

May 12, 2010

The Honorable Tom Coburn, M.D.
United States Senator
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Senator Coburn:

Thank you for your letter of May 11 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 cases or doctrines of the Supreme Court or other courts, beyond what I have provided in my testimony and earlier written responses. As a scholar, I have engaged in academic study and critique of various 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. Moreover, given considerations of respect, comity, and collegiality that are essential to the effective functioning of a multimember court, and because I will be bound by precedents written by my colleagues on the Ninth Circuit if I am confirmed (apart from the *en banc* process), I do not believe it is appropriate for me now, outside the ordinary judicial decision-making process, to critique opinions written by my potential colleagues on the Ninth Circuit. My responses to some of your questions reflect these concerns.

Question 1(g)

If confirmed, I would faithfully follow the Supreme Court's precedents on the Second Amendment, including any instructions in those precedents on how to interpret the Second Amendment. My writings have analyzed the Court's method of constitutional interpretation in *District of Columbia v. Heller*, the Court's most recent and authoritative precedent on the Second Amendment, see *Keeping Faith with the Constitution* 30-33 (2009), and my writings have identified nothing in *Heller* indicating that the Court should look to foreign law (apart from English antecedents to the Second Amendment) in deciding whether the right to bear arms is a fundamental right that should be incorporated on to the states.

Questions 1(h) and (i)

(h) If confirmed, I would faithfully follow the Supreme Court's precedents on the Second Amendment, and there is no indication in *District of Columbia v. Heller*, the Court's most recent and authoritative precedent on the Second Amendment, that foreign law (apart from English antecedents to the Second Amendment) is relevant to judicial interpretation of the Second Amendment.

(i) The Supreme Court has not looked to foreign law in interpreting the Second Amendment, and although the Court has looked to foreign law in interpreting the Eighth Amendment, it has made clear that foreign law is not "controlling." *Roper v. Simmons*, 543 U.S. 551, 575 (2005). If confirmed, I would faithfully follow the Court's precedents on the Second and Eighth Amendments, paying careful attention to the guidance in those precedents as to what factors are controlling in the legal analysis. My role as a circuit judge would not be to critique or theorize about any differences between the Court's Second and Eighth Amendment jurisprudence, but to apply the law faithfully and impartially to the facts of each case.

Question 2(a)

I do not think Congress and the Court's interpretation of the Constitution in general has shifted to an affirmative right guarantee, rather than a set of restrictions on government power. I agree with you that the predominant view has been, as Judge Richard Posner of the Seventh Circuit put it, that the Constitution is "a charter of negative liberties; it tells the state to let people alone; it does not require the federal government or the state to provide services, even so elementary a service as maintaining law and order." See *Education, Equality, and National Citizenship*, 116 Yale L.J. 330, 336 (2006) (noting "the conventional wisdom that 'the Constitution is a charter of negative rather than positive liberties' (quoting *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983) (Posner, J.))). My scholarly writings have sought to challenge the conventional view in the area of education based on historical inquiry into how leading

Members of Congress between 1870 and 1890 understood the Fourteenth Amendment guarantee of national citizenship. *See id.* at 367-99. But my writings acknowledge that my academic view is at odds with current law. *See id.* at 336 (“[t]he concept of positive rights [is] disfavored in Supreme Court doctrine” (citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973), among other cases)).

Question 3(a)

In stating that “we should not use the concept of citizenship to deny education to noncitizen children,” my writings did not specifically address the constitutional rights of children who are present in this country illegally. Children who are lawful resident aliens are “noncitizen children,” and their eligibility for U.S. citizenship distinguishes them from children who are illegal immigrants under current law. Further, my writings have not addressed whether adults who are illegal immigrants have any constitutional right to public education, and this question has been the subject of litigation in recent years.

The Supreme Court has held that, absent a congressional policy providing otherwise, a state may not deny free public education to children who are here illegally if the state provides such education to other children. *See Plyler v. Doe*, 457 U.S. 202 (1982). If 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 speculate on whether children who are here illegally have a constitutional right to public education because *Plyler* is a precedent that I will be duty-bound to apply faithfully and impartially if I am confirmed. In addition, because the question whether adult illegal immigrants have a constitutional right to public education is unsettled and may become before me as a judge if I am confirmed, I believe it is not appropriate for me to speculate on that question.

Questions 4(b)

Whether the U.S. Constitution guarantees same-sex couples the right to have their relationships recognized as marriages by the states is a question on which I have not previously expressed a view, and it is the subject of active litigation that may come before me as a judge if I am confirmed. Accordingly, I do not believe it is appropriate for me to speculate on this question.

Question 7

Although my writings have analyzed the method of constitutional interpretation employed by the majority and dissenting opinions in *District of Columbia v. Heller*, my analysis “d[id] not weigh the merits of the contrasting opinions in *Heller*.” *Keeping Faith with the Constitution* 30 (2009). If

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 Court's decision in *Heller*, in which Justice Scalia determined that the right to bear arms is a fundamental right, is a precedent that I will be duty-bound to apply faithfully and impartially if I am confirmed.

Questions 7(d) and (e)

(d) If 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 Court's decision in *Heller*, which held that the text of the Second Amendment is best read as codifying a pre-existing right, is a precedent that I will be duty-bound to apply faithfully and impartially if I am confirmed.

(e) When interpreting the Second Amendment as a judge if I am confirmed, I would apply the underlying principle that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation." *District of Columbia v. Heller*, 128 S. Ct. 2783, 2797 (2008). I do not believe it is appropriate for me now, as a nominee to serve as an inferior court judge, to speculate on whether some other underlying principle should guide interpretation of the Second Amendment because *Heller* is a precedent that I will be duty-bound to apply faithfully and impartially if I am confirmed.

Question 7(f)

The Court in *Citizens United* applied the doctrine of *stare decisis* to overrule *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and part of *McConnell v. FEC*, 540 U.S. 93 (2003), and thereby "return to the principle established in [*Buckley v. Valeo*, 424 U.S. 1 (1976),] and [*First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978),] that the Government may not suppress political speech on the basis of the speaker's corporate identity." *Citizens United v. FEC*, 130 S. Ct. 876, 913 (2010). If 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 Court's decision in *Citizens United*, which said it was restoring pre-1990 law, is a precedent that I will be duty-bound to apply faithfully and impartially if I am confirmed.

Questions 8(a), (b), (d), and (e)

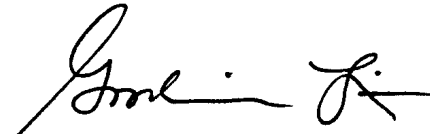
Given considerations of respect, comity, and collegiality that are essential to the effective functioning of a multimember court, and because I will be bound by precedents written by my colleagues on the Ninth Circuit if I am confirmed (apart from the *en banc* process), I do not believe it is appropriate for me now,

outside the ordinary judicial decision-making process, to critique opinions written by a potential Ninth Circuit colleague.

Question 8(c)

Given considerations of respect, comity, and collegiality toward fellow Article III judges that I intend to observe if I am confirmed, I do not believe it is appropriate for me now, outside the ordinary judicial decision-making process, to critique opinions written by a potential Article III colleague on a sister circuit.

Sincerely,

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

Goodwin Liu