

FEINGOLD ASKS SOTOMAYOR ABOUT EXECUTIVE POWER

Russ Feingold, predictably, asked Sonia Sotomayor about executive power. I confess, I'm troubled (probably unjustifiably so) by her answer to his first question about executive power.

FEINGOLD: Let me get into a topic that I discussed at length with – with two most recent Supreme Court nominees, Chief Justice Roberts and Justice Alito, and that's the issue of executive power.

In 2003, you spoke at a law school class about some of the legal issues that have arisen since 9/11. You started your remarks with a moving description of how Americans stood together in the days after those horrific events and how people from small, Midwestern towns and people from New York City found their common threads as Americans, you said.

As you said in that speech, while it's hard to imagine that something positive could ever result from such a tragedy, that there was a sense in those early days of coming together as one community, that we would all help each other get through this.

And it was, of course, something that none of us had ever experienced before and something I've often discussed, as well. But what I have to also say is that, in the weeks and months that followed, I was gravely disappointed that the events of that awful day, the events that had brought us so close together as one nation, were sometimes used, Judge, to justify policies that departed so far from what America stands

for.

So I'm going to ask you some questions that I asked now-Chief Justice Roberts at his hearing. Did that day, 9/11, change your view of the importance of individual rights and civil liberties and how they can be protected?

SOTOMAYOR: September 11th was a horrific tragedy for all of the victims of that tragedy and for the nation. I was in New York. My home is very close to the World Trade Center. I spent days not being able to drive a car into my neighborhood because my neighborhood was used as a staging area for emergency trucks.

The issue of the country's safety and the consequences of that great tragedy are the subject of continuing discussion among not just senators, but the whole nation.

In the end, the Constitution, by its terms, protects certain individual rights. **That protection is often fact-specific. Many of its terms are very broad. So what's an unreasonable search and seizure?** What are other questions or facts specific?

But in answer to your specific question, did it change my view of the Constitution? No, sir, the Constitution is a timeless document. It was intended to guide us through decades, generation after generation, to everything that would develop in our country.

It has protected us as a nation. It has inspired our survival. That doesn't change. [my emphasis]

Sotomayor dodged Feingold's question the same way she dodged many questions, by stating that every decision is fact-specific. Though in this case, of course, she was speaking about

constitutionally protected rights in the era of the war on terror. More troubling for me, though, is that she immediately suggested an example that she will almost certainly rule on, after she is confirmed, in the next year or two—on the (il)legality of Bush's warrantless wiretap question.

I'm troubled because rather than framing the question in terms, first and foremost, of Youngstown and a congressional limit on executive power, or of a warrant, she framed it in the same terms Yoo used to "authorize" it—with a very expansive view of what constitutes a "reasonable" search. It makes me worried that Sotomayor would suggest that wiretapping a group like al-Haramain might be considered reasonable, even in spite of the restrictions that clearly limit doing so in FISA.

That said, when pressed (and Feingold did have to press her) she did ultimately agree that Youngstown would govern such cases.

FEINGOLD: That's fine.

As I'm sure you're aware, many of us on the committee discussed at length with the prior Supreme Court nominees the framework for evaluating the scope of executive power in the national security context. You already discussed this at some length with Senator Feinstein, Justice Jackson's test in the Youngstown case.

And I and others on the committee are deeply concerned about the very broad assertion of executive power that's been made in recent years, an interpretation that has been used to authorize the violation of clear statutory prohibitions, from the Foreign Intelligence Surveillance Act and the anti-torture statute.

You discussed with Senator Feinstein the third category, the lowest ebb category,

in the Youngstown framework. And that's where, as Justice Jackson said, the president's power is at its lowest ebb, because Congress has, as you well explained it, specifically prohibited some action.

I take the point of careful scholars who argue that, hypothetically speaking, Congress could conceivably pass a law that is plainly unconstitutional. For example, if Congress passed a law that said that somebody other than the president would be the commander in chief of a particular armed conflict, and not subject to presidential direction, presumably, that would be out of bounds.

But setting aside such abstract hypotheticals, as far as I'm aware – and I'm pretty sure this is accurate – the Supreme Court has never relied on the Youngstown framework to conclude that the president may violate a clear statutory prohibition. In fact, in Youngstown itself, the court rejected President Truman's plan to seize the steel mills.

Now, is that your understanding of the Supreme Court precedent in this area?

SOTOMAYOR: I haven't cases, or a sufficient number of cases, in this area to say that I can remember every Supreme Court decision on a question related to this topic.

As you know, in the Youngstown case, the court held that the president had not acted within his powers in seizing the steel mills in the particular situation existing before him at the time.

But the question or the framework doesn't change, which is, each situation would have to be looked at individually, because you can't determine ahead of

time with hypotheticals what a potential constitutional conclusion will be.

As I may have said in – to an earlier question, academic discussion is just that. It's presenting the extremes of every issue and attempting to debate about, on that extreme of the legal question, how should the judge rule?

FEINGOLD: I'll concede that point, Judge. I just – I mean, given your tremendous knowledge of the law and your preparation, I'm pretty sure you would have run into any example of where this had happened.

And I just want to note that I am unaware of and if anybody is aware of an example of where something was justified under the president's power under the lowest ebb, I'd love to know about it, but I – I think that's a – that's not a question of a hypothetical. That's a factual question about what the history of the case law is.

SOTOMAYOR: I – I can only accept your assumption. As I said, I – I have not had sufficient cases to have looked at what I know in light of that particular question that you're posing.

FEINGOLD: In August 2002, the Office of Legal Counsel at the Department of Defense issued two memoranda considering the legal limits on interrogation of terrorism detainees. And one of these contained a detailed legal analysis of the criminal law prohibiting torture.

It concluded, among other things, that enforcement of the anti- torture statute would be an unconstitutional infringement on the president's commander-in-chief authority.

But, Judge, that memo did not once cite to the Youngstown case or to Justice

Jackson's opinion in *Youngstown*. And we just learned on Friday in a new inspector general report that a November 2001 OLC memo providing the legal basis for the so-called terrorist surveillance program also did not cite *Youngstown*.

Now, I don't think you would have to be familiar with those memos to answer my question. Does it strike you as odd that a complex legal analysis of the anti-torture statute or the FISA act that considers whether the president could violate those statutes would not even mention the *Youngstown* case?

SOTOMAYOR: I have never been an adviser to a president. That's not a function I have served, so I don't want to comment on what was done or not done by those advisers in that case. And it's likely that some question – and I know some are pending before the court in one existing case, so I can't comment.

All I can comment – on whether that's surprising or not, **I can only tell you that I would be surprised if a court didn't consider the *Youngstown* framework in a decision involving this question, because it is – that case's framework is how these issues are generally approached.**

FEINGOLD: Good. I appreciate that answer.[my emphasis]

Ultimately, though I was very heartened by Sotomayor's response to Feingold's question about *Korematsu* and not judging from fear.

FEINGOLD: I realize I'm jumping back and forth through these issues. But the last one I want to bring up has to do with the wartime Supreme Court decisions like *Korematsu* that we look back at with some bewilderment, of course. The *Korematsu v. the United States* decision in which

the Supreme Court upheld a government policy to round up and detain more than a hundred thousand Japanese-Americans during World War II.

It seems inconceivable that the U.S. government would have decided to put huge numbers of citizens in detention centers based on their race and yet the Supreme Court allowed that to happen. I asked Chief Justice Roberts about this, I'll ask you as well.

Do you believe that Korematsu was wrongly decided?

SOTOMAYOR: It was, sir.

FEINGOLD: Does a judge have a duty to resist the kind of wartime fears that people understandably felt during World War II which likely played a role in the 1944 Korematsu decision?

SOTOMAYOR: A judge should never rule from fear. A judge should rule from law and the Constitution. It is inconceivable to me today that a decision permitting the detention and arrest of an individual solely on the basis of their race would be considered appropriate by our government.

FEINGOLD: Now, some of the great justices in the history of our country were involved in that decision. How does a judge resist those kind of fears?

SOTOMAYOR: One hopes, by having the — the wisdom of a Harlan in Plessy, by having the wisdom to understand always, no matter what the situation, that our Constitution has held us in good stead for over 200 years and that our survival depends on upholding it.

Now, Charlie Savage analyzed what I assume to be the same 2003 speech Feingold mentioned and concluded (with some reservations) that

Sotomayor's statements—arguing for a particularized suspicion of illegality—auger well for her approach to civil liberties. I still have a somewhat queasy stomach about her immediate invocation of unreasonable search in this context. Others—including Kagro X, who actually has one of those fancy JD things and good judgment to boot, aren't so worried. Hopefully, I'm just being paranoid.