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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

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June 9, 2010

Justice Sonia Sotomayor
Supreme Court of the United States
1 First Street, NE
Washington, D.C. 20543

Dear Justice Sotomayor:

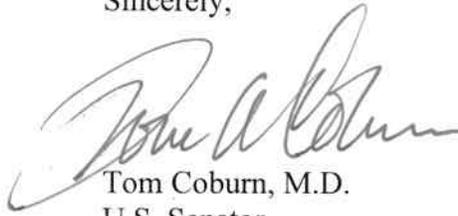
I write to inquire about your decision to join Justice Anthony Kennedy's opinion in the case of *Graham v. Florida*, No. 08-1224. In that case, a 5-4 majority of the Court ruled that sentencing a juvenile offender to life in prison without parole for a nonhomicide crime is unconstitutional.

In Justice Kennedy's majority opinion, he employs a methodology similar to that used in *Roper v. Simmons*. In *Roper* and *Graham*, the majority relies on what five Justices perceive to be "evolving standards of decency" in concluding that the punishment in question violates the Eighth Amendment's ban on cruel and unusual punishment. In arriving at this conclusion, Justice Kennedy looked to both the sentencing practices of the states and the federal government and to the "judgments of other nations." Justice Kennedy's opinion in *Graham*, which you joined, states, "[the] global consensus against the sentencing practice in question" provides "support for our conclusion" that the punishment is unconstitutional. He further writes, the "judgments of other nations and the international community" and the "climate of international opinion" are "not irrelevant" to determining the "acceptability of a particular punishment." Specifically, the opinion notes, "the overwhelming weight of international opinion against life without parole for nonhomicide offenses committed by juveniles 'provide[s] respected and significant confirmation for our own conclusion'" that it violates the Eighth Amendment.

Given your testimony at your confirmation hearing, I have serious concerns about your decision to join Justice Kennedy's opinion, which extensively cites foreign law. At your hearing, I asked you the following question: "[W]ill you affirm to this Committee and the American public that, outside of where you are directed to do so through statute or through treaty, refrain from using foreign law in making the decisions that you make that affect this country and the opinions that you write?" You responded: "I will not use foreign law to interpret the Constitution or American statutes. I will use American law, constitutional law to interpret those laws, except in the situations where American law directs a court." I sought further clarification and asked: "So you stand by it? There is no authority for a Supreme Court justice to utilize foreign law in terms of making decisions based on the Constitution or statutes?" You responded: "Unless the statute requires you or directs you to look at foreign law ... the answer is no."

Your decision to join Justice Kennedy's opinion that uses foreign law to "support" its conclusion conflicts with your pledge to the Judiciary Committee and the American public not to "use foreign law to interpret the Constitution." In light of that conflict, I respectfully request that you explain why you chose to join the majority's opinion in *Graham*. I recognize that Justice Kennedy's opinion does not rely on foreign law as precedent for its decision; however, if foreign law is of no value to the reasoning of the opinion and did not influence the final outcome, then please explain why you supported its inclusion in the opinion. These questions are particularly relevant as the Senate is faced with evaluating another Supreme Court nominee in the coming months. Accordingly, I would appreciate a prompt response.

Sincerely,

A handwritten signature in cursive script, appearing to read "Tom A. Coburn".

Tom Coburn, M.D.
U.S. Senator