

Nominations Hearing
July 29, 2014
Questions from Senator Lee
Questions for Victor Allen Bolden (nominated for D. Conn.)

- 1. Mr. Bolden, as I understand it you were counsel for the city of New Haven in *Ricci v. DeStefano* (2009). After the Supreme Court decided the case, you criticized the outcome.**

- a. Can you elaborate on the reasons you were critical of the Court's decision?**

Response: Thank you for the opportunity to clarify. On January 15, 2009, when I became counsel for the City of New Haven, the *Ricci v. DeStefano* litigation had been underway for several years, and the Supreme Court already had granted certiorari. Following the Supreme Court's decision, in my official capacity as the City of New Haven's lawyer, I expressed concern about two aspects of the outcome: (1) reconciling the Supreme Court's decision with the City of New Haven's decades-long litigation history stemming from racial discrimination with respect to African Americans in the New Haven Department of Fire Services; and (2) implementing the Supreme Court's decision without entangling the City of New Haven in further litigation, such as follow-on lawsuits regarding disparate impact liability over the same civil service examinations at issue in the *Ricci* case.

Regardless of these concerns, as my record demonstrates, I fulfilled my professional obligations and, following the Supreme Court's decision in the *Ricci* case, I helped ensure that the City of New Haven complied with the Supreme Court's order and defended against collateral attacks on the Supreme Court's decision in *Ricci*. If confirmed, I would faithfully apply Supreme Court and Second Circuit precedent, as I would all areas of the law.

- b. In what circumstances do you believe a potential disparate impact justifies intentional discrimination?**

Response: In *Ricci*, the Supreme Court held that "under Title VII, before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action." *Ricci v. DeStefano*, 557 U.S. 557, 585 (2009). If confirmed, I would faithfully apply Supreme Court and Second Circuit precedent in this area of the law, as I would all areas of the law.

- c. Is your view of the doctrine of disparate impact at odds with that of the Supreme Court?**

Response: No.

- 2. Mr. Bolden, you filed an amicus brief in the *Heller* case in which you argued that the Second Amendment did not protect an individual right to bear arms.**

- a. Can you explain your basis for that assertion?**

Response: On behalf of the NAACP Legal Defense and Educational Fund, Inc. (“LDF”), I worked on an *amicus curiae* brief in *District of Columbia v. Heller*. The decision of whether to file the brief ultimately was not made by me. The organization filed the brief to highlight the problem of gun violence facing African-Americans in densely populated urban centers like the District of Columbia. The brief argued that an individual right to bear arms existed within the context of the “well regulated Militia” referenced in the text of the Second Amendment, based on binding precedent prior to the Supreme Court’s decision in *District of Columbia v. Heller*. See, e.g., *United States v. Miller*, 307 U.S. 174, 178 (1939).

I appreciate the difference between the role of an advocate and the role of a judge. If confirmed, I would faithfully apply the Supreme Court’s decision in *District of Columbia v. Heller* and other Second Amendment jurisprudence, as I would all areas of the law, rather than the viewpoints expressed on behalf of any former client.

- b. In that same brief, you argued that an individual right to bear arms “would not address racial discrimination of criminal justice.” To which types of racial discrimination were you referring, and in what ways did the Supreme Court’s decision in *Heller*, which found that the Second Amendment protects an individual right to bear arms, not address those types of discrimination?**

Response: The brief referred to any issues related to the “discriminatory enforcement of firearm laws” or “the history surrounding the adoption of early gun control laws, or “even the Second Amendment itself,” to the extent such history “is tainted by racial discrimination,” a matter that had been raised by others, but not the NAACP Legal Defense & Educational Fund, Inc. The brief did not suggest that the Second Amendment should be interpreted to address issues of racial discrimination. Instead, the brief recognized that the Supreme Court’s “traditional vehicles” for addressing racial discrimination, “the Equal

Protection Clause of the Fourteenth Amendment, or where the actions of the federal government are at issue, the Due Process Clause of the Fifth Amendment,” should continue to be interpreted to address any such issues, to the extent warranted and consistent with Supreme Court precedent. If confirmed, I would faithfully apply the Supreme Court’s decision in *District of Columbia v. Heller* and other Second Amendment jurisprudence, as I would all areas of the law.

3. **Mr. Bolden, in your 1990 *Harvard BlackLetter Law Journal* article entitled, “Judge Not, That Ye Be Not Judged,” you lay out four primary jurisprudential guiding principles. These principles suggest that judges should look beyond the text of statutes or the merits of decisions and incorporate into their decision an analysis of the fruits or consequences of a decision.**

- a. **What role does consequentialism have in your jurisprudence?**

Response: If confirmed, consequentialism would have no role in my jurisprudence, unless binding Supreme Court and Second Circuit precedent required a district court to do so.

- b. **How could a judge take into account the consequences of his decision?**

Response: Please see response to Question 3a.

- c. **In what circumstances could the consequences of a ruling be dispositive—can you provide an example?**

Response: Please see response to Question 3a.

4. **Mr. Bolden, in *Arizona v. U.S.*, you filed an *amicus* brief in support of the proposition that Arizona’s SB 1070 immigration law infringed on Congress’s enumerated powers, and was preempted by federal law.**

- a. **Can you articulate for the Committee your view of the doctrine of enumerated powers?**

Response: For many years prior to my becoming the Corporation Counsel of the City of New Haven, the City of New Haven had been active on the issue of immigration. Consistent with these efforts, the Mayor of the City of New Haven decided that the city should join a number of municipalities and file an *amicus curiae* brief in *Arizona v. U.S.*, regarding Arizona’s S.B. 1070 and, on behalf of my client, I signed on to this brief, which had been drafted by others. The brief therefore represents a position on behalf of my client, the City of New Haven, and

expresses my client's concern that certain enforcement requirements with respect to immigration pose considerable legal challenges for municipalities.

In *Arizona v. U.S.*, on the issue of Congress' power in the area of immigration, the Supreme Court held that: "The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens. This authority rests, in part, on the National Government's constitutional power to 'establish an uniform Rule of Naturalization'." *Arizona v. U.S.*, 132 S. Ct. 2492, 2498 (2012) (quoting Article I, Section 8, clause 4 of the U.S. Constitution) (other citations omitted). If confirmed, I would faithfully follow binding Supreme Court and Second Circuit precedent on the issue of Congress' enumerated powers, as I would any other issue, rather than the viewpoint expressed on behalf of any former client.

b. In what circumstances do you believe courts should strike down federal laws as infringing on purely state prerogatives?

Response: In *Arizona v. U.S.*, the Supreme Court recognized that: "[f]ederalism, central to the constitutional design, adopts the principle that both the National and State Governments have elements of sovereignty the other is bound to respect." *Arizona v. U.S.*, 132 S. Ct. 2492, 2500 (2012). Indeed, there have been instances where courts have struck down federal laws, infringing on state prerogatives. See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000); *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 488 U.S. 1041 (1992). If confirmed, I would faithfully follow binding Supreme Court and Second Circuit precedent on the issue of when state sovereignty has been infringed upon by federal law.

c. Can you provide a few examples?

Response: Please see response to Question 4b.

5. Mr. Bolden, you have filed amicus briefs in several cases in which the outcome would largely depend on whether the court found a fundamental right had been infringed.

a. When in your view should federal courts find that a fundamental right has been infringed?

Response: As the Supreme Court has recognized, the Due Process Clause of the Fourteenth Amendment provides for "heightened protection against government interference with certain fundamental rights and liberty interests." *Washington v.*

Glucksberg, 521 U.S. 702, 720 (1997) (citations omitted). These “fundamental rights and liberty interests” may not be infringed upon “unless the infringement is narrowly tailored to serve a compelling state interest.” *Id.* at 721 (citations and internal marks omitted). As a result, if government interferes with a fundamental right without such interference being narrowly tailored to serve a compelling state interest, then such infringement cannot survive constitutional scrutiny.