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.

Senator Chuck Grassley
Additional Questions for the Record
Stephen Six, U.S. Court of Appeals for the Tenth Circuit

I understand from your testimony and your written account of events that, generally, you allowed your Assistant Attorneys General to handle the legal actions relating to the prosecution of Planned Parenthood. However, as you rightly concede in your letter, you were the state's chief prosecutor and responsible for overseeing all cases in which your Office was involved, and it was under your name that legal actions preceded. Please address these questions candidly.

1. **In testimony at your nominations hearing, you said that there was "never any decision on my part to pursue or not pursue" the case against Planned Parenthood. However, in a February 7, 2008, Associated Press article, you are quoted as saying the following in relation to the Planned Parenthood investigation, "That case was closed, and I'm not doing anything to reopen it."[1] This quotation suggests that you made an affirmative decision to decline to reopen the case. How is this statement consistent with your testimony that you never made any decision whether or not to reopen the case against Planned Parenthood?**

   Response: As you may be aware, I was not involved in the investigation and prosecution of Comprehensive Health of Planned Parenthood of Kansas and Mid-Missouri, Inc., which began five years before I became Attorney General of Kansas. My understanding of the events before I became Attorney General is based on information taken from the following Kansas Supreme Court opinions:

   Comprehensive Health of Planned Parenthood of Kansas and Mid-Missouri, Inc. v. Kline, 287 Kan. 372 (2008)

   State v. Comprehensive Health of Planned Parenthood of Kansas and Mid-Missouri, Inc., 291 Kan. 322 (2010)

   State of Kansas, ex rel, Stephen Six, Attorney General of Kansas v. Anderson, (Kansas Supreme Court Case No. 99,050) The case was dismissed without written opinion. (Attorney General Morrison filed this case and I was substituted in after he resigned and I was sworn in)

   Alpha Medical Clinic v. Anderson, 280 Kan. 903 (2006)

   I became Attorney General on January 30, 2008. It is my understanding that Attorney General Morrison completed his investigation of Planned Parenthood and closed the case six months before I took office. After becoming Attorney General, I did not re-review any previously closed cases in the office. At the time I took office, the case against Planned Parenthood, previously investigated by the Kansas Attorney General's Office

[1] Hanna, John, AP NewsBreak: *AG's office subpoenaed by Tiller grand jury*, Associated Press, February 7, 2008.

and closed, was under investigation by a grand jury in Johnson County, Kansas and Johnson County District Attorney Kline was prosecuting that same case.

2. **When you made the statement quoted by the Associated Press, were you aware of Judge Anderson's determination that Planned Parenthood's records – in his possession as custodian by appointment of the Kansas Supreme Court – appeared to have been manufactured in violation of Kansas criminal law?**

   Response: I do not recall being aware of it.

3. **Given Judge Anderson's concerns, as well as his statements questioning A.G. Morrison's decision to clear Planned Parenthood of wrongdoing, did you or anyone in your office (including the criminal division) reevaluate A.G. Morrison's decision to clear Planned Parenthood of any wrongdoing?**

   Response: No. At the time I became Attorney General on January 30, 2008, the office did not re-review any previously closed cases. Additionally at the time I became Attorney General, the case against Planned Parenthood was the subject of a grand jury investigation in Johnson County, Kansas and the case was being prosecuted by District Attorney Kline, also in Johnson County, Kansas.

   a. **If yes, what was the evaluation's conclusion?**

      Response: Please see the answer to question 3.

   b. **If no, why weren't Judge Anderson's concerns -- a District Court Judge with first-hand knowledge of the situation -- considered important enough to warrant a reevaluation?**

      Response: Please see the answers to questions 2 and 3.

4. **I understand that the mandamus actions undertaken by the Attorney General's office against District Attorney Kline (See *CHPP v. Kline*) and Judge Anderson (See *Morrison v. Anderson)* were commenced prior to your appointment. However, as Attorney General, your office continued to pursue these actions. Given the issues mentioned above, did you, or anyone in your office, reevaluate the legal positions taken by A.G. Morrison in these cases? Please explain why or why not. If your office did reevaluate the legal positions please explain the conclusion of that evaluation.**

   Response: After I became Attorney General, the Kansas Supreme Court ordered that my office file a brief in each case. The brief that was filed in the case represented the position of the Attorney General's Office. I do not recall re-evaluating any previous position of the Attorney General's Office in coming up with the position taken by my office and filed with the Court. Assistant Attorneys General drafted the briefs and they were filed with my approval. In the mandamus action filed by Planned Parenthood

against Kline, my office sought the return of the file taken by Kline from the Attorney General's Office. It is my understanding that this is the same position taken by Morrison. In the mandamus action against Judge Anderson my office sought Court supervision of the medical records. It is my understanding that Morrison sought to have the records returned to Planned Parenthood.

5. **At your nomination hearing, I asked you whether you were ever pressured by Governor Sibelius or anyone in her administration not to pursue charges against Planned Parenthood. You responded in part, "I never had a discussion with her about any topics or any cases in the Attorney General's office in our criminal division." Did you, or anyone in your office, communicate with anyone in the Governor's Administration about pursuing criminal charges against Planned Parenthood? If so, please explain the nature of those conversations and with whom they transpired.**

   Response: I did not discuss the topic of pursuing criminal charges against Planned Parenthood with anyone in Governor Sebelius' administration. I do not recall anyone in my office telling me they discussed the topic with anyone in Governor Sebelius' administration.

CHPP v. Kline

1. **When you became Attorney General you replaced A.G. Morrison in the mandamus action in *CHPP v. Kline*. A.G. Morrison's mandamus action sought to have D.A. Kline return CHPP's medical records. However, the final brief submitted in your name sought, "each and every copy of those records that [Kline] has made and any and all other evidence Kline developed and obtained while he was acting as Attorney General that he took with him to Johnson County." (*Comprehensive Health of Planned Parenthood of Kansas and Mid-Missouri, Inc. v. Kline*, 197 P.3d 370, 393 (2008)). If it was not your intent to interfere in any way with D.A. Kline's investigation, why was your request for Mr. Kline to return all the documents, and not simply provide your office with complete copies of all the documents in his possession?**

   Response: Former Attorney General Morrison intervened in the mandamus action filed by Planned Parenthood against Kline in July 2007 and sought return of the file containing the materials from the Judge Anderson inquisition taken by Kline when he left the Attorney General's Office. I became Attorney General six months later on January 30, 2008. Pursuant to a Kansas Supreme Court Order my office filed a brief in May 2008 asserting that former Attorney General Kline should return the file as improperly taken State property. It is my understanding that this is the same position previously taken by Morrison. (*Memo of AG Morrison In Support of Pet. for Mandamus*, at 18)("return any and all evidence produced in response to the now-closed inquisition to the Office of the Attorney General"). The Kansas Supreme Court in *Comprehensive Health of Planned Parenthood of Kansas and Mid-Missouri, Inc. v. Kline*, 287 Kan. 372 (Kan. 2008) ordered Kline to return a copy of the medical records and the investigation file taken

from the Attorney General's Office but permitted him to keep a copy for his criminal case against Planned Parenthood.

2. **It is my understanding that when Mr. Kline left the AG's office, he made copies of the records but deposited the original medical records with Judge Anderson. Furthermore, it is my understanding that AG Morrison was informed of the location of the records within the first few days of assuming office. Is this a correct understanding of the status of the records?**

   Response: I became Attorney General more than a year after Attorney General Morrison was sworn in and the activities referenced in the question took place. I do not know the status of the records when Attorney General Morrison took office. The Kansas Supreme Court noted that no inventory of the file was completed when Morrison took office and that no Planned Parenthood records were in the office. *CHPP*, 287 Kan. at 384.

   a. **If so, why was it necessary for you to obtain copies of the records, when you had the originals available to you?**

      Response: When I became Attorney General on January 30, 2008, there were not any Planned Parenthood records in the office. Prior to my becoming Attorney General, the Kansas Attorney General's Office had sought the return of the file taken by former Attorney General Kline when he left office. I did not re-evaluate the position taken by the Attorney General's Office that former Attorney General Kline should return the file as improperly taken State property.

   b. **Did you seek to obtain just a return of the records which Mr. Kline obtained while AG, or did you also seek to obtain any other evidence, including evidence he may have obtained as a result of his investigation while in his position as District Attorney?**

      Response: My office filed a brief in the *CHPP v. Kline* mandamus action seeking the return of the file created by Kline while he was Attorney General of Kansas.

   c. **Was any of the evidence which Mr. Kline had gathered, other than the original medical records, shared with Planned Parenthood or their attorneys?**

      Response: No. It is my understanding that only the medical records were returned to Planned Parenthood's attorneys.

3. **The Kansas Supreme Court ultimately ruled in Mr. Kline's favor on the merits of the case, but ordered him to provide complete copies of all the documents to your office. Had you been successful in requiring Mr. Kline to return all of the documents, wouldn't that have effectively prohibited any case against Planned Parenthood from going forward?**

Response: At the time I became Attorney General a case against Planned Parenthood was going forward before a grand jury in Johnson County, Kansas. The grand jury case against Planned Parenthood continued until March 2008 when the grand jury refused to return an indictment.

My office was not involved in Kline's prosecution of Planned Parenthood in Johnson County, Kansas. The Court's recitation of the facts in *State v. CHPP*, 291 Kan. 322, 338 (2010) show that Kline had access to the Planned Parenthood records from Judge Anderson and that pursuant to Kline's subpoena Judge Anderson testified and brought the records to court. Later in Kline's case, as discussed in *State v. CHPP*, he issued another subpoena to Judge Anderson seeking the Planned Parenthood records that was quashed by Johnson County District Court Judge Stephen Tatum. Kline appealed Judge Tatum's order and in *State v. CHPP,* 291 Kan. 322 (2010), the Kansas Supreme upheld portions of the order and reversed portions of the order and allowed Judge Anderson to produce the Planned Parenthood records. *State v. CHPP,* 291 Kan. at 363.

a. If so, do you believe this result would have been in the interest of justice, considering Judge Anderson's concerns about "manufactured records"?

Response: As discussed in the answer to question 3, the case against Planned Parenthood was being investigated by a grand jury. As district attorney, Kline had subpoena power and pursuant to Kline's first subpoena, Judge Anderson brought the Planned Parenthood records to court in Kline's criminal proceedings. Kline again exercised his subpoena power to obtain the records later in the case and the district court quashed his subpoena.

4. Did you, or anyone in your office, have a conversation with anyone representing Planned Parenthood or any representative of Planned Parenthood regarding your brief filed in *CHPP v. Klein*? If so, please explain the nature of those conversations and with whom they transpired.

Response: I did not have any conversations with Planned Parenthood's attorneys or any representative of Planned Parenthood on this topic. I do not recall anyone in my office telling me they had conversations with Planned Parenthood's attorneys or any representative of Planned Parenthood about the brief filed by the Kansas Attorney General's Office.

5. Did you, or anyone in your office, have discussions with then Governor Sibelius, or anyone in her Administration concerning the mandamus actions against D.A. Kline? If so, please explain the nature of those conversations and with whom they transpired.

Response: I did not discuss the topic of Planned Parenthood's mandamus action against former Attorney General Kline with Governor Sebelius or anyone in Governor Sebelius' administration. I do not recall anyone in my office telling me they discussed the topic with Governor Sebelius or with anyone in Governor Sebelius' administration.

Morrison v. Anderson

1. **When you became Attorney General you also replaced former A.G. Morrison in his mandamus action to require Judge Anderson to turn over the CHPP medical records in his custody. Were you, or members of your office, aware of Judge Anderson's statement that to return the documents obtained from Planned Parenthood, as you requested, "would unacceptably increase the risk that evidence could be lost, destroyed or compromised…it is difficult to understand how this could benefit the citizens of Kansas"?**

   Response: I was not aware of Judge Anderson's statement. I do not recall anyone in my office discussing Judge Anderson's statement with me.

   a. **If so, did your office take into account Judge Andersons concern in your continuation of the mandamus action? Please explain why or why not.**

      Response: Morrison filed the mandamus action against Judge Anderson six months before I became Attorney General. It is my understanding that Morrison sought to have the medical records returned to Planned Parenthood.

      In the mandamus action against Judge Anderson, my office sought Kansas Supreme Court supervision and protection of these records. The motion suggested that the Court consider quashing the subpoena issued by Kline and leaving the records with Judge Anderson during the pendency of the mandamus case, placing the records in the custody of the Clerk of the Supreme Court or with District Court Judge Stephen Tatum who was assigned to the criminal case against Planned Parenthood. Any of these actions would, in my view, protect the records.

2. **Did you or anyone in your office have a conversation with anyone representing Planned Parenthood or any representative of Planned Parenthood about seeking a judicial order compelling Judge Anderson to return the medical records in his possession? If so, please explain the nature of those conversations and with whom they transpired.**

   Response: Former Attorney General Morrison intervened in the mandamus case against Judge Anderson seeking return of the medical records in July of 2007, six months before I took office. After I became Attorney General on January 30, 2008, I did not speak with anyone representing Planned Parenthood or any representative of Planned Parenthood about this topic. I do not recall anyone in my office telling me they spoke with anyone representing Planned Parenthood or any representative of Planned Parenthood about the mandamus action against Judge Anderson.

3. **Did you, or anyone in your office, have discussions with then Governor Sibelius, or anyone in her Administration, concerning the mandamus action against Judge**

Anderson or the eventual emergency protective order sought by your office? If so, please explain the nature of those conversations and with whom they transpired.

Response: The mandamus case against Judge Anderson was filed under seal. I did not discuss the topic of the mandamus action against Judge Anderson or the motion for a protective order with Governor Sebelius or with anyone in Governor Sebelius' administration. I do not recall anyone in my office telling me they discussed the topic with Governor Sebelius or anyone in Governor Sebelius' administration.

4. **During his investigation, Mr. Kline issued a subpoena to Judge Anderson to testify at a hearing regarding Planned Parenthood. Based on unsealed court documents, Judge Anderson notified the Kansas Supreme Court of the subpoena and that he intended to comply with it unless directed otherwise by the Court. *Six v. Morrison*, No. 07-099050-S (2008), Notice of Collateral Proceeding and Receipt of Subpoena for Records. The same day, you sought an emergency protective order to quash the subpoena. Is it common practice for the State Attorney General to interfere with subpoenas and requests for evidence by local prosecutors? If so, can you provide any examples of other cases where Attorney General has done so?**

   Response: The Kansas Attorney General's Office filed the motion for the protective order to ensure that the Kansas Supreme Court was aware of the subpoena directed to the records that were the subject of the mandamus case against Judge Anderson pending before the Court and to ensure that any further movement of the records took place under the supervision of the Court. The motion suggested that the Court consider quashing the subpoena, placing the records in the custody of the Supreme Court Clerk during the pendency of the mandamus case against Anderson, or placing the records in the custody of Judge Stephen R. Tatum who was handling the criminal case filed by Kline against Planned Parenthood in Johnson County. The Kansas Attorney General's Office believed that any of these actions would have provided Court supervision and protection of the records.

5. **You cited privacy concerns in your emergency protective order request. You similarly alluded to such concerns in your testimony before the Committee and in the written statement you provided to me. But, it is my understanding that the medical records were redacted to remove any identifying information pursuant to a previous court order. Is this accurate?**

   Response: The Kansas Attorney General's Office believed that the records contained information that could be used to identify a patient. Judge Anderson noted the redacted records could be used to identify a patient and the Kansas Supreme Court noted this risk of disclosure of patient privacy from the redacted records in *Comprehensive Health of Planned Parenthood of Kansas and Mid-Missouri, Inc.*, 291 Kan. 322, 363 (2010).

   a. **When were the medical records first redacted, and by whom?**

Response: I do not know. When I became Attorney General there were not any Planned Parenthood records in the office.

b. If the records where redacted to remove patient identification information, how did they pose privacy concerns?

Response: Please see the answer to 5.

6. Do you agree with Judge Anderson's assessment that the medical records obtained from the abortion clinics in Kansas pursuant to subpoenas requested by former Attorney General Phil Kline were redacted of identities even <u>beyond</u> the requirements of HIPPA? *See Morrison v. Anderson*, Case No. 07-99050-S (response of Judge Richard Anderson to Petitioner Attorney General Paul J. Morrison's Petition for Writ of Mandamus) (footnote 1).

Response: I have never reviewed the records. I have no reason to disagree with Judge Anderson's assessment.

<u>General Questions</u>

1. It has been reported that between 2002 and 2003, Kansas abortion providers drastically underreported incidents of child sexual abuse/statutory rape, filing only 2 reports of child sexual abuse despite performing 166 abortions on children 15 years old or younger. Did you take any action to support or initiate an investigation into this apparent underreporting? If so, what action did you take?

Response: After I became Attorney General in January 2008, I am not aware of the Kansas Attorney General's Office conducting such an investigation.

2. Did your office have access to reports provided by abortion providers under K.S.A. 65-445 to the Kansas Department of Health and Environment?

Response: After I became Attorney General on January 30, 2008, I am not aware of my office seeking access to any reports under K.S.A. 65-445. The statute provides that the reports may be disclosed to the Attorney General's Office on a showing that reasonable cause exists to believe a violation of the Act occurred.

3. Are the reports provided by abortion providers under K.S.A. 65-445 redacted of patient identities?

Response: I have never reviewed any such reports. The statute, K.S.A. 65-445, provides that the reports should not contain the patient's names.

4. Is it accurate to say that one of the reasons that Kansas's law requires such reports is to ensure compliance with Kansas's abortion restriction laws?

Response: Yes.

5. **Did you ever receive a request from a District Attorney to assist in gaining access to those reports in order to move forward with a pending criminal case? If so, what was your response and why?**

   Response: I do not recall anyone discussing such a request with me. If a request was made in a criminal case by a District Attorney it likely would have been handled by the Assistant Attorneys General in the Criminal Division.

6. **Did you, or anyone in your office, discuss the criminal proceeding against Planned Parenthood with Kansas Department of Health and Environment staff? If so, please explain what these discussions entailed.**

   Response: I did not discuss criminal proceedings against Planned Parenthood with Kansas Department of Health and Environment staff. I do not recall anyone in my office telling me they discussed criminal proceedings against Planned Parenthood with Kansas Department of Health and Environment staff.

7. **Did you, or anyone in your office, ever seek to prevent Kansas Department of Health and Environment staff from working with law enforcement officers or District Attorney Office's in investigations pertaining to violations of Kansas's abortions laws?**

   Response: I did not seek to prevent Kansas Department of Health and Environment staff from working with law enforcement officers or a District Attorney's office. I am not aware of anyone in my office doing so.

8. **What is your understanding of the state of the law in Kansas, as enunciated by the State Supreme Court regarding who can enforce Kansas abortion law? Can a District Attorney do so, or is it limited to the AG's office? It seems the Supreme Court has taken contrary views on this issue. Can you provide any clarification?**

   Response: My understanding is that the Kansas Attorney General's Office does not have original criminal jurisdiction for criminal cases. The Kansas Attorney General's Office is required to be asked by a district or county attorney to assume jurisdiction in a case in order to become involved as prosecutors.

Responses of Stephen N. Six
Nominee to be United States Circuit Judge for the Tenth Circuit
to the Written Questions of Senator Tom Coburn, M.D.

1. **Some people refer to the Constitution as a "living" document that is constantly evolving as society interprets it. Do you agree with this perspective of constitutional interpretation?**

   Response: I do not agree with the idea that the Constitution is constantly evolving as society interprets it. While societal circumstances can change, the Constitution is only changed through amendments as set forth in Article V.

2. **Justice William Brennan once said: "Our Constitution was not intended to preserve a preexisting society but to make a new one, to put in place new principles that the prior political community had not sufficiently recognized." Do you agree with him that constitutional interpretation today must take into account this supposed transformative purpose of the Constitution?**

   Response: No.

3. **Do you believe judicial doctrine rightly incorporates the evolving understandings of the Constitution forged through social movements, legislation, and historical practice?**

   Response: No.

4. **The U.S. Supreme Court held in *District of Columbia v. Heller*, 554 U.S. 570 (2008), that the Second Amendment of the United States Constitution "protects an individual right to possess a firearm unconnected to service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home." As Justice Scalia's opinion in *Heller* pointed out, Sir William Blackstone, the preeminent authority on English law for the Founders, cited the right to bear arms as one of the fundamental rights of Englishmen. Leaving aside the *McDonald v. Chicago* decision, do you personally believe the right to bear arms is a fundamental right?**

   Response: The Second Amendment establishes that right and the Supreme Court affirmed that right.

   a. **Do you believe that explicitly guaranteed substantive rights, such as those guaranteed in the Bill of Rights, are also fundamental rights? Please explain why or why not.**

      Response: The Supreme Court stated in *McDonald v. City of Chicago*, that certain rights, including most of the rights guaranteed in the Bill of Rights, have been determined by the Court to be "fundamental" to our country's "scheme of ordered liberty" or "deeply rooted in the Nation's history and tradition," and have been deemed to apply against the States.

b. Is it your understanding of Supreme Court precedent that those provisions of the Bill of Rights that embody fundamental rights are deemed to apply against the States? Please explain why or why not.

Response: Yes. Please see response to 4(a).

c. The *Heller* Court further stated that "it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right." Do you believe that the Second Amendment, like the First and Fourth Amendments, codified a pre-existing right? Please explain why or why not.

Response: Yes. In *Heller*, the Supreme Court determined "the Second Amendment, like the First and Fourth Amendments, codified a pre-existing right." If confirmed, I would apply the precedent in *Heller* as well as any other applicable cases.

5. Some have criticized the Supreme Court's decision in *Heller* saying it "discovered a constitutional right to own guns that the Court had not previously noticed in 220 years." Do you believe that *Heller* "discovered" a new right, or merely applied a fair reading of the plain text of the Second Amendment?

Response: The Supreme Court's decision in *Heller* was based on the text of the Second Amendment and if confirmed I would apply the precedent in *Heller* as well as any other applicable Supreme Court cases.

a. Similarly, during his State of the Union address, the President said the Supreme Court's decision in *Citizens United v. FEC*, 558 U.S. ___ (2010), "reversed a century of law" and others have stated that it abandoned "100 years of precedent." Do you agree that the Court reversed a century of law or 100 years of precedent in the *Citizens United* decision? Please explain 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.

6. What limitations remain on the individual Second Amendment right now that it has been incorporated against the States?

Response: As the Supreme Court discussed in *McDonald v. City of Chicago* and in *Heller* some limitations remain, such as possession of a firearm by felons or the mentally ill or "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings."

a. Is the Second Amendment limited only to possession of a handgun for self-defense in the home, since both *Heller* and *McDonald* involved cases of handgun possession for self-defense in the home?

Response: The Supreme Court in *Heller* and *McDonald* identified certain types of laws that would not infringe on the Second Amendment, however, the Court did not define the extent of Second Amendment rights under all scenarios. If confirmed, I would apply the Supreme Court's precedents in *Heller* and *McDonald*.

7. In *Roper v. Simmons*, 543 U.S. 551 (2005), Justice Kennedy relied in part on the "evolving standards of decency" to hold that capital punishment for any murderer under age 18 was unconstitutional. I understand that the Supreme Court has ruled on this matter, but do you agree with Justice Kennedy's analysis?

Response: If confirmed, I would apply the binding precedent of the Supreme Court in *Roper* as well as any other applicable precedent.

a. Do you agree that the Constitution's prohibition on cruel and unusual punishment "embodies a principle whose application is appropriately informed by our society's understanding of cruelty and by what punishments have become unusual?"

Response: If confirmed as a circuit court judge and faced with an issue involving the Eighth Amendment and capital punishment, I would be required to follow the Supreme Court precedents and the analytical framework in *Roper v. Simmons* on what constitutes cruel and unusual punishment.

b. How would you determine what the evolving standards of decency are?

Response: I would follow the guidance of the Supreme Court in *Roper* and any other applicable binding precedents.

c. Do you think that a judge could ever find that the "evolving standards of decency" dictated that the death penalty is unconstitutional in all cases?

Response: The Supreme Court has determined the death penalty is constitutional except in limited circumstances. Given this binding precedent, I do not believe a lower court judge could decide otherwise.

d. What factors do you believe would be relevant to the judge's analysis?

Response: Given that a lower court judge could not decide that the death penalty was unconstitutional in all circumstances, I do not believe such analysis would be appropriate.

e. When determining what the "evolving standards of decency" are, justices have looked to different standards. Some justices have justified their

decision by looking to the laws of various American states,[1] in addition to foreign law, and in other cases have looked solely to the laws and traditions of foreign countries.[2] Do you believe either standard has merit when interpreting the text of the Constitution?

Response: In interpreting the Constitution I would look to domestic sources of law and legal authorities unless instructed otherwise by the Supreme Court. In *Roper* the Court held that state laws and foreign laws are relevant but not controlling. I would not consider state law or foreign law in Constitutional interpretation unless binding Supreme Court precedent required it.

i. If so, do you believe one standard more meritorious than the other? Please explain why or why not.

Response: Please see response to 7(e).

8. In your view, is it ever proper for judges to rely on foreign or international laws or decisions in determining the meaning of the Constitution?

Response: In interpreting the United States Constitution I would use domestic legal sources, unless instructed to do otherwise by binding Supreme Court precedent.

a. Is it appropriate for judges to look for foreign countries for "wise solutions" and "good ideas" to legal and constitutional problems?

Response: I would not look to the law of foreign counties in evaluating legal and constitutional problems unless directed to do so by the Supreme Court.

b. If so, under what circumstances would you consider foreign law when interpreting the Constitution?

Response: If confirmed, I would not use foreign laws when interpreting the Constitution unless directed to do so by the Supreme Court.

c. Do you believe foreign nations have ideas and solutions to legal problems that could contribute to the proper interpretation of our laws?

Response: I believe the United States Constitution and laws should be interpreted with domestic legal authorities not foreign sources.

d. Would you consider foreign law when interpreting the Eighth Amendment? Other amendments?

Response: If confirmed, I would not consider foreign law in interpreting the Constitution unless directed to do so by binding Supreme Court precedent.

[1] *Roper v. Simmons*, 543 U.S. 551, 564-65.
[2] *Graham v. Florida*, 130 S.Ct. 2011, 2033-34.