

May 12, 2010

The Honorable Jeff Sessions
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Senator Sessions:

Thank you for your letter of May 10 and for the opportunity to provide additional information in response to your written questions. In answering your letter, I begin with a brief explanation of how I approached some of the questions on which you have requested more information.

Some of your questions ask for my views on specific Supreme Court cases or doctrines beyond what I have provided in my testimony and earlier written responses. As a scholar, I have engaged in academic study and critique of Supreme Court cases and doctrines in an effort to advance understanding and betterment of the law and to promote the education of future lawyers. Where I have expressed views about a particular case or doctrine in my scholarly work, I have identified those views and cited the relevant book, article, or speech, while noting that if confirmed I would faithfully follow the law, regardless of my academic views. Where I am able to supply additional information of this sort, I have done so below.

The role of a scholar, however, is distinct from the role of an inferior court judge. As I said at my confirmation hearing and in my responses to written questions, the role of a circuit judge—unlike that of a scholar—is not to evaluate or opine on the correctness of Supreme Court cases or doctrines. It is to apply the law faithfully and impartially to the facts of each case. Accordingly, like prior nominees who have been nominated to serve as an inferior court judge, I do not believe it is appropriate for me now to critique or speculate on the correctness of Supreme Court precedents or doctrines that I will be duty-bound to apply faithfully and impartially if I am confirmed. My responses to some of your questions reflect this concern.

Questions 1(a)(i) and (ii)

If I am confirmed, my role as a circuit judge would not be to evaluate or opine on the correctness of Supreme Court cases or doctrines, but to apply the law faithfully and impartially to the facts of each case. Accordingly, I do not believe it is appropriate for me now, as a nominee to serve as an inferior court judge, to critique or speculate on the correctness of *Wickard v. Filburn* because it is a precedent of the Court that I will be duty-bound to apply faithfully and impartially if I am confirmed. In general, my writings have supported a functional approach to Commerce Clause jurisprudence as well as judicial deference to Congress's legislative prerogatives under the clause. See *Keeping Faith with the Constitution* 65-72 (2009); *Separation Anxiety: Congress, the Courts, and the Constitution*, 91 Geo. L.J. 439 (2003).

Questions 1(b)(i) and (ii)

If I am confirmed, my role as a circuit judge would not be to evaluate or opine on the correctness of Supreme Court cases or doctrines, but to apply the law faithfully and impartially to the facts of each case. *Kelo v. City of New London* is a precedent of the Court that I will be duty-bound to apply faithfully and impartially if I am confirmed.

Question 6(a)

The book *Keeping Faith with the Constitution* describes how constitutional interpretation has in fact been practiced by the Supreme Court of the United States. This description does not apply to inferior court judges, for they must accept Supreme Court precedent as controlling. Even when an inferior court judge hears a case of first impression or reviews a panel decision *en banc*, Supreme Court precedent is binding and constrains the decision-making process. Thus, a circuit judge, even in a novel or *en banc* case, must take his guidance from Supreme Court precedent and lacks authority to improvise his own approach to constitutional interpretation, as recent *en banc* decisions in the Ninth Circuit demonstrate. See, e.g., *United States v. Nevils*, 598 F.3d 1158 (9th Cir. 2010) (*en banc*) (applying *Jackson v. Virginia*, 443 U.S. 307 (1979), to sustain federal conviction for being a felon in possession of a firearm and ammunition); *Bull v. City & County of San Francisco*, 595 F.3d 964 (9th Cir. 2010) (*en banc*) (applying the Supreme Court's Fourth Amendment precedents to uphold the strip search policy of the county jail system). This understanding of the role of an inferior court judge is what I had in mind when I testified that my writings would have no bearing on my role as a judge.

Question 7(a)

I understand your concern that, without accountability, courts can move away from the law. At one level, our system provides that the American people

retain the ultimate power to determine whether the judiciary has been faithful to the Constitution. On occasion, the American people have exercised this power to overrule Supreme Court precedent. *See, e.g.,* U.S. Const. amend. XIII, *overruling* *Dred Scott v. Sandford*, 60 U.S. 393 (1857); U.S. Const. amend. XI, *overruling* *Chisholm v. Georgia*, 2 U.S. 419 (1793).

Apart from the process of constitutional amendment, I understand your question to ask how unelected life-tenured judges can be held accountable to the Constitution if they may adapt the Constitution to meet the challenges and conditions of each generation. The independence of our judiciary means that constitutional decisions are not reversible by the elected branches of government. However, in the case of inferior courts, the Supreme Court serves as the ultimate arbiter of when the lower courts have been faithful to the Constitution. In the case of the Supreme Court itself, that institution is constrained by its own commitment to the Constitution and by the doctrine of *stare decisis*, whose faithful application promotes judicial accountability and safeguards the rule of law.

For example, in applying the Fourth Amendment guarantee against “unreasonable searches and seizures,” the Supreme Court has asked whether the person subject to search has a “reasonable expectation of privacy.” *Bond v. United States*, 529 U.S. 334, 337 (2000). Reasonableness is an objective inquiry that turns in part on “whether the individual’s expectation of privacy is one that society is prepared to recognize as reasonable.” *Id.* at 338 (internal quotation marks and citation omitted). Judges properly consider the challenges and conditions of our society in applying the Fourth Amendment insofar as they must determine what privacy expectations our society is prepared to recognize as reasonable. But this is not a free-wheeling, unaccountable inquiry. When the Supreme Court decides cases under the Fourth Amendment, it does so against the backdrop of its own precedents. The process of precedent-based, analogical reasoning disciplines and constrains judicial inquiry into what privacy expectations are reasonable. *See, e.g., id.* at 336-38.

Questions 7(b)(i) and (ii)

(i) I have written disapprovingly of *Buck v. Bell* when I described it as “the notorious ‘[t]hree generations of imbeciles is enough’ case in which Justice Holmes dismissively referred to the Equal Protection Clause as ‘the usual last resort of constitutional argument.’” *Keeping Faith with the Constitution* 99 (2009).

(ii) The fact that a policy is broadly accepted does not make it constitutional, for our Constitution includes express guarantees of individual rights and liberties as safeguards against “tyranny of the majority.” Where a broadly accepted policy infringes on a constitutional right, the policy is invalid. Where no countervailing constitutional right exists, however, our system gives the democratic process wide latitude to enact broadly accepted policies. In resolving

conflicts between majoritarian policies and individual rights, the judiciary plays a crucial role. Because it is “[i]nsulated from partisan pressures, the judiciary bears a responsibility to render decisions without fear or favor toward the political majority. As Alexander Hamilton said, independent courts serve as an ‘excellent barrier to the encroachments and oppressions of the representative body,’ and they play a ‘peculiarly essential’ role in safeguarding individual rights and liberties.” *Id.* at 24. My writings have discussed *Skinner v. Oklahoma* as an example of how the Supreme Court properly applies the Constitution’s principles of individual liberty and equal protection of the laws to invalidate a broadly accepted policy. *See id.* at 98-99.

Questions 9(b) and (c)

My writings have generally agreed that the Supreme Court is authorized to make this determination based on whether the original expected application of a constitutional provision would preserve or undermine the vitality of the constitutional text or principle in light of societal change. In my book, I use *Katz v. United States*, 389 U.S. 347 (1967), as an example: “*Katz* illustrates how an approach to interpretation that relies too heavily on original understandings of the reach of a constitutional principle would defy our own understanding of the Constitution as a document meant to retain not lose its significance over time. In reading the terms ‘search’ and ‘seizure’ to cover non-physical intrusions such as wiretapping, the Court famously declared that ‘the Fourth Amendment protects people, not places,’ and effectively heeded Justice Brandeis’s admonition that the Constitution ‘must have a . . . capacity of adaptation to a changing world’ if ‘[r]ights declared in words [are not to] be lost in reality.’” *Keeping Faith with the Constitution* 95 (2009) (citing *Katz*, 389 U.S. at 351, and *Olmstead v. United States*, 277 U.S. 438, 472-73 (1928) (Brandeis, J., dissenting) (internal quotation marks and citation omitted)).

Question 10(b)

If I am confirmed, my role as a circuit judge would not be to evaluate or opine on the correctness of Supreme Court cases or doctrines, but to apply the law faithfully and impartially to the facts of each case. *Zelman v. Simmons-Harris* is a precedent of the Court that I will be duty-bound to apply faithfully and impartially if I am confirmed.

Questions 13(b), (d), (e), (f), (g), (h), and (i)

If I am confirmed, my role as a circuit judge would not be to evaluate or opine on the correctness of Supreme Court cases or doctrines, but to apply the law faithfully and impartially to the facts of each case. (b) *District of Columbia v. Heller*, (d) *Boumediene v. Bush*, (e) *Lee v. Weisman*, (f) *Morrison v. Olson*, (g) the Court’s precedents concerning obscene speech, (h) *Kennedy v. Louisiana*, and

(i) *Gonzales v. Carhart* are precedents of the Court that I will be duty-bound to apply faithfully and impartially if I am confirmed.

Question 17(a)

Yes, I believe that affecting the distribution of wealth in our society is a permissible constitutional basis for the federal government to enact legislation, provided that the legislation is authorized by one of Congress's enumerated powers.

No, I do not believe that affecting the distribution of wealth in our society is a permissible basis for a judicial decision, unless a court is faithfully applying a duly enacted statute with that purpose or a provision of the Constitution, such as the Due Process Clause or Takings Clause, that protects property rights.

Question 18(a)

I do not agree with Professor Tushnet that there is no "domain of freedom unto which the Constitution doesn't reach."

Question 18(b)

If I am confirmed, my role as a circuit judge would not be to evaluate or opine on the correctness of Supreme Court cases or doctrines, but to apply the law faithfully and impartially to the facts of each case. The state action doctrine is governed by precedents of the Court that I will be duty-bound to apply faithfully and impartially if I am confirmed.

Question 19(c)

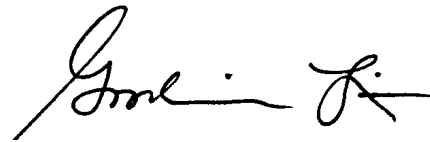
The text of the Constitution says that "[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." The text does not specify a standard for determining whether a state's law violates the Privileges or Immunities Clause, just as the text of the First Amendment does not specify what "speech" is constitutionally protected and the text of the Fourteenth Amendment does not specify what inequalities violate "equal protection of the laws." See *Keeping Faith with the Constitution* 42-43 (2009). The proper application of these generally worded constitutional provisions has been determined through a gradual process of case-by-case judicial interpretation, and that gradual process is what I meant when I said that "[n]ew rights would not 'flood in' if *Slaughterhouse* were reversed today" and that "[i]t would be case-by-case."

Questions 20(a) and (b)

(a) I agree with Justice Kennedy insofar as the Ninth Amendment, like the rest of the Bill of Rights, was originally understood to apply only to the federal government and the Framers generally trusted the states to protect individual rights and liberties.

(b) I do not agree with Professor Grey that the Ninth Amendment is a “license” for judges to “look beyond the substantive commands of the constitutional text.” The Ninth Amendment does not say whether unenumerated rights that are retained by the people are judicially enforceable, and the Supreme Court has not read the Ninth Amendment as an independent source of rights beyond those protected elsewhere in the Constitution.

Sincerely,

A handwritten signature in black ink, appearing to read 'Goodwin Liu', with a stylized flourish at the end.

Goodwin Liu