
Follow-up Questions of Senator Coburn

Follow-up Question for Laurence Tribe

When answering a question related to the President's executive power, you stated: "But there is no way, consistent with his expressed beliefs, that a Justice Alito could go along with that view; that is, under his view, which would be, I think, quite similar to the view of Justice Thomas dissenting in Hamdi, it is up to the President to decide how he will, through his subordinates in the unitary executive branch, carry out his authority as commander-in-chief, especially given the authorization for the use of military force." Professor Tribe, can you, without a doubt, say that there is "no way" that Judge Alito will rule a certain way on a case, based on a memo that he wrote while serving as an advocate?

Answers to Questions submitted by Senator Coburn

**Mr. Lawrence Tribe
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Answer:

In the testimony to which you have referred, "[w]hen answering a question related to the President's executive power," I was not expressing the view that you quoted "based on a memo that [Judge Alito] wrote while serving as an advocate" but based, rather, on the text of a public speech that Judge Alito, speaking on his own behalf, delivered to a meeting of the Federalist Society on November 17, 2000, in which he discussed his continued adherence to a "unitary executive" theory considerably more muscular than the one he appeared to be describing in his testimony before the Senate Judiciary Committee.

In that speech, which was subsequently published in Volume 2 of the journal "Engage" (November 2001), Judge Alito continued to regard the theory developed when he "was in OLC" as the theory that "best captures the meaning of the Constitution's text and structure." He described himself on that occasion as "preaching the gospel according to OLC." He frankly stated in that speech that the Supreme Court had "not exactly adopted the theory of the unitary executive" -- an understatement in light of the Court's rejection of that theory in 1988 in *Morrison v. Olson* -- but then proceeded to explain how he then believed, not as someone else's counsel but as a sitting federal judge speaking his own mind, the Court's *Morrison v. Olson* precedent could properly be read to heed "if not the constitutional text that [he] mentioned, at least the objectives for setting up a unitary executive -- namely, energy, faction control, and accountability."

He argued that reading the precedent of the Court this way would permit the conclusion that, if any restriction enacted by Congress "frustrates, or thwarts the President's ability to discharge any of" his executive functions, including the commander-in-chief functions of which Justice Thomas wrote in his *Hamdi* dissent, "then it would be seen as violating the *Morrison* test." This is an approach that he acknowledged "could lead to a fairly strong degree of presidential control " even "over the work of the administrative agencies in the area of policy making," and it is an approach that certainly would lead to the invalidation of restrictions, regardless of the non-executive branch from which they emanated, upon the President's ability to conduct the war on terrorist groups, particularly given the Authorization for Use of Military Force ("AUMF"), whether the presidential decision regarding the conduct of that war entails the use of the sort of indefinite detention for purposes of interrogation of American citizens whom he deems enemy combatants that was, at bottom, the concern in *Hamdi*; or the use of cruel and inhuman techniques of interrogation of such alleged enemy combatants whether or not in compliance with recently enacted and overwhelmingly supported congressional legislation; or the use of warrantless electronic surveillance of American citizens who find themselves swept up in the broad net defined by even the publicly revealed aspects of the NSA program so much

in the news of late, in direct violation of the Foreign Intelligence Surveillance Act of 1978 and well beyond anything arguably authorized by the AUMF of September 2001.

In all of those instances, it would have to be said that the contested action of Congress, as viewed through the distorting lens of the unitary executive philosophy that Judge Alito was proudly and personally defending as his own under the rubric of the "gospel according to OLC" as of the time he served in that office, "frustrates, or thwarts the President's ability to discharge" a core function of the President's office under Article II, notwithstanding the broad Article I powers of Congress to carry into execution its several powers to control the discharge of the functions of the commander in chief through all means "necessary and proper" to that end. I therefore was in no sense projecting Judge Alito's likely approach to the cases that would come before him as Justice Alito "based on a memo that he wrote while serving as an advocate."