

**Responses to Senator Jeff Sessions’
Questions for the Record
To Virginia Seitz**

1. In his book *The Terror Presidency*, Jack Goldsmith writes that the Office of Legal Counsel has a tradition akin to *stare decisis* regarding prior opinions from the Office. Mr. Goldsmith states: “If OLC overruled every prior decision that its new leader disagreed with, its decisions would be more the whim of individuals than the command of impersonal laws.” Likewise, “[c]onstant reevaluation of prior OLC decisions would make it hard for OLC’s many clients to rely on its decisions.”

- a. Do you agree with Mr. Goldsmith that OLC decisions are based on a tradition of *stare decisis*?

Response: I agree with Mr. Goldsmith that OLC has a tradition akin to *stare decisis* regarding prior opinions of the Office. OLC’s *Best Practices for OLC Legal Advice and Written Opinions*, dated July 16, 2010, states that “OLC opinions should consider and ordinarily give great weight to any relevant past opinions of Attorneys General and the Office. The Office should not lightly depart from such past decisions, particularly where they directly address and decide a point in question, but as with any system of precedent, past decisions may be subject to reconsideration and withdrawal in appropriate cases and through appropriate processes.”

- b. If confirmed, do you commit to abide by OLC’s tradition of treating prior decisions as precedent akin to *stare decisis*?

Response: Yes, if confirmed, I will abide by OLC’s tradition and its *Best Practices* in the treatment of prior decisions.

2. On April 1, 2009, the *Washington Post* reported that OLC issued a legal opinion that the D.C. voting rights legislation being considered by Congress was unconstitutional. The story further stated that, upon getting this legal opinion, Attorney General Holder sought an alternative opinion from the Solicitor General’s office. According to the story, lawyers in the Solicitor General’s office “told [Attorney General Holder] that they could defend the legislation if it were challenged after its enactment.”

In contrast, the previous head of OLC, Jack Goldsmith, as well as others within the Department, including the Deputy Attorney General, threatened to resign when others in the administration tried to overrule his judgment that certain aspects of a surveillance program were contrary to the law or were unconstitutional.

If you think an administration prerogative is unconstitutional or illegal, will you sit silently by while the Attorney General or President override your decision on policy grounds or will you take the position that Jack Goldsmith took?

Response: If I were to conclude that an administration action being contemplated is unconstitutional or unlawful, I would not sit silently by. Although I have read public accounts of the events described in the question, I am not familiar with the underlying circumstances of Mr. Goldsmith's threat to resign. And, although I would not consider every good faith, reasonable disagreement about any legal issue grounds for resignation, I agree that resignation is appropriate where legal advice is overruled or disregarded based on improper or irrelevant considerations or for an improper purpose.

3. **Two of the former deputies within OLC, Marty Lederman and David Barron, published two articles in the January 2008 *Harvard Law Review* in which they questioned the exclusivity of the President's Commander in Chief powers relative to the legislature. In their articles, they expressly rejected 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[.]"**

President Obama has been criticized for not seeking Congressional authorization before engaging in Libya. Former Assistant Attorney General for OLC Jack Goldsmith recently wrote that the President is acting constitutionally.

- a. **Do you agree with Mr. Barron and Mr. Lederman that the Executive's powers are limited in this case, or do you agree with Mr. Goldsmith?**

Response: The articles written by Mr. Barron and Mr. Lederman are complex and lengthy. They were written before the President's action in Libya, and I am not confident that the authors would disagree with Mr. Goldsmith's analysis with respect to Libya. Mr. Goldsmith's analysis, too, rests on numerous sources which I have not studied. The question of the constitutional limits on the President's authority to engage in Libya is complex and fact-intensive. It involves the analysis of numerous factors, including the scope, nature and duration of the U.S. engagement and the relevant U.S. interests, as well as an analysis of a substantial body of law, including public and nonpublic decisions of Attorneys General and OLC. OLC published an opinion on this question entitled *Authority to Use Force in Libya*, dated April 1, 2011. If I were to receive a similar question at OLC, I would follow the traditional OLC policies and practices in responding, including researching the relevant facts and law and engaging in consultations with other Department of Justice components and with other agencies with relevant interests.

- b. **Do you agree with Mr. Barron and Mr. Lederman's rejection of "the argument that tactical matters [in wartime] are for the President alone[?]"**

Response: The scope of the President's unilateral authority over tactical matters in wartime would depend in significant part on the breadth of the writer's definition of what is "tactical." I agree that there are many cases in which

Congress does not have sufficient information or speed to regulate military tactics in the midst of armed conflict; and, indeed, it is my understanding that Congress does not often try to do so.

- c. **Do you believe Congress has the constitutional authority to prescribe legislatively the military's tactics during wartime?**

Response: My response is contained in subpart b. above.

- d. **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?**

Response: First, and importantly, if constitutional or other legal considerations are set aside, the question becomes one of policy and thus would not fall in the province of OLC. Second, I am not familiar with examples of congressional legislation of tactics during a military campaign. Finally, as noted above, while the scope of Congress's authority would depend in significant part on the breadth of the writer's definition of what is "tactical," I agree that Congress generally lacks the information and nimbleness to legislate tactics during a military campaign.

4. **Mr. Barron and Mr. Lederman 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 that, if confirmed, you should resist the urge to give President Obama discretion to conduct military operations in Libya, for example?**

Response: As noted above, I am not confident I can discern these authors' position on the President's conduct of military operations in Libya. In this regard, however, I note that I agree with a statement by Steve Bradbury in an OLC memorandum that, although the President has broad authority as Commander in Chief to take military actions, Article I, section 8 of the Constitution grants Congress significant war powers as well. See *Status of Certain OLC Opinions Issued in the Aftermath of the Terrorist Attacks of September 11, 2001* (Jan. 15, 2009), which is available at <http://www.usdoj.gov/opa/documents/memostatusolcopinions01152009.pdf>. The scope of the President's broad discretion as Commander in Chief to conduct military operations would have to be addressed in a concrete setting, considering all relevant facts and circumstances, as set forth in the response to question 3.a.

5. **In 1993, you participated in a panel discussion that was published in the *Cumberland Law Review*. During that discussion, you argued that, in order to achieve the "optimal nation," "redistribution" of economic rights is necessary in order for all to achieve a minimum level of assets so that individuals are truly able**

to exercise their non-economic rights. In response to a question from the audience, you acknowledged that the rights of those from whom resources are taken would be diminished, but said that this would not be a problem because you do not see economic rights as “the kind of undivided whole in which every cent you have is your right.” However, I believe as F.A. Hayek explained, that “Economic control is not merely control of a sector of human life which can be separated from the rest; it is the control of the means for all our ends. And whoever has sole control of the means must also determine which ends are to be served, which values are to be rated higher and which lower – in short, what men should believe and strive for.”

- a. Do you think the kind of control Hayek describes—the kind of control you seemed to be advocating—is consistent with the founding generation’s concept of liberty, as protected by the Constitution?**

Response: The panel which the question references took place in 1993. I was asked to participate because I had been one of the attorneys representing the AFL-CIO in several cases involving economic rights such as the property clause and the contracts clause, and I was speaking from that perspective. I am not familiar with the passage from Hayek that is quoted in the question and not confident that I grasp his meaning. Reading the transcript of the question and answer session, I believe that I was discussing the constitutionality of federal laws regulating economic rights and interests and expressing the view that such government regulation may be constitutional even if it affects economic interests. For example, I believe my answer quoted above was responding to a question about the lawfulness of taxes and tax increases which, as the questioner stated, diminish the resources of some for the benefit of others. In that context, I believe that I was stating that laws such as the tax code are constitutional, and I believe that this is true.

- b. At another point in the discussion, you justified your view by saying**

“I do not know exactly how much economic liberty is essential to the preservation of other liberties that I consider more fundamental, but I am not persuaded that the required amount of economic liberty is the same as was present in eighteenth-century America. Property and contract rights have been redefined in many different ways since the founding, most notably in the eighteenth century when significant changes occurred to make the Industrial Revolution possible.”

- i. Do you believe that the meaning of the Constitution can be altered by changing laws and norms over time?**

Response: As noted above, the panel occurred in 1993 and I do not recall the session. Reading the transcript, I believe that in the statement quoted in the question, I was not describing my views about the correct framework for constitutional interpretation; I was simply agreeing that economic liberty is essential to our system of government and posing the question of how much liberty (freedom from regulation) is essential. I was also stating that government

regulation of the economy has increased since the time of the Founding, and that we had maintained both property and contract rights and other kinds of rights. The Supreme Court's interpretation of the Constitution's liberty and due process provisions and their application to government regulation has changed over time. This is seen in comparing the Supreme Court's decisions in the *Lochner* era with those in the post-*Lochner* era. I do not believe, however, that changes in laws have changed the meaning of the Constitution; instead, the Supreme Court altered its interpretation of the relevant provisions. If I were confirmed, in addressing the constitutional issues before OLC, I would apply the Supreme Court's interpretation and application of the relevant constitutional provision.

- ii. **Would this same logic apply to noneconomic rights? For example, if all the states and the federal government passed a law that said that no individual's right to privacy or right to be free of unreasonable searches and seizures extended to their library records, would that be subject to judicial decision-making to determine if that right was "essential to the preservation of other liberties"?**

Response: As stated above, I do not believe that my statement was setting forth a framework for constitutional analysis. And, I do not believe that the mere fact that all states have enacted a law changes the meaning of the Constitution, whether that law addresses economic or noneconomic rights. Instead, the Supreme Court would decide the constitutionality of any such law using its traditional method, that is, analyzing the constitutional text and structure, the Framers' intent and its relevant precedent.