

QUESTIONS FOR THE RECORD FOR DAWN JOHNSEN **SUBMITTED BY SENATOR JEFF SESSIONS**

Presidential War Powers

Two of the deputies within the Office of Legal Counsel, Marty Lederman and David Barron, have already been hired.

Before they were hired, then-Professors Lederman and Barron published two law review articles in the *Harvard Law Review* in January 2008 in which they questioned the exclusivity of the President's Commander in Chief powers relative to the legislature. In their articles, they expressly reject as "unwarranted" the "view expressed by most contemporary war scholars — namely that our constitutional tradition has long established that the Commander in Chief enjoys substantive powers that are preclusive of congressional control, especially with respect to the command of forces and the conduct of [military] campaigns[.]"

- Do you share the views of Mr. Barron and Mr. Lederman regarding the limited power of the Executive Branch in wartime?
- Do you agree with Mr. Lederman and Mr. Barron's rejection of "the argument that tactical matters [in wartime] are for the President alone[?]"
 - o Do you believe Congress has the constitutional authority to prescribe legislatively the military's tactics during wartime?
 - o Setting aside the constitutional considerations, do you believe Congress has the ability - both in terms of information and nimbleness - to legislate tactics during a military campaign?

Mr. Lederman and Mr. Barron conclude their second article, *The Commander in Chief at the Lowest Ebb - A Constitutional History*, with advice to future Executive Branch lawyers. They write that such lawyers "should resist the urge to continue to press the new and troubling claim that the President is entitled to unfettered discretion in the conduct of war."

- Do you believe you should resist the urge to give President Obama discretion to conduct military operations in Afghanistan? In Iraq?

Answer: I have not carefully studied these very lengthy articles, so cannot answer questions regarding their specific content. My recollection of these articles is that their inquiry is directed at a specific question, namely whether there is a firm

historical basis for the contention that Congress lacks all authority to determine specific uses of America's war powers. In that regard, I believe that Steven Bradbury was correct when he wrote in an OLC memorandum two months ago that although the President has broad authority as Commander in Chief to take military actions in defense of the country, Article I, section 8 of the Constitution grants significant war powers to Congress, as well. See Memorandum for the Files, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, *re: Status of Certain OLC Opinions Issued in the Aftermath of the Terrorist Attacks of September 11, 2001* (Jan. 15, 2009), available at <http://www.usdoj.gov/opa/documents/memostatusolcopinions01152009.pdf>. When Congress enacts a statute pursuant to its Article I war powers, it is generally the case that the law limits what the President could otherwise do as Commander in Chief (which is not to say there may not be exceptions). As best I can recall their articles, Professors Barron and Lederman demonstrate that this has been the consistent understanding of both political branches throughout most of our Nation's history. Thus, I agree with President Obama, who wrote during the campaign that "[t]he President is not above the law, and the Commander-in-Chief power does not entitle him to use techniques that Congress has specifically banned as torture." See Charlie Savage, *Barack Obama's Q&A*, The Boston Globe (Dec. 20, 2007), available at <http://www.boston.com/news/politics/2008/specials/CandidateQA/ObamaQA/>. I also agree that there are many cases in which Congress does not have sufficient information or dispatch to try to regulate tactics by statute in the midst of war—which is why Congress does not often try to do so.

Al Qaeda

At his confirmation hearing, Attorney General Holder stated that not only is the U.S. at war with al Qaeda, but that the nation was probably late in recognizing the existence of that state of war. In response to a question from Senator Graham, Attorney General Holder stated: "I think our nation didn't realize that we were at war when, in fact, we were. When I look back at the '90s and the Tanzanian -- the embassy bombings, the bombing of the Cole, I think we as a nation should have realized that, at that point, we were at war. We should not have waited until September the 11th of 2001, to make that determination."

- Do you agree with Attorney General Holder's statement? In your view, what is the earliest period prior to 2001 (if any) that President Clinton would have been justified in using military force against al Qaeda?

The U.S. military frequently undertakes military action, including detention measures, against persons and organizations associated with, but not members of, al Qaeda.

- In your view, are members of terrorist organizations other than al Qaeda that threaten or have attacked U.S. interests (including through association with al Qaeda) lawfully subject to U.S. military action?

During Attorney General Holder's confirmation proceedings, I asked him about an account from Jack Goldsmith's book, *The Terror Presidency*. Mr. Goldsmith describes how "White House and Department [of Justice] lawyers opposed an unrestricted lethal operation against Bin Laden, and would authorize his killing only if it were necessary for self-defense in the course of legitimately arresting him." *Id.* at 95. This opposition came despite the fact "[t]he CIA had Bin Laden in its sights," and after the Office of Legal Counsel (OLC) had decreed that Executive Order 12333's assassination ban "did not apply to a military target, like Osama Bin Laden, who posed an imminent threat to the United States." *Id.* at 94-95. Mr. Goldsmith concludes by noting, "[f]ear of retroactive discipline, induced by cautious legal authorizations, led the CIA to forego the covert operation." *Id.* at 95.

- Did you advance any argument with regard to the legality of the CIA Operation against bin Laden described in Mr. Goldsmith's book? I would like to know whether you counseled in favor of a broad authorization consistent with the OLC opinion or backed the opposing view described in Mr. Goldsmith's book. I would also like to know your current view on this question.

Answer: I agree that al Qaeda engaged in hostilities against the United States prior to September 11, 2001, and that therefore that President Clinton was justified in concluding that he could use military force in response, as he did. I also believe that the President can take military action against other terrorist groups that have attacked U.S. interests and, in some cases, when they threaten to do so. Whether and under what circumstances the law allows the United States to engage in military action against groups based on their associations with al Qaeda is a complex, fact-intensive question that depends in large measure on the proper interpretation of Congress's Authorization for Use of Military Force against those organizations responsible for the 9/11 attacks, and on the longstanding law-of-war principles that the plurality decision in *Hamdi* indicated should inform interpretation of that law.

With respect to the question about the excerpt from Prof. Goldsmith's book regarding a CIA operation against Osama bin Laden, it would be inappropriate for me to answer that question to the extent it asks me to disclose nonpublic legal advice that I provided during the course of my service at OLC. The subject matter is such that, if such advice occurred, it likely would have been classified.

Executive Power

Do you agree that the Supreme Court's decision in *Medellin v. Texas*, 552

U.S. ___ (2008), confirms that the President and the Executive Branch are not bound, as a matter of U.S. law, by provisions of treaties that are not self-executing, and that such treaties are not part of the “law” subject to Article II’s Take Care Clause?

Answer: I am generally aware of *Medellin* and the issue that you have identified, but I have not had any occasion to study the implications of this decision. If I am confirmed, I will treat *Medellin*, and other Supreme Court cases involving treaty interpretation, as binding law when construing treaties.

FISA

In your view, does the Fourth Amendment’s warrant requirement apply to surveillance activities directed toward non-U.S. persons overseas and designed to secure foreign intelligence and other national security information, including when non-U. S. persons subject to surveillance communicate with U.S. citizens in the United States? Do you believe that any provision of the FISA Amendments Act of 2008 is unconstitutional?

Answer: I have not studied the question in detail, but I am aware that last August, the Foreign Intelligence Surveillance Court of Review held that there is an exception to the Fourth Amendment’s Warrant Clause with respect to at least certain forms of foreign intelligence surveillance directed at foreign powers and agents of foreign powers located abroad. The court further held that such surveillance remains subject to the Fourth Amendment’s reasonableness test and that reasonableness will depend on the totality of the circumstances. I have not studied the FISA Amendments Act sufficiently to reach a judgment whether it is constitutional as applied in all possible circumstances.