

Written Questions of Senator Tom Coburn, M.D.

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Nominee, to be Solicitor General

U.S. Senate Committee on the Judiciary

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1. You were counsel of record for an *amicus* brief filed by the Rockefeller Foundation in *National Endowment for the Arts (NEA) v. Finley*, which challenged a statute requiring the NEA to consider “general standards of decency and respect for the diverse beliefs and values of the American public” in making art grants. In your brief, you argued the statute “imposes impermissible viewpoint-based criteria on NEA grants.” Your brief further argues that the statute violates the First Amendment because “Congress has no more power to discriminate against unconventional views when it is fund[ing] private expression than when it is restricting private expression directly.”
 - a. Congress uses its spending power to coerce actions all the time. Are there any other grants or appropriations you think are unconstitutional? I would note that the Supreme Court rejected your argument in the brief, but I’m wondering how far your logic extends.

ANSWER

The *amicus* brief I filed in *National Endowment for the Arts v. Finley* was for the Rockefeller Foundation and set forth the legal arguments that the Foundation wanted to present to the Supreme Court. The brief makes an argument that Congress cannot use the spending power to impose viewpoint-based restrictions on grants that fund expressive activity, if those restrictions would violate the First Amendment had Congress sought to impose them directly.

If I am confirmed as Solicitor General, it will be my responsibility to defend federal grants and congressional appropriations when they are challenged in court. Should a question like the one presented in *National Endowment for the Arts v. Finley* come before the courts, the decision in that case would be one of the defensive tools I would employ. Whatever personal views I might have respecting any legal issue – and whatever the views of my former clients – they will play no role in the discharge of my obligations. My decisions will be based on the law as the Supreme Court has determined it, and my best judgment as to the long-term institutional interests of the United States (informed by the kind of extensive deliberations with executive branch departments and agencies that the Solicitor General’s Office regularly undertakes in order to determine the interests of the United States).

- b. For example, do you agree with the judge in *Commonwealth of Massachusetts v. Health and Human Services* that the Defense of Marriage Act (DOMA) violates the 10th Amendment and is inducing states to violate the equal protection rights of their citizens because it imposes an unconstitutional condition on the receipt of federal funding? Please explain.

ANSWER

Because I was recused, I did not participate in any internal Department of Justice deliberations or inter-agency deliberations within the executive branch regarding whether reasonable arguments could be advanced in defense of the constitutionality of Section 3 of DOMA. Participation in such discussions and deliberations would be essential to developing a fully informed view on the question of whether Section 3 of DOMA could be defended under the Department of Justice’s traditional standards. Thus, any opinion I

can offer in response to this question is necessarily limited and provisional. I can say, however, that, under the most deferential standard of review available under the equal protection component of the Due Process Clause, a reasonable argument can be advanced that Section 3 of DOMA has a rational basis. That conclusion is consistent with the Attorney General's February 23, 2011 letter to Speaker Boehner pursuant to 28 U.S.C. § 530D, which stated that "[i]f asked by the district courts in the Second Circuit for the position of the United States in the event those courts determine that the applicable standard is rational basis, the Department will state that, consistent with the position it has taken in prior cases, a reasonable argument for Section 3's constitutionality may be proffered under that permissive standard."

2. In contrast, to your brief in the NEA case, you acted as counsel of record in an *amicus* brief filed by The Coalition to Stop Gun Violence in *Printz v. US*. In that brief you argued in support of a provision in the Brady Act requiring state law enforcement officials to conduct background checks on prospective handgun purchasers. You argued that the bill did not violate the principles of federalism and state sovereignty as embodied in the Constitution and the 10th Amendment because the act did not compel state legislatures to enact laws, "but merely enlisted state officers to help enforce a federal program for a temporary period of time." Further, you argued that the law "must be upheld because the compelling federal interest in immediately addressing the epidemic of handgun violence greatly outweighs the minimal and temporary obligations placed on the states." The Supreme Court rejected your position in a 5 to 4 decision.
 - a. How do you reconcile these two arguments when, in NEA you are arguing that the conditioning of federal funding violates the First Amendment, but requiring certain actions by state officials in the *Printz* case does not violate the 10th Amendment?

ANSWER

The brief I filed in *Printz v. United States* was for the Coalition to Stop Handgun Violence. The case involved a challenge, on Tenth Amendment grounds, to a federal law that required State governments to administer (for a limited period of time) a federal background check system for firearms purchases. The requirement was imposed directly on state governments. Thus it did not raise any question regarding potential constitutional limits on the kinds of conditions Congress can attach to federal funds when Congress acts under the Spending Power. Rather, the question in the case was to what extent, if any, the federal government could directly require a state government to cooperate in the administration of a federal program, consistent with the state sovereignty interests that the Tenth Amendment protects. Therefore, I do not believe there was any inconsistency with the arguments I advanced on behalf of the Rockefeller Foundation in the *NEA v. Finley* case, which did not involve a Tenth Amendment question and involved an exercise of the Spending Power.

To the extent there had been any inconsistency between the position I took on behalf of the *amicus* group in *NEA v. Finley* and the position I took on behalf of the *amicus* group in *Printz v. United States*, it would be explained by the fact that I was advocating for different clients with different interests in different cases raising distinct legal issues. A lawyer in private practice representing a client has an obligation to represent the interests of the client vigorously, and it is not uncommon for lawyers to advocate legal positions on behalf of one client that are not entirely consistent with legal positions advanced on behalf of a different client in a different matter.

- b. Do you continue to believe your arguments in both of these cases were supported by the law at the time?

ANSWER

I believe that the arguments advanced on behalf of my clients in both cases had a solid foundation in the law at the time they were made. In both cases, the court of appeals had agreed with the legal position I advocated on behalf of my client in the Supreme Court, and in both cases the Supreme Court was divided.

3. You filed an *amicus* brief in support of a petition for cert in the Supreme Court case of *Housel v. Head*. Housel had been sentenced to death for a brutal and murderous crime spree spanning several states. Housel appealed his sentence arguing ineffective assistance of counsel. The arguments in your brief were based on “international human rights” and cited several international law sources. In fact you concluded by arguing that “[i]t is in the interests of the United States and the world community that the legal standards of the United States should reflect and be informed by international human rights.” The Supreme Court rightfully denied cert in this case. If you are confirmed as Solicitor General, will you argue for legal standards that reflect international human rights?

ANSWER

In *Housel v. Head*, I filed an *amicus* brief as counsel for Members of Parliament of the United Kingdom as well as two professional legal organizations – the Law Society of England and the Human Rights Committee of the Bar of England and Wales. They had an interest in the case because the criminal defendant was a British subject. The legal arguments set forth in the brief represented the position that those Members of Parliament and professional organizations wanted to present to the Supreme Court. I served as their lawyer and presented their views.

If I am confirmed, my responsibility as Solicitor General will be to represent the United States, and to make determinations about what position the United States should take in the Supreme Court on the basis of the Constitution and laws of the United States. In making those determinations, I will adhere to my view that foreign law, including international human rights law, has no authoritative force in interpreting the Constitution and laws of the United States, except in those rare instances in which federal statutes incorporate or make international and/or foreign court decisions binding legal authority.

- a. Other than the interpretation of treaties, in which cases could you foresee including any citation to international law in your argument or brief?

ANSWER

Generally, if I am confirmed, I do not foresee relying on international law in arguments or briefs because, apart from the interpretation of treaties, international law should have no authoritative force in interpreting the Constitution and laws of the United States. There are circumstances in which I could foresee including citations to English common law predating American independence, because that law can sometimes illuminate the understanding of the Framers and therefore inform interpretation of the Constitution. There are also circumstances in which the Supreme Court’s jurisprudence makes reference to international law – specifically the laws of war – relevant in interpreting domestic law. For example, in *Hamdi v. Rumsfeld*, Justice O’Connor’s plurality opinion looked to traditional law of war principles to inform analysis of the lawfulness, scope and duration of military detention under the 2001 Authorization for the Use of Military Force (AUMF). Future litigation regarding detention under the AUMF may therefore require some reference to the laws of war. Finally, it may be necessary in briefs and arguments

to respond to claims made by persons adverse to the interests of the United States that rely on international law.