturning its decision *in Austin v. Michigan Chamber of Commerce*. *Austin* held that a state statute prohibiting corporations from making independent expenditures in support of political candidates from its general treasury was constitutional. In a 5 to 4 decision the Supreme Court overturned its decision in *Austin* and held the campaign finance restrictions on corporations at issue in the case were unconstitutional.**

   a. **Many have been highly critical of the Supreme Court's decision. Do you believe *Citizens United* was correctly decided?**

      Response: If confirmed as a circuit court judge I would apply the precedent of *Citizens United* and all Supreme Court decisions regardless of my personal views.

   b. **If you have not already done so, please take this opportunity to review *Citizens United*. Do you believe it is a fair and accurate characterization of the Supreme Court's decision to say that it "reversed a century of law"? Why or why not?**

      Response: The holding in *Citizens United* was based on the First Amendment and the Supreme Court's many cases applying the First Amendment some of which are described by the court as conflicting lines of precedent. If confirmed I would apply the *Citizens United* precedent as well as any other applicable Supreme Court precedent.

7. **Kansas has a statute providing in-state college tuition to children of illegal immigrants. While you were Attorney General, a similar law was struck down by a California appeals court, although this decision was later reversed by the California Supreme Court. At the time of the appellate court's decision, you defended the legality of the Kansas law in the news, saying that "Federal courts have rejected [a legal] challenge to Kansas law." However, it is my understanding that the federal**

court never reached the merits in the case against Kansas's statute, but dismissed the case for lack of standing.

a. **Current federal law states,**

   "Notwithstanding any other provision of law, an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State … for any postsecondary education benefit *unless* a citizen or national of the United States is eligible for such a benefit … without regard to whether the citizen or national is such a resident."." (8 U.S.C. § 1623)

   Do you believe the Kansas statute is consistent with federal law? Why or why not?

   Response: The issue of any conflict between the federal statute and the Kansas statute was not considered during my time as Attorney General. If confirmed, should the issue come before the Tenth Circuit; I would apply relevant Supreme Court and Tenth Circuit precedent.

b. **If a state law directly conflicts with a duly enacted federal law, does the State Attorney General have a duty to refuse to defend the state law?**

   Response: As Attorney General it was my duty to presume laws passed by the state legislature were constitutional and to defend those laws if challenged. I do not recall having an occasion to consider whether a state attorney general has a duty to refuse to defend state law in a situation where that law was in a direct conflict with a federal law.

c. **Did you ever perform an analysis to determine if a conflict existed? If so, what was your conclusion and why?**

   Response: I do not recall performing such an analysis.

8. **Do you believe that our federal government is one of limited and enumerated powers?**

   Response: Yes, under the Tenth Amendment to the United States Constitution and as the Supreme Court discussed in *United States v. Lopez,* 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000) our federal government is one of limited and enumerated powers.

9. **What does the concept of separation of powers mean for the federal courts? If confirmed, will this be a governing principle which you will follow?**

   Response: Under our Constitution the separation of powers is a fundamental part of the foundation of our system of government. The separation of powers limits each branch of government to its appropriate role. If confirmed as a circuit court judge, I would follow the Supreme Court and Tenth Circuit precedents in this area.

10. Do you believe it is proper for a judge, consistent with governing precedent, to strike down an act of Congress that it deems unconstitutional? If so, under what circumstances, and applying what factors?

Response: Yes, if Congress exceeds its authority under the Constitution, as determined by Supreme Court precedents, it is appropriate for a judge to strike down an act of Congress.

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

Response: The most important attributes of a judge are impartially applying the law to the facts and working hard. I believe I have those attributes.

12. 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: A judge should treat all litigants with respect and patience and work hard to listen and not prejudge issues. I believe I possess these attributes.

13. 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. Are you committed to following the precedents of higher courts faithfully and giving them full force and effect, even if you personally disagree with such precedents?

Response: Yes.

14. At times, judges are faced with cases of first impression. If there were no controlling precedent that dispositively concluded 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 begin with the text of the statute or Constitutional provision at issue. I would also examine closely analogous Supreme Court or Tenth Circuit cases and cases that are closely related to the issue from other circuits. Additionally, if the Supreme Court has developed an approach or framework to decide a closely related issue or area of law, that can be a useful approach.

15. 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 own judgment of the merits, or your best judgment of the merits?

Response: If confirmed, I would apply the binding precedent regardless of my personal views.

16. Under what circumstances, if any, do you believe an appellate court should overturn precedent within the circuit? What factors would you consider in reaching this decision?

Response: Precedent within the Tenth Circuit can only be overturned by the entire court sitting *en banc*. The *en banc* proceedings should be used infrequently and only when an issue is of exceptional importance or when it is required to establish uniformity in the panel decisions, as discussed in the federal rules governing appellate procedure. The principle of *stare decisis* should govern any consideration to overturn circuit court precedent.

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

Response: I reviewed some of the cases to refresh my recollection and drafted the answers. I discussed the draft with a Department of Justice staff member. I submitted a final draft to the Department of Justice for submission to the Committee.

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

Response: Yes.