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TEN QUESTIONS: RESPONSES OF JOHN S. BAKER, JR.[†]

2. *Is the Justice Jackson concurrence in the Steel Seizure case really that helpful in sorting out separation-of-powers questions? Combined answer with: 10. What is the most important question in national security law today?*

Justice Jackson has confused the understanding of separation of powers by viewing domestic and foreign affairs through the same prism. His description of the relationship between Congress and the President fairly well describes the preeminence of Congressional power in domestic matters. The Constitution, however, reverses the relationship between the political branches in foreign affairs and national defense by structuring power so that the President has preeminence.

Although President Truman was waging war in Korea, he seized steel plants inside the United States. In the *Steel Seizure* case, Justice Black's opinion for the Court plainly and accurately applied the separation-of-powers principle. The case simply reaffirmed that the President must find his power either in a statute or the Constitution. Without a supporting statute, President Truman could only claim to be acting under his constitutional powers as Commander in Chief. Inside the United States, which was outside the "theater of war," he remained the Commander-in-Chief, but he could not act solely on those powers.

Until *Rasul v. Bush*,¹ the Court accepted that the Constitution operated differently in foreign and military matters. First of all, the Framers wrote against background distinctions between natural and positive law. While far from denying natural law, the founding generation knew that positive law was the product only of a sovereign. Accordingly, outside the sovereign territory of states, only the law of nature existed. Jurists differed on the explanation of the relationship between the law of nature and the law of nations, which was said to govern the relationships among states. It was undisputed, however, that the law of nations did apply only as between sovereigns. Violations of

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1. 542 U.S. 466 (2004).

the law of nations had to be resolved, if at all, by sovereigns themselves. Long after the terms “natural law” and the “law of nature” fell from favor, and the “law of nations” became “international law,” it was still undisputed that “real law” did not apply outside the territory of the sovereign which enacted it. Under both the “natural law” and positivist approaches, the President, as head of State, dealt with other sovereigns.

The source and scope of presidential power as projected outside the United States was well stated in *United States v. Curtiss-Wright Export Corp.*,² a case which Justice Jackson viewed very narrowly.

[T]he very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable principles of the Constitution.³

The view of the Presidency expressed in this quote was not a twentieth century invention of supporters of an “imperial presidency.” *The Federalist* explained the Constitution’s creation of a unitary, energetic Executive as necessary to protect the nation.

Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish *the exercise of power by a single hand*. The direction of war, implies the direction of the common strength: and the power of directing and employing the common strength: forms an unusual and essential part in the definition of the executive authority.⁴

Understanding and accepting this original constitutional structure of separation of powers, which includes a unitary Executive created especially to protect the nation in foreign affairs and war, is “the most important question in national security law today.”

5. Does Congress have the authority, if so inclined, to regulate wiretaps for foreign intelligence purposes outside United States territory?

The Constitution assigns powers without specification generally as to the purpose of their use. Congress has the power “[t]o regulate Commerce with foreign Nations.” Communication, like transportation,⁵

2. 299 U.S. 304 (1936).

3. *Id.* at 320.

4. THE FEDERALIST No. 74 (Alexander Hamilton) (emphasis added).

5. See *Gibbons v. Ogden*, 22 U.S. 1 (1824).

is “commerce.” Telephone communication between the U.S. and foreign nations is “Commerce with foreign Nations,” and, therefore, Congress has the power to regulate it if it chooses to do so. The disputes over FISA concerns whether Congress has or has not regulated such wire-tapping. Note that regulating wire-tapping of communications which occur between two points outside the United States would fall neither under Congress’s power to regulate commerce *with* foreign nations, nor under any other congressional power.

6. *What is the next step for the majority of the detainees in Guantánamo Bay, Cuba?*

Detainee lawyers, who have been providing vigorous representation for their clients, have already taken and lost several “the next steps” following *Hamdan*. They quickly lodged constitutional challenges to Congress’s *Hamdan* fix. The Court of Appeals for the D.C. Circuit ruled against all their challenges to the Military Commissions Act,⁶ the Supreme Court denied their petition for certiorari,⁷ and then denied a petition for an extension of time to file a petition for rehearing and for suspension of order denying certiorari.⁸ Their “next step” must be to exhaust their administrative remedies as provided in the Military Commissions Act, per the concurring opinion of Justice Kennedy, joined by Justice Stevens. Only if the Government unreasonably delays the proceedings or causes some other ongoing injury” will they be able to seek earlier review by an Article III court. After exhausting the administrative process, they can go to the D.C. Circuit as provided in the Military Commissions Act and thereafter petition the Supreme Court. Otherwise, detainee lawyers have been lobbying the new majority on the Senate Judiciary Committee to reverse Congress’s removal of habeas jurisdiction over Guantanamo detainees. Even if such a provision were passed by Congress, it would be vetoed by the President.

7. *Between Hamdi and Hamdan, which decision is most significant?*

Both *Hamdi* and *Hamdan* are bad decisions for reasons stated in the dissents by Justice Scalia. *Hamdi* wrongly expanded presidential power domestically, as approved by Congress. *Hamdan* wrongly limited the President’s constitutional powers to act outside the United States. For reasons stated in the combined answer to questions two and ten, *Hamdan*

6. *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007).

7. 127 S. Ct. 1478 (2007).

8. 2007 WL 1225368 (U.S.)

has the greatest significance.