Senator Jeff Sessions

Questions for the Record

Christopher H. Schroeder

1. If confirmed to head the Office of Legal Policy (OLP), you will be the primary policy advisor to the Attorney General and the Deputy Attorney General and will be responsible for developing and implementing the Department's significant policy initiatives. 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."

    a. Do you agree with Attorney General Holder's statement?

    Answer: Yes.

    b. 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?

    Answer: I agree with the Attorney General that we can look back now and see that the nation was at war prior to September 11, 2001, but I do not believe it would be possible for me in hindsight, without benefit of the intelligence available to the President at the time, to give a specific response.

    c. 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?

    Answer: Congress has authorized the President to use military force "against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." Authorization of the Use of Military Force, 115 Stat. 224 (2001).

2. You have spent a significant portion of your career advocating against conservative legal principles, principles you assert were expounded by President Reagan, President George H.W. Bush, and President George W. Bush. You served as counsel to Senator Biden

during the Bork and Thomas hearings and were one of the co-authors of the "Biden Report," a sharply critical and, in my opinion, unfair assessment of Judge Bork and his record. In 1991, you wrote an op-ed in the *New York Times* stating that: "The Reagan and Bush Administrations have permitted the Supreme Court nomination process to be captured by ultraconservatives who want a judiciary that is far to the right of the nation as a whole. The faction . . . is the primary cause of our recent protracted acrimonious struggles to confirm Court nominees." And, very recently, you co-authored a book entitled, Keeping Faith with the Constitution, published by the American Constitution Society, in which you criticize originalism and textualism as theories of Constitutional interpretation and argue that the Constitution should be interpreted "in light of the concerns, conditions, and evolving norms of our society."

a. If confirmed as the head of OLP, you will be instrumental in helping Obama choose his judicial nominees. As such, I am concerned that the types of judges you would favor are not those who would strictly apply the Constitution. What assurances can you give this Committee that that will not be the case?

As I have emphasized in my writings, any interpretation of the Constitution must begin with the document's text, history, structure and purposes, as well as judicial precedent. The President and the Attorney General believe, and I concur, that a fundamental qualification for anyone being considered for a judicial appointment is that he or she understand the Constitution has binding force that must be applied faithfully in cases that come before any court, independent of his or her own policies or preferences.

That said, the President selects judicial nominees, and the tradition function of the Assistant Attorney General for Legal Policy is to evaluate candidates for judicial nomination with respect to their professional qualifications, integrity, temperament and other criteria established by the President. If confirmed, I would carry out the traditional function of the Office of Legal Policy.

b. Do you believe the judges that President Obama has nominated so far fit the standards that you espoused in the aforementioned writings? Why or why not?

Answer: I have not yet been involved in evaluating any of President Obama's judicial nominees, so I cannot express an opinion.

c. What is your view on the Administration's outsourcing of the vetting process for Judge Sotomayor's nomination? Will you continue that process?

Answer: I have not participated in and have no personal knowledge of the vetting process for Judge Sotomayor's nomination to the Supreme Court. However, I intend to follow the tradition of the Office of Legal Policy, as I understand it, of involving personnel inside the Administration in vetting candidates for U.S. District and Circuit Court vacancies.

3. You were critical of the Bush Administration's use of signing statements to suggest avoidance of the obligation to comply with certain laws. In 2006, you stated that President Bush has engaged in an "unjustifiable arrogation of power" in his use of signing statements.[1] The Clinton Administration claimed broad authority with respect to signing statements during the time you served. In 1993, Assistant Attorney General for the Office of Legal Counsel Walter Dellinger signed an opinion letter to the White House Counsel in which he stated the following:

> [The President] may properly *announce* to Congress and to the public that he will not enforce a provision of an enactment he is signing. If so, then a signing statement that challenges what the President determines to be an unconstitutional encroachment on his power, or that announces the President's unwillingness to enforce (or willingness to litigate) such a provision, can be a valid and reasonable exercise of Presidential authority.[2]

a. Were you aware of that statement during your service in the Justice Department? Do you agree with that statement?

Answer: I was aware of the 1993 statement of Assistant Attorney General Dellinger that is quoted above, and I agree with it. I believe that signing statements can appropriately be used to express presidential intentions not to enforce or comply with a statute, whether by President Bush or any other president. As the 2006 statement on "Untangling the Debate on Signing Statements" states: "The signing statement is a good thing: a manifestation of the Executive's intentions that helps us to understand the heart of the problem. If the President has decided to decline to enforce a statute because it's unconstitutional (see above) then it is much better that he tell the Congress and the public of his intentions, rather than keep it secret, because in that case the checks and balances of the constitutional system can be set to work." The objection I have raised with respect to some of President Bush's signing statements was that they expressed a broad view of the President's constitutional authority to disregard Acts of Congress beyond what the Constitution permits.

b. In a 1994 opinion letter to the White House Counsel, Mr. Dellinger stated that "the President is not obligated to announce his reservations in a signing statement; he can convey his views in the time, manner, and form of his choosing."[3]

---

[1] "Untangling the Debate on Signing Statements," Dawn Johnsen, David Barron, Walter Dellinger, Neil Kinkopf, Marty Lederman, Chris Schroeder, Richard Shiffrin, and Michael Small for *Georgetown Law Faculty Blog*. July 31, 2006

[2] Memorandum for Bernard N. Nussbaum, Counsel to the President, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, *The Legal Significance of Presidential Signing Statements*, 17 U.S. Op. Off. Legal Counsel 131, 134 Nov. 3, 1993 (emphasis in original).

[3] Memorandum for Abner J. Mikva, Counsel to the President, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, *Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 U.S. Op. Off. Legal Counsel 199, 202, Nov. 2, 1994.

i. Did you participate in the preparation of this statement?

Answer: Yes, I do recall participating in conversations involving the preparation of this statement.

ii. If not, were you aware of this position during your tenure in the Justice Department?

Answer: See response immediately above.

iii. Do you agree with this statement?

Answer: I do agree with the statement.

4. In *Guidelines for the President's Legal Advisors, an introduction to Principles to Guide the Office of Legal Counsel*, you stated that, among other things, OLC opinions should account for "the institutional traditions and competences of the executive branch as well as the views of the President who currently holds office." The OLC under President Clinton held that the president can go to war on his own authority; he can conduct the war as he sees fit; a war can exist between the United States and a non-state entity such as al Qaida; and Congress's ability to interfere is limited by the president's constitutional powers, including his Commander-in-Chief power.

a. In your view, do traditions that encompass broad war-making powers, as the Clinton OLC repeatedly noted, fall under the "institutional traditions" that you mention?

Answer: Yes, the views of the Office of Legal Council as expressed in opinions of the Office during the Clinton Administration are part of the "institutional traditions" referred to in the Principles to Guide the Office of Legal Counsel.

b. The Obama Administration's position on several war-on-terror related legal issues so far (*e.g.*, the state secrets privilege, extraordinary rendition, and targeted killing) has been in line with the Bush Administration's position. Even on the largest issue of apparent difference – interrogation of terror suspects – the Obama Administration has left the door open to authorizing interrogation techniques beyond those in the Army Field Manual. As a critic of the Bush Administration, how will you reconcile your views with the present administration's positions if confirmed?

Answer: The issue of appropriate policy and the issue of the lawfulness of any policy are distinct questions. My primary criticism of some of the actions of the Bush Administration has not been directed at the policies motivating those actions but at their questionable legal basis.

As for the policies themselves, along with the President and the Attorney General, I am committed to a strong national defense and to policies and programs that protect the American people. I believe that the Constitution and the laws enacted by Congress provide a firm basis for such policies and programs to be carried out lawfully. For example, programs such as the terrorist surveillance program could have been conducted within the law by making appropriate amendments to the FISA statute, as was eventually done in 2008.

c. Do you still hold to all of your criticisms of the Bush Administration's conduct of the war on terror?

Answer: My primary criticism has been that the Bush Administration did not comply with the Constitution and the laws of the United States in some of its actions. I continue to hold to that view, and also to the view that the war on terror can be prosecuted effectively and lawfully.

d. What criticisms, if any, do you have of the Clinton Administration's practices or policies regarding the same issues?

Answer: Generally, I believe that the Clinton Administration sought to implement policies and conduct those policies guided by an appropriate understanding of the President's constitutional authorities and the laws of the United States. This is not to deny that legal analysis of a particular policy or practice might not have been subsequently shown to be in error.

5. At your hearing, I asked you whether, in your view, the Fourth Amendment's warrant requirement applies 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. You answered that you did not have a view at that time. I also asked whether you believe that any provision of the FISA Amendments Act of 2008 is unconstitutional. You responded that you have not studied the amendments. Now that you have had time to reflect upon these issues and review the FISA Amendments Act of 2008, please provide an answer to the foregoing questions.

Answer: In United States v. Verdugo-Urquidez 494 U.S.259 (1990), the Supreme Court held that the Fourth Amendment's warrant requirement does not apply to non-U.S. persons outside the United States. Furthermore, in In re Directives Pursuant to Section 105B of the Foreign Intelligence Surveillance Act, 551 F.3d 1004 (For. Intel. Surv. Rev. 2008), the Foreign Intelligence Surveillance Court of Review recognized an exception to the warrant requirement for foreign intelligence surveillance, at least so long as foreign intelligence gathering is a significant purpose of the surveillance.

With respect to the FISA Amendments of 2008, several other legal challenges to aspects of those amendments have been filed but none has resulted in a judicial determination. I am

not aware of any provision of the 2008 Amendments that is unconstitutional on its face. Whether specific applications of the new authorities in the FISA are constitutional cannot be ascertained without knowledge of the particular facts of those applications.

6. At your hearing, Senator Feinstein asked whether you believe that the laws of armed conflict allow for the preventive detention of individuals if an Article 3 court has determined that they are enemy combatants or otherwise meet international standards. You responded that have not studied the issue enough to give a "personal answer." Now that you have had the chance to study the issue, please provide your personal answer.

    a. Do you believe the United States has the power to preventively detain terrorist suspects?

    Answer: Yes, Hamdi v. Rumsfeld, 542 U.S. 507 (2004), held that the United States has the authority to preventively detain individuals who have been properly designated "enemy combatants." I understand that the President has established an interagency task force to review appropriate policy in this area.

    b. Must such detentions occur in the United States?

    Answer: The question of whether the law compels such detentions to occur in the United States would be a legal determination within the normal purview of the Office of Legal Counsel, but I do not believe there is such a legal requirement. If the question is asking whether the best policy approach to such detentions is to have them occur within the United States, the President has established an interagency task force to resolve policy questions such as this, and I believe that such interagency collaboration is the best way to formulate policy in this area.

    c. Does the United States have no authority to detain except after Article III court determinations?

    Answer: Hamdi v. Rumsfeld, 542 U.S. 507 (2004), recognized the authority of the United States to detain individuals who have been properly designated "enemy combatants" prior to any Article III court determination.

        i. What, in your view, constitutes the minimum of due process that should be required for tribunals that authorize or affirm detentions?

        Answer: In Hamdi v. Rumsfeld, 542 U.S. 507 (2004), the Supreme Court indicated that the requirements of Due Process should be determined by balancing the government's national security interests against the individual interest in being free of erroneous or arbitrary detention. This is obviously not a bright-line test. Resolving specific procedural questions is a very fact-intensive and context-intensive determination that should be made only after consultation with all the many components of the executive branch that hold substantive expertise, as well as with Congress.

ii. Would detainees before those tribunals enjoy a presumption of innocence or of guilt?

Answer: Hamdi *intimated but did not decide that the tribunals could employ a presumption in favor of the government's evidence. Because the advisability and the legality of any specific procedural rule may depend upon the resolution of other procedural issues, I believe that such questions need to be resolved through the interagency and interbranch consultation and cooperation described in response to subparts b and c(i).*

iii. What evidentiary threshold would have to be met in those tribunals that review such cases? A preponderance of the evidence? Clear and convincing evidence? Beyond a reasonable doubt?

Answer: I believe that this question should be resolved through interagency consultation and cooperation.

iv. Would you authorize the admission of evidence in such tribunals not admissible in civilian courts? How would you go about departing from the evidentiary rules that govern civilian courts?

Answer: It would not be the role of the Office of Legal Policy to make decisions of this sort.

v. Would detainees have to be either released or brought to the United States?

Answer: A determination of what is legally required or allowed is a matter for the Office of Legal Counsel. The determination of what is the best policy within the parameters of the law is a matter that involves complicated calculations of not only legal policy but also military and foreign affairs policy. I believe it would be unwise to formulate a policy position on this or similar questions without first undertaking extensive consultations with relevant agencies, such as the State and Defense Department, as well as relevant units of the Department of Justice itself.

Questions of Senator Tom Coburn, M.D.

Nomination of Christopher H. Schroeder, to be an Assistant Attorney General, Office of Legal Policy
United States Senate Committee on the Judiciary
July 1, 2009

---

1. In a 1991 op-ed entitled "Low Roads to the High Court," you stated "The Reagan and Bush Administrations have permitted the Supreme Court nomination process to be captured by ultraconservatives who want a judiciary that is far to the right of the nation as a whole." Do you believe the current Justices on the Supreme Court who were nominated by Presidents Reagan and Bush are "far to the right of the nation as a whole?"

Answer: Such an assessment of a sitting Justice should be done on the basis of his or her entire body of opinions. On that basis, none of the current Justices is far to the right of the nation as a whole.

   a. If so, which positions in particular do you believe are "far to the right?"

   Answer: See the response immediately above.

2. You have stated that judicial doctrine should incorporate "the evolving understandings of the Constitution forged through social movements, legislation, and historical practice." You also said that "[i]n many instances, a court cannot be faithful to the principle embodied in the text unless it takes into account the social context in which the text is interpreted. The relevant context includes not only social conditions and facts about the world, but also public values and social understandings as reflected in statutes, common law, and other parts of the legal landscape."

   a. When a judge takes into account the "evolving understanding of the Constitution" and "public values and social understandings" does that not give them more latitude to insert their own policies and preferences into their opinions? Why or why not?

   Answer: I do not believe taking those matters into account gives judges more latitude. When applying the Constitution in a case, a judge's responsibility is to remain faithful to the written Constitution, not to insert his or her own policies and preferences.

   b. In *Roper v. Simmons*, Justice Kennedy relied in part on the "evolving standards of decency" to hold that capital punishment for any murderer under age 18 was unconstitutional. Do you agree with Justice Kennedy's ruling?

   Answer: Although I have not studied the evidence upon which Justice Kennedy relied in Roper, I do agree that the Constitution's prohibition on cruel and unusual punishment embodies a principle whose application is appropriately informed by our society's understanding of cruelty and by what punishments have become unusual.

   c. How would you describe judicial activism?

   Answer: I agree with Judge Frank Easterbrook who has written that the term "judicial activism" is "notoriously slippery" (Frank H. Easterbrook, Do Liberals and Conservatives Differ in Judicial Activism? 73 U. Colo. L. Rev. 1401, 1401 (2002)). Because it means

different things to different people, I do not think it is a phrase that helps us understand Constitutional interpretation or the work judges undertake.

3. President Obama has described the types of judges that he will select as follows: "We need somebody who's got the heart, the empathy, to recognize what it's like to be a young teenage mom. The empathy to understand what it's like to be poor, or African-American, or gay, or disabled, or old. And that's the criteria by which I'm going to be selecting my judges." What role do you believe that empathy should play in a judge's consideration of a case?

Answer: I agree with the President, who has also said that a judge should be an individual who is "dedicated to the rule of law, who honors our constitutional traditions, who respects the integrity of the judicial process and the appropriate limits of the judicial role," but that empathy is also "an essential ingredient for arriving at just decisions and outcomes." As such, all of these qualities should play a role in a judge's consideration of a case.

a. What role will empathy play in your vetting process for future judicial nominees?

Answer: The traditional function of the Assistant Attorney General for the Office of Legal Policy is to evaluate candidates for judicial nomination with respect to their professional qualifications, integrity, temperament and other criteria established by the President. To the extent that it is important that nominees for judicial vacancies be able to see cases from all points of view and understand the positions of the variety of litigants that come before them, empathy should play some part in the vetting process. If confirmed, I would carry out the traditional function of the Office of Legal Policy.

b. Do you believe President Obama's judicial nominees thus far embody this idea of empathy toward certain groups?

Answer: I have not yet been involved in evaluating any of President Obama's judicial nominees, so I cannot express an opinion.