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PERSPECTIVE

The increasing positioning and politicizing of federal courts

By Sanford Jay Rosen

The 9th U.S. Circuit Court of Appeals has entered a new era of judicial positioning and politicization illustrated by its recent decisions and opinions in *Edmo v. Corizon, Inc.*

Andree Edmo is a transgender inmate in prison in Idaho. Assigned male gender at birth, she self-identified as female when she was 5 or 6 years old. While in prison, she has suffered from severe depression attributable to her gender dysphoria, and she attempted to cut off her testes twice. The treatments provided to her did not ameliorate her suffering, and she sought gender confirmation surgery, or GCS, which the Idaho Corrections Department and its private health care provider, Corizon Inc., refused. Edmo sued Corizon and state officials for violating her Eighth Amendment right to be free from cruel and unusual punishment.

The district court issued an injunction ordering the surgery. Last August, the 9th Circuit affirmed in a 85-page per curium opinion. 2019 DJDAR 8068.

The panel carefully reviewed the evidence and the record and determined that:

"Following four months of intensive discovery and a three-day evidentiary hearing, the district court concluded that GCS is medically necessary for Edmo and ordered the State to provide the surgery. Its ruling hinged on findings individual to Edmo's medical condition. The ruling also rested on the finding that Edmo's medical experts testified persuasively that GCS was medically necessary, whereas testimony from the State's medical experts deserved little weight. In contrast to Edmo's experts, the State's witnesses lacked relevant experience, could not explain their deviations from generally accepted guidelines, and testified illogically and inconsistently in important ways.

"The district court's detailed factual findings were amply supported by its careful review of the extensive evidence and testimony. Indeed, they are essentially unchallenged. The appeal boils down to a disagreement about the implications of the factual findings."

As to the evidence and the court's findings concerning the expert testimony and the credibility of the witnesses, the panel specifically decided that:

"The district court permissibly credited the opinions of Edmo's experts that GCS is medically necessary to treat Edmo's gender dysphoria and that the State's failure to provide that treatment is medically unacceptable. Edmo's experts are well-qualified to render such opinions, and they logically and persuasively explained the necessity of GCS and applied the WPATH Standards of Care — the undisputed starting point in determining the appropriate treatment for gender dysphoric individuals. On the other side of the coin, the district court permissibly discredited the contrary opinions of the State's treating physician and medical experts. Those individuals lacked expertise and incredibly applied (or did not apply, in the case of the State's treating physician) the WPATH Standards of Care. In other words, the district court did not clearly err in making its credibility determinations, so it is not our role to reevaluate them. The credited testimony establishes that GCS is medically necessary."

The panel thus affirmed the district court's decision that denying GCS to Edmo was deliberately indifferent to her proven medical needs, and therefore is cruel and unusual punishment prohibited by the Eighth Amendment. In making this decision, like the district court, the panel surveyed and differentiated decisions of other circuits that the defendants argued are to the contrary largely due to the individualized facts in the case.

The defendants sought en banc review, which was denied in a brief order issued on Feb. 10. 2020 DJDAR 989. Eight active 9th Circuit judges signed onto dissentals — the colloquial term coined by former Judge Alex Kozinski for dissents from denial of rehearing en banc — while two senior status judges — Diarmuid O'Scannlain and Carlos Bea — also weighed in.

Senior Judge O'Scannlain authored a "statement" "respecting the denial of rehearing en banc," which was joined by Senior Judge Bea and seven of the active judges who dissented from the denial of an en banc hearing.

A dissental was authored by Judge Patrick Bumatay. Judge Ryan Nelson did not sign onto Judge Bumatay's dissental, but it was signed onto in its entirety by five of the other active judges and by Judge Daniel Collins in part. Judge Collins, who did not sign onto Judge O'Scannlain's dissental, authored his own brief dissental agreeing with the other dissenters that the panel had effectively watered the Eighth Amendment deliberate indifference standard "down into a 'mere negligence' test."

All of the dissenters were appointed by Republican presidents. The overwhelming majority of the active judges on the court, including four of the 10 judges appointed by President Donald Trump, and one by President George W. Bush, did not dissent. Nor did any of the numerous other senior status judges. We can infer that the non-dissenting active service judges agreed that the district court's findings of fact, including determinations of credibility, were bulletproof and had been appropriately reviewed by the panel using the clearly erroneous standard, and that the district court's and panel's differentiation of the out-of-circuit decisions had traction. So far as the senior judges are concerned, it is extremely unusual for a senior judge to be on the public record concerning the granting or denial of an en banc hearing, unless he served on the panel that issued the decision a party wants to be re-heard en banc. (More about this below.)

Judge O'Scannlain's "statement" excoriated the panel and the district court for what he judged to be flawed findings of fact, attenuation of the Eighth Amendment's high threshold deliberate indifference standard down to ordinary negligence, and, in his view, the panel's sophistical distinguishing of contrary decisions of other circuits.

Judge Bumatay's dissental started with acknowledgement of Edmo's pain and suffering but gave her no comfort after that. He agreed fully with Judge O'Scannlain's conclusions that Edmo did not prove deliberate indifference under existing Supreme Court Eighth Amendment precedent. However, he also mapped out an originalist analysis of the Eighth Amendment, which Judge Collins and Judge R. Nelson did not endorse. Nor did Judge O'Scannlain (or Judge Bea) in his statement.

Conveniently, the dissenters overlooked the fact that the panel reserved for another day the question of whether "Corizon and IDOC have a de facto policy or practice of refusing GCS to prisoners." If the district court's finding of such a policy is correct, it would be hard for the dissenters to say with a straight face that deliberate indifference had not been proven under current Eighth Amendment precedents.

The defendants have said that they will seek Supreme Court review. They take encouragement from the dissentals, which were crafted with an eye on the Supreme Court.

Judges O'Scannlain and Bea have no vote on whether to grant an en banc hearing. Neither of them was on the panel that issued the decision, and by law, neither could have been on any en banc panel had the call for one been successful. Yet they weighed in with a "statement" that reads a lot like a petition for writ of certiorari or brief on the merits of the case. Judge Bumatay's dissental goes even further and reads like an originalist call to action.

In publishing his statement , Judge O'Scannlain relied on the 9th Circuit's General Order 5.5(a), which provides that:

"Any judge may circulate memoranda in response to an en banc call within 21 days after: (1) the conclusion of all supplemental briefing by the parties pursuant to G.O. 5.4.c.2 and .3, or (2) the calling judge's circulation of a memorandum in support of the en banc call, whichever is later."

It is by no means clear that this General Order was intended to authorize the filing of a dissental by a senior judge who has no authorized role in en banc proceedings beyond encouraging active judges to consider them.

Of course, an active judge could have appropriated Judge O'Scannlain's statement as her own dissental. But then Judges O'Scannlain's and Bea's agreement would not be a matter of public record when the Supreme Court decides whether to review the panel's decision. Senior Judges O'Scannlain and Bea were not on the panel, and could not sign onto any dissental authored by an active judge or a senior judge who was on the panel.

Obviously, public silence did not work for Judges O'Scannlain and Bea, or the active judges who signed on to the statement. They wanted Judge O'Scannlain's position to be public. He is known as a "feeder" judge of clerks who go on to serve as Supreme Court clerks, and was one of the most prolific and successful dissental writers during his time as an active judge.

The district court and the 9th Circuit panel covered all the correct bases. If a petition for writ of certiorari is filed, everything should turn on the fact that the district judge who heard the testimony and observed the witnesses made proper findings of fact including credibility determinations, and that the 9th Circuit panel applied the correct "clearly erroneous" standard of review of findings of facts. Were it not for its present composition, in exercising its limited discretionary jurisdiction, the Supreme Court likely would defer to the two courts who have already made and vetted the findings. It would deny certiorari. The rules for appellate review of findings of fact would prevail, Eighth Amendment jurisprudence would not be in jeopardy, and Edmo would have her surgery forthwith.

Final note. If the Supreme Court decides to review the 9th Circuit's decision, what will it do about the issue that the panel did not reach? That question is: If the district court's finding that Corizon and IDOC have a de facto policy and practice of denying GCS to prisoners is correct, have defendants violated Edmo's Eighth Amendment rights? On the record in this case, the answer almost surely should be yes.

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