



Stephen N. Six
Nominee for the United States Court of Appeals for the Tenth Circuit

June 15, 2011

On March 9, 2011, President Obama nominated Stephen N. Six to serve as a judge on the United States Court of Appeals for the Tenth Circuit.¹ Six's hearing was held on May 24, 2011.² The ABA rated Six unanimously well-qualified.³ As outlined below, however, there is some reason to be concerned about Six's fitness to sit on the federal bench.

1. *Six's position regarding litigation concerning the federal health care law.*

Six declined the opportunity to join a law suit by a number of other states challenging the constitutionality of the recently-enacted Patient Protection and Affordable Care Act. (PPACA)⁴ Six defended his refusal by 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."⁵

Deciding not to spend resources on a lawsuit that one concludes has little chance of succeeding seems like a prudent decision. But Six's statement that the PPACA contains no constitutional defects may signal that Six holds an overly-expansive view of federal power. The primary point of contention in litigation concerning PPACA is the so-called "individual mandate," a provision that requires most Americans, whether they

¹ Press Release, White House, *President Obama Nominates Steve Six to the United States Circuit Court* (Mar. 9, 2011), <http://www.whitehouse.gov/the-press-office/2011/03/09/president-obama-nominates-steve-six-united-states-circuit-court>.

² Hearing of the Senate Judiciary Comm. on Nominations, 112th Cong. (May 24, 2011).

³ American Bar Association, *Ratings of Article III Judicial Nominees: 112th Congress*, http://www.americanbar.org/content/dam/aba/migrated/2011_build/federal_judiciary/ratings112.authcheckdam.pdf (last updated Mar. 17, 2011); United States Senate Comm. on the Judiciary, *Judicial Nomination Materials*, 112th Cong. .

⁴ Responses of Stephen N. Six to the Written Question of Senator Chuck Grassley. Response to Question 1a (Grassley Questions), *available at*, <http://judiciary.senate.gov/nominations/112thCongressJudicialNominations/upload/StephenSix-QFRs.pdf>; *Six Says No 'Constitutional Defects' in Health Care Law*, LEGALNEWSLINE.COM (Apr. 4, 2010, 3:46 PM), <http://www.legalnewsline.com/news/226489-six-says-no-constitutional-defects-in-health-care-law>.

⁵ Grassley Questions, *supra* n. 4, Response to Question 1a.

want to or not, to purchase government approved health insurance or pay a penalty. The government has defended the individual mandate as a legitimate exercise of Congress's power to regulate commerce among the states. But the individual mandate is unprecedented; never before has Congress attempted to use its power to regulate commerce to force people to enter into a commercial transaction simply because they exist and reside in this country. If the individual mandate is a constitutional exercise of the power to regulate commerce, there is no reason why the federal government could not compel people to enter into any number of other transactions or buy other products. While the courts may ultimately find the individual mandate constitutional, that holding would represent a significant expansion of federal power. Six apparently believes that expansion is warranted. If so, Senators concerned about judicial approval of federal overreaching would have good reason to oppose Six's confirmation.

2. Six's involvement in ongoing criminal investigations of abortion providers

Six took several actions as Attorney General that delayed (and could potentially have ended) criminal investigations of certain abortion providers. To understand the importance of those actions, a brief chronology of events is necessary.

While Attorney General of Kansas, Phill Kline initiated a criminal investigation of certain abortion providers.⁶ During this investigation, Kline procured redacted medical records filed by those providers with the Kansas Department of Health and Environment.⁷ The investigation was controversial. In 2006, Kline was defeated in his bid for re-election by Paul Morrison, the Johnson County District Attorney.⁸ An important issue in that election was the ongoing investigation; in fact, that issue likely led to Kline's defeat.⁹ When Morrison took office as Attorney General in 2007, Kline was appointed to replace him as Johnson County District Attorney.¹⁰ As Johnson County District Attorney, Kline initiated an investigation of abortion providers based on copies of medical records he had received as Attorney General.¹¹ Meanwhile, Morrison ultimately ended the Attorney General's office's investigation and cleared the abortion providers of wrongdoing.¹² Morrison also intervened in a mandamus action by Planned Parenthood seeking to have Kline return the copies of Planned Parenthood medical records and initiated another mandamus action against the custodian of the records, District Judge Richard Anderson, seeking to have Anderson return the records in his possession.¹³

Morrison resigned as Attorney General in December 2007 after it was revealed that he had been carrying on an extramarital affair with Linda Carter, his office administrator

⁶ *Kansas v. Planned Parenthood*, 241 P.3d 45, 51 (Kan. 2010).

⁷ *Id.*

⁸ Tim Carpenter, *Sex scandal rocks A.G.*, The Capital-Journal, Dec. 9, 2007, at 1A.

⁹ Bill Blankenship, *Abortion issue undid Kline*, The Capital-Journal, Nov. 8, 2006, http://cjonline.com/stories/110806/leg_klineloss.shtml.

¹⁰ 241 P.3d at 53.

¹¹ *Id.*

¹² *Id.* at 56-57.

¹³ *Id.*

in the Johnson County District Attorney's office.¹⁴ Carter had continued on as the office administrator after Kline became Johnson County District Attorney.¹⁵ Besides revealing the affair, Carter alleged that Morrison had wanted her to give him information concerning Kline's investigation of Planned Parenthood.¹⁶ Morrison's resignation, along with Carter's accusations, were well-publicized.¹⁷

In January 2008, stating that she hoped that he would bring order and integrity back to the office, then-Governor Sebelius appointed Six to replace Morrison as Attorney General.¹⁸ While Six was serving as Attorney General, his office took several actions concerning Kline's investigation of Planned Parenthood. First, Six approved briefs filed by the Attorney General's office in the two mandamus actions initiated while Morrison was Attorney General.¹⁹ Second, when in April 2008 Kline subpoenaed Judge Anderson to appear in court with the Planned Parenthood records, after Anderson had testified in January that he had found irregularities in the records, the Attorney General's office filed a motion for a protective order to prevent Anderson from appearing.²⁰ Six also did not re-evaluate Morrison's decision to close the Attorney General's Planned Parenthood investigation.²¹

Six's actions regarding the Planned Parenthood investigation and his answers to questions about those actions raise serious concerns about Six's fitness to sit on the federal bench. Six's decision not to re-evaluate Morrison's decision to end the Planned Parenthood investigation seems questionable given that the investigation was an issue in the Kline-Morrison election campaign and given the well-published details of Morrison's affair and resignation and Carter's accusations that Morrison pressed her about information regarding Kline's investigation of Planned Parenthood in Johnson County. These facts should lead one to at least a tentative conclusion that Morrison's treatment of the investigation may well have been based on something other than the legal merits of the case.

Six claimed not to have any knowledge of the investigation's history,²² but that claim is implausible given the facts noted above. As one observer has noted, "Six seems to have developed sudden amnesia concerning any conversations that took place concerning the Planned Parenthood prosecution, which is troubling at best . . . Six admits to making legal decisions about mandamus decisions and seeking [protective orders] while maintaining that he was unaware of the critical details of the case and without re-

¹⁴ Tim Carpenter, *Power, lust, undoing*, The Capital-Journal, Dec. 16, 2007, at 1A.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*; Carpenter, *supra* note 8; Blankenship, *supra* note 9.

¹⁸ George Diepenbrock & Scott Rothschild, *Lawrence judge named new AG, promises to serve with integrity*, LJWorld.com, Jan. 19, 2008, http://www2.ljworld.com/news/2008/jan/19/lawrence_judge_named_new_ag_promises_serve_integrity/.

¹⁹ Senator Chuck Grassley Additional Questions for the Record, Response to Question 4 (Additional Questions).

²⁰ *Dispute threatens Kline's Case*, The Associated Press, May 18, 2008, http://cjonline.com/stories/051808/kan_280249229.shtml.

²¹ Additional Questions, Response to Question 1.

²² *Id.* Response to Questions 1-5.

examining the decisions of the man who was forced to resign over a scandal that involved the case.”²³

²³ *Six's Answers Are Implausible Concerning Abortion Questions*, Operation Rescue (June 8, 2011), <http://www.operationrescue.org/archives/sixs-answers-are-implausible-concerning-abortion-questions/>