

**Responses of Stephen N. Six
Nominee to be United States Circuit Judge for the Tenth Circuit
to the Written Follow-Up Questions of Senator Chuck Grassley**

- 1. In Question 2(d)(i), I asked if you believed that 18 U.S.C. § 2516(2) permits a state to adopt more permissive wiretap authorization standards than those required by federal law. You responded, “I have never considered that issue.” Part of my evaluation of your nomination will be based on my assessment of your ability to properly interpret federal statutes and applicable precedent. This was an issue you should have considered prior to delegating the authority to authorize wiretaps, but apparently did not. Please take this opportunity to review the statute and any relevant case law and answer the question.**

Response: Section 2516(2) provides that an appropriate state level official may, if authorized by state statute, apply to a judge for a wiretap and “such judge may grant in conformity with section 2518.” Case law has interpreted this provision as allowing states to enact more restrictive legislation than the federal statute, but not less restrictive. *State v. Farha*, 218 Kan. 394, 400 (1975).

- 2. In response to Question 2(d)(ii), you said 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.” Do you believe that you gave “careful consideration” to this case when delegating the wiretap application to Mr. Disney, despite your admission that you were not aware of relevant Kansas and federal statutes and case law when making that decision? If no, why did you not give this matter “careful consideration”?**

Response: The Deputy Attorney General presented the procedure of delegating steps in the wiretap application process to me and I relied on his presentation that the procedure complied with the requirements of the wiretap statute. The procedure in this case was that an Assistant Attorney General and the law enforcement officers working on the case determined that the office should request judicial approval for a wiretap. The Assistant Attorney General then presented this information to the Deputy Attorney General who agreed that an application was warranted. The Deputy Attorney General then briefed me on the request to proceed with judicial review of a wiretap application and the supporting reasons required by the wiretap statute. I authorized proceeding with an application. The Assistant Attorney General, the law enforcement officer and the Deputy Attorney General completed the application, supporting affidavits and presented the materials and sworn testimony to a judge for review. The judge reviewed the materials and approved the wiretap. At the time of the procedure described above, I thought we were complying with the legal requirements of the wiretap statute. I now believe I should not have delegated steps in the wiretap application process to a Deputy Attorney General. I should have reviewed this area of law myself. I am responsible for the error.

3. **In your response to Question 2(e), you said that you did not intend to give Mr. Disney unending authority to apply for wiretap orders. If that was the case, why didn't the delegation stipulate that it was limited to these specific circumstances?**

Response: I discussed the application procedure with the Deputy Attorney General and from this conversation he understood he was required to get my authorization to proceed with an application for a wiretap. I would agree that the written delegation is not limited to these specific circumstances. I cannot say that the delegation would have been better if it was limited in writing to these specific circumstances because, as I stated in the answer to question 2, I should not have delegated steps in the application process to the Deputy Attorney General.

4. **In Question 2(f), I asked you to explain your understanding of how K.S.A. 75-710 and K.S.A. 22-2515 operated together. You did not answer that question. Please take this opportunity to carefully consider the question and provide an answer.**

Response: Section 75-710 provides that “[a]ssistants [appointed by the Attorney General] shall act for and exercise the power of the attorney general to the extent the attorney general delegates them the authority to do so.” Section 22-2515, the specific statute relating to applications for a wiretap, provides that the application for a wiretap may be made by “[t]he attorney general, district attorney or county attorney.” In *State v. Farha*, the Kansas Supreme Court stated that this language in K.S.A. 22-2515, as applied to the Kansas Attorney General’s Office, meant that the Attorney General was required to authorize an application for a wiretap under this statute, not an assistant appointed by the Attorney General. 218 Kan. at 403. Section 22-2515, as the specific statute authorizing who can apply for an application, would control over the more general statute, K.S.A. 75-710, relating to delegation of authority of the Attorney General.

5. **In your response to Question 2(f), you stated that “After further consideration of the statutes as a result of this, I believe the attorney general should not delegate procedural responsibility to obtain a wiretap to a Deputy Attorney General.” Further, in response to Question 2(i), you stated that “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.”**

- a. **In light of this, please explain why the relevant Kansas and federal statutes and case law were not considered when making the decision to delegate authority.**

Response: I made a mistake in not researching this area of law myself and personally reviewing these authorities. That was my error. The Deputy Attorney General presented the process of delegating necessary steps to get the application documents reviewed and signed by the judge after I authorized proceeding with the application. The Deputy Attorney General’s presentation was that the

proposed process complied with the Kansas wiretap statute. I do not recall the specific authorities that were included in his presentation.

b. Do you not agree that it was part of your responsibility to be aware of these authorities?

Response: Yes, it was my responsibility.

6. In your responses, you repeatedly stated that Mr. Disney proposed the wiretap authorization procedure and you relied on his presentation. To the best of your knowledge, do you believe that Mr. Disney was unaware of the relevant authorities? Alternatively, do you believe he was aware of them but misapplied them in this case?

Response: I understand that the Deputy Attorney General's position was that a delegation could be appropriate if it is written, specific and limited. The reasoning was that K.S.A. 75-710 was amended after the *State v. Farha* case. The amendment relating to the delegation of the Attorney General's authority states: "Assistants appointed by the attorney general shall perform the duties and exercise the powers as prescribed by law and shall perform other duties as prescribed by the attorney general. Assistants shall act for and exercise the power of the attorney general to the extent the attorney general delegates them the authority to do so." Additionally, his position was that the delegation in this case was written and specifically delegated the authority to one individual, unlike the delegation rejected in *In re Olander*, 213 Kan. 282 (1973). This position is essentially the argument advanced by Chief Justice Fatzer in the dissent in *Farha* and *In re Olander*, 213 Kan. 282 (1973)(relying on *United States v. Tortorello*, 480 F.2d 764 (2nd Cir. 1973)("having the chief prosecuting officer pass on application which his assistants prepare and, after he has approved them, having them presented to the issuing judge. [The objective of 18 U.S.C. 2516(2)] will not be furthered by requiring the chief prosecuting officer to appear personally before the issuing judge.")). The district court that reviewed the application procedure in this case held that this position was a misapplication of the relevant authorities. I am responsible for the delegation and the error.

7. As a federal appellate judge with the duty to apply the applicable precedents, how would you ensure that relevant statutes and precedents are not overlooked, as you concede happened here?

Response: Due to the responsibilities and demands of the job of Attorney General in many different areas of law, I relied on briefings or memoranda from Deputy and Assistant Attorneys General on legal cases and matters assigned to them or in their area of expertise. I usually would not re-research the legal conclusions or re-read the case law relied upon by these Deputy or Assistant Attorneys General. Previously, when I served as a state district court judge for three years, I researched the legal issues and read the case law on issues that appeared before me. If confirmed as a circuit court judge, I would continue my previous practice and review the briefs submitted in the case, all the relevant

cases and statutes at issue, and any other legal sources important to the case. I believe this would ensure that relevant statutes and precedents are not overlooked.

8. **In Question 5, I asked you about former Solicitor General Charles Fried’s statement about the constitutionality of an unfunded mandate. You said you were not familiar with Mr. Fried’s testimony, and for that reason did not answer the question. Attached for your convenience is a copy of Mr. Fried’s testimony (see pp. 34-35 for the relevant statement). Please take this opportunity to review his testimony and provide a thoughtful answer to the question.**

Response: From the reference cited I noted the following comment by Professor Fried:

“FRIED:

The case that comes to mind is South Dakota against Dole, which required the states -- and that wasn't even a funding mandate -- required the states to alter the drinking age, and threatened them with the withdrawal of 5 percent of highway funds if they didn't comply.

And the Supreme Court said, "Well, 5 percent is so little that it's not that much of a threat."

Implicit in that is would you believe 10 percent? How about 50 percent?

And the unfunded mandate here is huge. And that's why I said to Senator Grassley that I think there really is a constitutional worry about that. (Fried Testimony provided with these questions, pgs 34-35, emphasis in the copy provided.)

I agree with Professor Fried’s testimony that *South Dakota v. Dole*, 483 U.S. 203 (1987) is the Supreme Court case that provides guidance in analyzing when a congressional incentive moves from pressure into unconstitutional coercion. In *South Dakota*, the Supreme Court determined that the incentive offered by Congress to states to raise the drinking age did not rise to the level of improper coercion. Professor Fried asks whether a financial penalty of 10% or 50% imposed on a state for failing to follow a mandate imposed on the states would cross the line drawn by the Supreme Court in *South Dakota*. Because it is difficult to know the legal and factual context in which a challenge may be presented and because the issue could come before me if confirmed, it would be inappropriate to state agreement in advance on when pressure turns to compulsion in an unfunded mandate. Professor Fried’s comment concludes that the unfunded mandate in the federal healthcare legislation is huge and “is a constitutional worry. . .” His comment about “constitutional worry” in the federal healthcare legislation has been reflected in the opinions of the various federal district courts that have ruled on the federal healthcare legislation. As Attorney General my office reviewed the constitutional issues in the federal healthcare legislation and on April 2, 2010, concluded that there was little to no chance of succeeding on the constitutional claims. Subsequent to that decision several federal district courts have ruled on the constitutional concern identified by Professor

Fried. As a former state official I am concerned about the challenges presented by the federal government placing unfunded mandates on the state. If confirmed, were challenges to the federal healthcare legislation to come before me, as I stated in response to your first set of questions 1(b), given my public statements on the federal healthcare legislation I believe recusal may be appropriate.

- 9. In Question 6(b), you did not answer whether or not you believed it was a fair and accurate characterization of *Citizens United v. FEC* to say that it “reversed a century of law.” Please take this opportunity to review the decision, and provide a thoughtful response regarding whether or not you believe this characterization is accurate.**

Response: In *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010), the Court analyzes conflicting lines of First Amendment cases and overrules *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990)(holding “that political speech may be banned based on the speaker’s corporate identity”) and *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003)(overruling the part relating to a statutory restriction on independent corporate expenditures). *Citizens United*, 130 S. Ct. at 886, 913. The Supreme Court states that in overruling *Austin* “[w]e return to the principle established in *Buckley* and *Bellotti*, that the Government may not suppress political speech on the basis of the speaker’s corporate identity.” *Citizens United*, 130 S. Ct. at 913. The Court squared the facts before it with these conflicting lines of First Amendment precedent and said it was restoring pre-1990 Court precedent. If confirmed as a judge, I would faithfully apply the Supreme Court’s precedent in *Citizens United*.

- 10. In Question 7(a), I asked you about the consistency of Kansas’ statute providing in-state college tuition to children of illegal immigrants with 8 U.S.C. § 1623. You responded that this issue “was not considered during my time as Attorney General.” Respectfully, I did not ask whether it was ever considered during your time as Attorney General. Please take whatever time necessary and answer the question I initially asked: do you believe the Kansas statute is consistent with federal law? Why or why not? Again, I am trying to understand your approach to legal analysis; simply stating that you would apply relevant precedent does not answer the question, and is not sufficient.**

Response: I have not developed an opinion on the legal issues involved in these statutes. Any conflict between the federal and state law would implicate the Supremacy Clause which states: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.” U.S. Constitution, Article VI, cl. 2. Under the Supremacy Clause, the Supreme Court has long recognized that state laws that conflict with federal law are “without effect.” *Maryland v. Louisiana*, 451 U.S. 725 (1981). Because this issue may come before me if confirmed, it would be inappropriate to comment on the relationship between the state and federal statutes or how I would decide such an issue. If confirmed as a judge and were this issue to come before the court, I would review the

relevant Supreme Court precedent and any applicable Tenth Circuit precedent and faithfully apply that legal authority.

- 11. In your response to Question 9, I asked what the concept of separation of powers means for the federal courts. In response, you stated that “[t]he separation of powers limits each branch of government to its appropriate role.” Please take this opportunity to reconsider the question, and provide a thoughtful answer regarding what you believe is the “appropriate role” for the federal courts in our system of government.**

Response: Separation of powers in the United States Constitution is a foundational concept that power should not be concentrated in one branch of government and should be qualified by checks and balances within the three branches of government. Within this framework the appropriate role of the federal courts is to interpret the law. The federal courts “check” that the legislative and executive branches of government are not exceeding their authority under the Constitution. The role of the federal courts within this framework is to also “balance” or use its constitutional authority to limit the power of the other two branches when they exceed constitutional authority. The federal courts depend on the executive branch because the judiciary has “neither FORCE nor WILL but merely judgment” and rely on the executive branch to enforce its judgments. *The Federalist No. 78*, p. 394 (G. Willis ed. 1982)(A. Hamilton). The role of the federal judiciary is to serve “as the bulwar[k] of a limited constitution against legislative encroachments.” *The Federalist No. 78*, p. 526 (J. Cooke ed. 1961)(A. Hamilton). That role of the federal courts is further developed in *Marbury v. Madison*, 5 U.S. 137, 180 (1803), where Justice Marshall held that the Constitution was the “supreme law of the land” and that “a law repugnant to the constitution is void,” thereby establishing the Supreme Court’s power of judicial review.

- 12. In Question 10, I asked you what factors you would consider when determining whether to strike down an act of Congress as unconstitutional. You did not answer. Please take this opportunity to answer the question.**

Response: If confirmed as a circuit court judge I would start with the presumption that laws enacted by Congress are constitutional. If Congress passes a law that is inconsistent with individual rights secured to the American people under the Constitution, such as rights secured in the Bill of Rights, it is appropriate for a judge to determine that the law as applied in the case before the court is unconstitutional, or to strike down the law as unconstitutional. Similarly, if Congress passes a law that exceeds its enumerated powers or impermissibly encroaches on state sovereignty, then it is appropriate for a judge to declare the law unconstitutional. The Supreme Court has used different factors in reviewing these different types of constitutional challenges. If confirmed as a circuit court judge I would review the Supreme Court precedent that applied to the type of review presented in the case and faithfully apply that precedent.

- 13. In response to Question 2 in the Additional Questions for the Record, pertaining to your handling of the legal actions relating to the prosecution of Planned**

Parenthood, you stated that you were unaware of Judge Anderson's determination that Planned Parenthood's records appeared to have been manufactured in violation of Kansas criminal law. Please explain why you were unaware of this important finding by Judge Anderson relating to a recent investigation by the Attorney General's Office.

Response: I became Attorney General on January 30, 2008. More than one-half a year before I became Attorney General, the Kansas Attorney General's Office had closed its investigation of Planned Parenthood and cleared it of criminal charges in regard to the records referenced in this question. When I became Attorney General I did not re-review any previously closed cases or engage in a review of the reasons why any cases in the office had been previously closed or whether the office had correctly or incorrectly completed its work prior to my tenure. In the mandamus case against Judge Anderson, previously filed by Attorney General Morrison in July of 2007, the same Assistant Attorneys General who handled the case prior to my tenure continued to do so. As Attorney General I was responsible for the work of all the Assistant Attorneys General in the office but I was not involved in reviewing the documents in the case or drafting the motion and show cause response filed with the Kansas Supreme Court. I did approve the documents filed by my office with the Kansas Supreme Court. These documents do not discuss the statement by Judge Anderson.

14. In Question 4 in the Additional Questions for the Record, pertaining to *Morrison v. Anderson*, I asked you if it was common practice for the Attorney General to interfere with subpoenas and requests for evidence by local prosecutors, and if so, to provide some examples of other cases where the Attorney General has done so. You did not answer this question. Please take this opportunity to do so.

Response: No. I am not aware of any such examples during my time as Attorney General.