

May 21, 2010

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

Dear Senator Coburn,

I am writing in response to your letter of May 19. I have carefully reviewed the questions in your letter and will do my best to be as responsive as possible within the limits that apply to me as a sitting district judge and circuit nominee.

Question 1

In your letter, you ask for a more thorough response to question 1 of your original set of written questions, concerning the principles of constitutional interpretation I would look to in analyzing whether a statute infringes upon an individual right. More specifically, you ask me to describe the precedents I would consider, the principles they embody, and how these principles would inform my analysis.

Response:

In any given case, I would start with the text of both the constitutional provision guaranteeing the individual right and the text of the statute at issue. Next I would look to precedent dealing with the individual right and the statute. In particular, I would look for authority regarding the applicable standard of judicial review, the nature and weight of the interest advanced by the statute and any limits on the scope of the individual right. In the absence of such authority, I would look to authority regarding analogous rights and statutes. After identifying the nature and weight of the interest advanced by the statute and the scope of the individual right, I would apply the appropriate standard of judicial review to determine whether the statute comports with applicable law. Though I cannot say with specificity what principles these hypothetical precedents would embody, I trust that they would comport with the judiciary's obligation to afford adequate protection to individual rights while respecting the responsibilities and prerogatives of other branches of government.

Question 3

a. In your letter, you ask for an explanation of why I believe I should refrain from expressing a view on whether the right to bear arms is a fundamental right.

Response:

I do not believe it would be appropriate for me to express a view on whether the right to bear arms is a fundamental right because the issue is currently pending before the Supreme Court in *McDonald*. Depending on how the Court decides the case, any view I express now could be construed as a comment on the correctness of the Court's decision.

b. You also ask whether I believe the right to bear arms is a right "expressly granted in the Constitution and deeply rooted in our history and legal tradition."

Response:

This question is before the Court in *McDonald*. Accordingly, I do not believe it would be appropriate for me to express an opinion.

Question 3(a)

In your letter, you ask a series of questions regarding fundamental constitutional rights.

Response:

Understanding your questions to refer to "explicitly guaranteed substantive rights," as stated in your original question 3(a), the Supreme Court has ruled explicitly or by clear implication that almost all the individual rights guaranteed by the Bill of Rights are fundamental and therefore enforceable against the States. These include the provisions of the First, Fourth, Sixth and Eighth Amendments and most provisions of the Fifth Amendment. See *Duncan v. Louisiana*, 391 U.S. 145, 147-50 (1968). The Court has indicated that certain aspects of the rights guaranteed by the Bill of Rights are not fundamental: the right to indictment by a grand jury, see *Hurtado v. California*, 110 U.S. 516 (1884); the right to a unanimous jury verdict in a criminal case, see *Johnson v. Louisiana*, 406 U.S. 356 (1972); and the right to jury trial in a civil case, see *Minneapolis v. St. Louis R. Co. v. Bombolis*, 241 U.S. 211 (1916). The Third Amendment prohibition on quartering soldiers in private houses

has not been the subject of litigation in the Supreme Court that would determine whether it is fundamental. If called on to decide this issue, I would follow the Second Circuit's decision in *Engblom v. Carey*, 677 F.2d 957 (2d Cir. 1982), which holds that the Third Amendment guarantee is a fundamental aspect of the right of privacy. This leaves the Second Amendment guarantee of the right to bear arms. Whether this right is fundamental is an issue before the Supreme Court in *McDonald*.

Question 3(d)

1. You ask whether I believe a fair reading of the plain text of the Second Amendment could result in a holding that there is no constitutional right to own guns.

Response:

In its opinion in *Heller*, the Supreme Court engages in a detailed textual analysis of the "operative clause" of the Second Amendment. See 128 S. Ct. at 2790-97. The Court then states, "[p]utting all of these textual elements together, we find that they guarantee the individual right to possess and carry weapons in case of confrontation." *Id.* at 2797. Continuing, the Court states: "This meaning is strongly confirmed by the historical background of the Second Amendment," which "codified a pre-existing right." *Id.* I will faithfully apply *Heller* in cases that come before me.

2. You ask whether I believe there is a fundamental right to self-defense.

Response:

Heller makes it clear that the Second Amendment protects an individual right to keep and bear arms for self-defense. Observing that "the inherent right of self-defense has been central to the Second Amendment right," the Court struck down the District of Columbia's ban on handguns because "it amount[ed] to a prohibition of an entire class of 'arms' that is overwhelmingly chosen by the American society for that lawful purpose." 128 S. Ct. at 2817. I will faithfully apply *Heller* in cases that come before me.

Questions 4, 4a, 4b, 4c

In your letter, you ask me to familiarize myself with Judge Reinhardt's opinions in *Newdow v. Rio Linda School District*, 597 F.3d 1007, 1042 (9th Cir. 2010), *Silveira v. Lockyer*, 312 F.3d

1052 (9th Cir. 2002) and *Planned Parenthood Federation of America, Inc. v. Gonzales*, 435 F.3d 1163 (9th Cir. 2006), and Judge Woods' opinion in *National Organization for Women, Inc. v. Scheidler*, 267 F.3d 687 (7th Cir. 2001). You also ask me to state whether I believe these judges avoided injecting their own policy preferences into their opinions.

Response:

I have reviewed the opinions as requested. Having done so, I accept each opinion at face value as a complete expression of the basis for the judge's decision.

Question 10

With regard to the sentencing in the case of *United States v. Salmon*, you point out that 18 U.S.C. § 3553(b)(2)(A)(ii) limits downward departures in child pornography cases to mitigating factors that have been "affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines." You ask whether the considerations I noted regarding the impact of the case on the defendant constituted such mitigating factors and, if not, you ask me to explain why they were relevant. You also ask whether I sympathized or empathized with the defendant.

Response:

The defendant in *United States v. Salmon* was sentenced in December 1997. At that time, § 3553 did not limit the availability of downward departures in cases involving child pornography. The limiting provision now found in the statute, § 3553(b)(2)(A)(ii), was added in April 2003. See PROTECT ACT, Pub. L. No. 108-21, Title IV, § 401(a), 117 Stat. 650, 667 (2003). Moreover, the downward departure in *United States v. Salmon* was based on diminished capacity, a mitigating factor specifically identified as a permissible basis for a downward departure in U.S.S.G. § 5K2.13. The impact of the case on the defendant was relevant to the statutory criteria that the sentence be sufficient but not greater than necessary to punish the defendant, deter him from offending again and provide him with needed treatment in the most effective manner. See 18 U.S.C. § 3553(a)(2). I did not sympathize or empathize with the defendant. The sentence he received (9 months' imprisonment followed by 6 months' home confinement with electronic monitoring) was higher than the one recommended by the Probation Office (5 months' imprisonment followed by 5 months' home confinement with electronic monitoring).

Question 17(b)

In your letter, you ask for an explanation of why I believe it is not appropriate for me to comment on the correctness of the Court's reasoning in *Atkins*. You also ask me to comment on what constitutes objective evidence of consensus, whether legislative acts of 47% of the country constitute objective evidence of consensus, the analysis I would perform in a case of first impression to determine whether there was a national consensus and what factors I would find persuasive.

Response:

As a district judge, I have a duty to faithfully apply *Atkins* in all cases that come before me. If I am confirmed, I will have a duty to faithfully apply *Atkins* in all cases that come before as an appellate judge. I do not believe it would be appropriate for me to comment on the correctness of a decision that I am duty-bound to follow. If I were to comment on the reasoning underlying binding precedents of the Supreme Court it could create an appearance that I believe some decisions are more or less worthy of respect than others and that I would not faithfully apply all Supreme Court precedents notwithstanding my duty to do so.

My approach to determining whether there is objective evidence of consensus would be governed by the Supreme Court's precedents, which instruct lower courts to consider "legislative enactments and state practice." *Graham v. Florida*, 2010 WL 1946731, at *9 (May 17, 2010) (citing *Roper v. Simmons*, 543 U.S. 551, 572 (2005)). Accordingly, in a case of first impression, I would consider whether legislative enactments and state practices demonstrated the existence of a national consensus. The number of states in agreement on the issue would be an important factor. Legislative enactments of fewer than half the States, standing alone, would be insufficient to establish the existence of a national consensus. I cannot speculate about other factors I would find persuasive or comment on the weight I would give them because I do not want to appear to be commenting on the correctness of the decision in *Atkins* or prejudging an issue that could come before me.

Questions 17(c), 17(d) and 18

You ask me to comment on whether I believe Justice Stevens avoided injecting the policy preferences of the Court into the opinion in *Atkins*, whether I believe it was appropriate for the Court in *Atkins* to consider the opinion of the "world community"

when interpreting the Eighth Amendment and whether I agree with Justice Kennedy's analysis in *Roper*.

Response:

As explained above, I have a duty to faithfully apply Supreme Court precedents in cases that come before me and, accordingly, I must respectfully decline to comment on the correctness of these decisions.

Question 19

a. You ask whether Dr. Stuart Grassian, the author of the article on the effects of solitary confinement on inmates, is the same Dr. Stuart Grassian who was involved in the Ross case.

Response:

Yes.

b. You ask whether this is the same Dr. Grassian whose cross-examination I cut off to issue my ruling.

Response:

It is the same person. I did not cut off the cross-examination to issue a ruling. The cross-examination was interrupted for a mid-day recess. Following the recess, before the cross-examination resumed, I stated that I thought we needed to clarify the procedural posture of the case, which was important because of the tight time constraints under which we were proceeding. I pointed out that the State's motion for summary dismissal had been denied and stated that a stay of the execution pending further proceedings appeared to be inevitable. Based on subsequent comments by counsel for the State, I understood that the State did not want to conduct further cross-examination. There was no objection that I had cut off the cross-examination nor any request for an opportunity to conduct further cross-examination.

c. You ask whether I informed the attorneys in the Ross litigation that I had read Dr. Grassian's writings prior to the Ross matter.

Response:

I told the attorneys that I had read a number of articles. I did not tell them I had read Dr. Grassian's article.

d. You refer to a statement in a law review article about Pelican Bay State Prison in California and ask whether I agree with the author of the article that psychiatric risks violate the Eighth Amendment.

Response:

If such a case were to come before me, I would follow the Supreme Court's precedents under the Eighth Amendment. The Eighth Amendment's protection against cruel and unusual punishment applies to prison conditions. *Farmer v. Brennan*, 511 U.S. 825, 828 (1994). Under the Eighth Amendment, a state must not deprive prisoners of "basic human needs - e.g., food, clothing, shelter, medical care, and reasonable safety." *Helling v. McKinney*, 509 U.S. 25, 32 (1993). To prove an Eighth Amendment violation, a prisoner must prove both an objective element - that a deprivation is "sufficiently serious" - and a subjective element - that the defendant acted with "deliberate indifference to inmate health and safety." *Farmer*, 511 U.S. at 834. A prison official acts with deliberate indifference if he "knows of and disregards an excessive risk to inmate health and safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Farmer*, 511 U.S. at 837. This culpable state of mind is equivalent to criminal recklessness. *Id.* at 839-40.

e. You ask whether I believe that psychiatric risks could ever lead the Supreme Court to rule that conditions of confinement violate the Eighth Amendment.

Response:

I do not believe it would appropriate for me to speculate about what the Supreme Court would do if it were presented with this issue. Moreover, because the issue may be presented to me in a future case, I do not believe it would be appropriate for me to comment.

f. You ask whether I agree with the following analysis: "The Eighth Amendment simply does not guarantee that inmates will not suffer some psychological effects from incarceration or segregation. However, if the particular conditions of confinement cause a serious mental illness, greatly exacerbate mental illness or deprive inmates of their sanity, then prison officials have deprived inmates of a basic necessity of human existence - indeed, they have crossed into the realm of psychological torture."

Response:

In accordance with the Eighth Amendment principles set forth above, I believe the Constitution protects against deliberate indifference by prison officials to conditions of confinement that cause serious harm to the health of inmates.

g. You ask whether I believe that Ross's treatment crossed into the realm of psychological torture.

Response:

No.

h. You ask why I read the article about the *Soering* case.

Response:

I read the article in connection with a case brought by an inmate challenging the conditions of his confinement.

I. You ask what weight I believe judges should give law review articles when considering matters before them.

Response:

Law review articles should be given no weight as precedential authority.

j. You ask whether I agree with the author of the article that the reaction to the *Soering* case was an "overreaction."

Response:

I am not familiar with the United States Government's response to the *Soering* case and therefore cannot comment on whether it was an overreaction.

k. You ask whether I agree with the author of the article that the "*Soering* understanding" to the Torture Convention was "petulant and useless" and "establishe[d] precedents that will become major obstacles to effective participation by the United States in other human rights treaty regimes."

Response:

No, I do not agree. The "*Soering* understanding" was appropriate under the law of the United States and consistent

with historical practice. See Restatement (Third) of Foreign Relations Law of the United States § 313 (1987) ("(1) A state may enter a reservation to a multilateral international agreement unless (a) reservations are prohibited by the agreement, (b) the agreement provides that only specified reservations not including the reservation in question may be made, or (c) the reservation is incompatible with the object and purpose of the agreement."). See also International Covenant on Civil and Political Rights (ICCPR), Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force March 23, 1976) (the United States ratified the ICCPR in 1992 with five reservations, five understandings and four declarations).

Question 21(d)

You ask whether the prosecutor who cross-examined Dr. Grassian stated that he had additional questions.

Response:

Before the mid-day recess, the attorney said he had more questions. However, his comments after the recess indicated to me that the State was electing to forego further cross-examination of Dr. Grassian at that time.

Question 22

You ask whether I believe the Supreme Court's decision in *Boumediene* was correctly decided.

Response:

I do not believe it would be appropriate for me to comment on the reasoning of binding Supreme Court precedent.

Question 22(a)

You ask whether there are constitutional distinctions between enemy combatants held at Guantanamo and those held at Bagram.

Response:

I do not believe it would be appropriate for me to offer an opinion on this issue because it may come before me in a future case.

Question 23(a)

You ask whether I agree with the Supreme Court's assessment in *Glucksberg* of the importance of public debate and legislative action.

Response:

I am unable to comment on the correctness of the Court's reasoning.

Question 24 and 24(a)

You ask whether I believe the President has constitutional authority as commander-in-chief to override laws enacted by Congress, immunize from prosecution people under his command, circumvent FISA and bypass the FISA court.

Response:

I do not believe it would be appropriate for me to offer an opinion at this time because these issues may come before me in a future case.

Questions 26, 26(a) and 26(b)

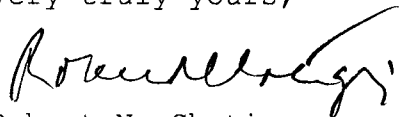
You ask a series of questions concerning preventive detention of noncitizen terrorist suspects.

Response:

In *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), the Supreme Court held that a United States citizen may be detained by the Government as an enemy combatant provided he is given "a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker." *Id.* at 509. I will faithfully follow *Hamdi* in cases that come before me. I am unable to comment further on the issues you raise because these issues may come before me in a future case and I do not want to appear to have prejudged them.

Thank you for your consideration.

Very truly yours,


Robert N. Chatigny