

2009

Responses to Ten Questions

Victor Hansen

Follow this and additional works at: <http://open.mitchellhamline.edu/wmlr>

 Part of the [Military, War, and Peace Commons](#), and the [National Security Law Commons](#)

Recommended Citation

Hansen, Victor (2009) "Responses to Ten Questions," *William Mitchell Law Review*: Vol. 35: Iss. 5, Article 5.

Available at: <http://open.mitchellhamline.edu/wmlr/vol35/iss5/5>

This Article is brought to you for free and open access by the Law Reviews and Journals at Mitchell Hamline Open Access. It has been accepted for inclusion in William Mitchell Law Review by an authorized administrator of Mitchell Hamline Open Access. For more information, please contact sean.felhofer@mitchellhamline.edu.

© Mitchell Hamline School of Law

RESPONSES TO THE TEN QUESTIONS

Victor Hansen[†]

*1. Do Americans need to give up their privacy to be safer? Can we be less secure and less free?*¹

The responses by the Bush administration, Congress, and the courts to the attacks of September 11 have brought an unprecedented level of attention to a multitude of national security issues. These issues have included legal questions related to the detention and punishment of terrorist suspects; the nature and scope of the state secrets privilege; the use of secret evidence in terrorist prosecutions; the executive's authority to conduct domestic surveillance outside of the structure established by Congress; and the proper role of the courts, to name a few. At the center of these and a myriad of other national security issues lies one fundamental question: In the post-September 11 world, must Americans sacrifice privacy and liberty in order to be more protected?

Many suggest that the events of September 11 and the threats posed by transnational terrorist organizations represent new and heretofore unanticipated threats for which a new legal paradigm is required. We often hear the refrain that September 11 changed everything. Perhaps it did. But before we rush headlong into some new legal order, we should remember that many of the national security issues we are grappling with today reflect at their most fundamental level the question of how to balance security and the

[†] Professor of Law, New England Law, Boston. Professor Hansen teaches Criminal Law, Criminal Procedure, Evidence, and Prosecutorial Ethics. Before joining the New England faculty, Professor Hansen served a twenty-year career in the Army, most of that time as a JAG Corps officer. His previous assignments include work as a military prosecutor and supervising prosecutor, and as a military defense counsel and supervising defense counsel. He has been involved in military capital litigation as a prosecutor and as a defense attorney. He also served as an associate professor of law at the Judge Advocate General's Legal Center and School in Charlottesville, Virginia.

¹ The language, "Can we be less secure and less free?", was added because the author slightly recharacterized the question.

continued survival of our Nation against the privacy and liberty rights of the individual. So, while the threats may be new and different, the tensions inherent in attempting to achieve both security and individual liberty in a democracy are as old as the Republic.

Some of those engaged in this debate seem to have an almost knee-jerk reaction against any of the Government's security efforts if individual privacy and liberty are adversely impacted. To these commentators, no amount of added security can justify any diminution of individual rights. While it is important to be vigilant anytime the Government seeks to reduce or encroach on privacy and liberty interests, I agree with Justice Jackson that the Constitution was not intended to be a suicide pact.² In some circumstances, individual liberty and privacy interests must give way to the collective interests of security.

On the other end of the spectrum are those who would suggest that security at any cost is a price we must pay to protect the country from the terrorist threats we face in the twenty-first century. People in this camp often see the executive as the government branch uniquely suited to deal with this new threat, and they argue that the executive should enjoy great, if not absolute, deference in combating terrorism both domestically and internationally. Unquestionably, our constitutional structure envisions a significant role for the executive, as Commander in Chief of our military forces, to protect against terrorist threats. Nonetheless, our constitutional structure favors a deliberative process, even in questions of national security, and Congress in particular, has significant responsibilities in striking the appropriate balance between security and individual liberties.

Finally, I must also take issue with those who would suggest that we can have both complete security and absolute protection of individual liberties at no cost. This is often the claim of politicians who have difficulty leveling with the electorate. We, of course, should know better. Everything has a price and there is simply no way to avoid or eliminate the tension that exists between collective security and individual liberties. Rather, what we should be striving for is to manage that tension in a way that allows for a flexible approach that can respond to real threats to our Nation while maintaining the core values of individual liberty which lies at the

2. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

heart of our democratic system.

In managing this tension and striking an effective and fair balance, we must be careful not to adopt approaches that will leave us less secure and at the same time less free. This, I believe, is where many of the policies of the Bush administration have left us after September 11. These failings represent the worst of both worlds. In this essay, I examine aspects of the Bush administration's domestic surveillance program and the administration's approach to the trial of enemy combatants as two examples where the administration's efforts have diminished individual liberty with little or no improvement to our collective security. I suggest some important lessons that we can learn from these examples, in the hope that we avoid similar mistakes in the future.

In December 2005, the *New York Times* revealed the existence of a domestic surveillance program which the Bush administration had been conducting since right after the September 11 attacks. The *Times* reported that, after the September 11 attacks, President Bush secretly authorized the National Security Agency to eavesdrop on Americans and others inside the United States to search for evidence of terrorist activity without court-approved warrants ordinarily required by the Foreign Intelligence Surveillance Act (FISA).³

The Bush administration justified this program on the grounds that Congress's passage of the Authorization to Use Military Force (AUMF),⁴ a week after September 11, was broad enough to serve as authority for the intrusion on privacy implicated by surveillance of international calls made to or received from our enemies. Implicit in the justification to bypass the FISA structure is the contention that the United States was facing an unknown and immediate threat, and the exigencies of the situation called for unilateral action by the President.

It is possible that in the initial days and weeks after September 11, while the Government was trying to assess the nature and scope of the terrorist threat, any delay created by complying with the

3. James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

4. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 (Supp. V 2005)) (authorizing the President to "use all necessary and appropriate force against those . . . he determines planned, authorized, committed, or aided the terrorist attacks [of September 11], or harbored such organizations or persons").

FISA structure could indeed have been costly. Given the actual attacks that occurred, and given the Government's inability to anticipate and stop those attacks before they occurred, quick unilateral action that could allow the Government to obtain information helpful in assessing the possibility of additional attacks would seem to fit within the ambit of the exigent circumstances authority. But the question is, how long did such an exigency last?

While we know very little about the specifics of the domestic surveillance program, we do know that it operated solely within the executive branch, free of congressional or judicial oversight from late 2001 until the President agreed to bring the program under the FISA structure in the spring of 2007, more than five years later. It seems doubtful that the exigency lasted for five years. So, at some point during the conduct of this program, the values of individual liberty and privacy would have outweighed the national security interests to conduct domestic surveillance without any meaningful oversight. This was a situation where President Bush's program made us less free, and because President Bush had continually refused to make any details of the program public, we simply have no way of determining if we were any more secure over that five-year period.

I believe one of the most important lessons we should take from this experience is the need to have an effective means that Congress, the courts, and the public can use to evaluate a President's claim of emergency circumstances. Fortunately, we are not without guidance. My colleague, Lawrence Friedman, and I have argued that the Supreme Court's Fourth Amendment jurisprudence provides some valuable guidance.⁵ The Court has created an exception to the Fourth Amendment's warrant requirement in certain exigent circumstances where the benefits of obtaining a warrant are outweighed by the costs to law enforcement and to society at large caused by the delay in obtaining a warrant.

There are a number of factors that emerged from these Fourth Amendment cases that are also applicable in the national security context. The most important factor to consider is the potential adverse consequences that might result if the President were not able to respond to a national security threat immediately and unilaterally. Still, a national security exigency requiring unilateral

5. See VICTOR M. HANSEN & LAWRENCE FRIEDMAN, *THE CASE FOR CONGRESS: SEPARATION OF POWERS AND THE WAR ON TERROR* (forthcoming 2009).

presidential action cannot be so broad as to include every conceivable threat to American interests or the security of American citizens.

There are undoubtedly situations in which the Government may need to act quickly—for example, the immediate need to capture suspected terrorists or to thwart an imminent terrorist plot against U.S. interests. This is closely analogous to hot pursuit situations in the Fourth Amendment context. But this should be the exception, not the rule. Even in a global environment of transnational terrorism, not every terrorist threat requires or justifies unilateral presidential action. Were unilateral action justified against every threat, there would be little to distinguish true exigency from the kinds of threats which the Framers clearly anticipated when they created a governmental structure that promotes oversight and accountability of the executive's actions.

Assessment of national security exigencies, like their Fourth Amendment counterparts, also must consider the seriousness of the threat and the potential harm to American interests. National security threats pose various degrees of harm, and not every action to prevent future harm requires unilateral executive action. Efforts to gather evidence and information about terrorist cells and future terrorist activity may be more like normal law enforcement investigatory and evidence-gathering activities, all of which we know may be effectively accomplished within the strictures of the warrant requirement and like legal regimes.

Similarly, the fact that the United States has suffered terrorist attacks in the past does not create an ongoing exigent circumstance that lasts in perpetuity. At some point after a threat comes to fruition, the immediate danger will end. When it does, the exigency no longer exists, and the need for unilateral executive action also ends. Were this not the case, the President would enjoy unchecked authority to act unilaterally from first contact with the enemy until the President alone decided the threat no longer existed, effectively delaying any real possibility of timely assessments of the efficacy of his actions.

The freshness and credibility of the information and evidence giving rise to a national security threat should also be considered in determining whether a true exigency exists. Information that is recent and specific may justify emergency executive action. As in the Fourth Amendment context, however, stale information, evidence, or intelligence alluding to events that have already taken

place, or information that is of uncertain reliability would not justify either a warrantless search or the unilateral exercise of exigent-circumstances authority by the executive.

Further, in considering the scope of exigent circumstances, the U.S. Supreme Court has often sought to determine the availability of less intrusive alternatives to warrantless searches. Similar considerations are appropriate in respect to the President's response to national security threats. Those threats might run the spectrum from true exigencies to inconsequential information, and there are likely to be many threats which should be taken seriously, but do not rise to the level of an exigency. In these cases, the President should look for alternatives to unilateral action that allow Congress to both consult and perform its oversight functions.

In those cases in which an exigency does exist and unilateral executive action is justified, care must be taken to honor appropriate limits on the scope and proportionality of the President's actions lest the exigency exception swallow the constitutional requirements of oversight and accountability. It is equally important to ensure that unilateral actions by the President in response to national security threats are commensurate with the scope of the exigency. Police in hot pursuit of a suspect may search a home where they believe the suspect is hiding, to locate the suspect or his confederates and to eliminate potential threats to police safety. But the police may not engage in a warrantless search of the entire home to look for contraband or other possible evidence of the crime. So, too, when U.S. forces are pursuing terrorists, their actions must be limited to ensure that the exigency does not become an excuse—or a subterfuge—to engage in actions unrelated to the exigency at hand, particularly actions that potentially infringe upon the rights and interests of American citizens.

Finally, perhaps the signal check on the executive's exigent circumstances authority is the most obvious: temporality. Once a threat in fact dissipates, for whatever reason, so too does the President's need to act unilaterally. At that point, the President must honor the requirements of our constitutional structure and seek congressional authorization and the oversight that comes with such authorization.

Unfortunately, this level of scrutiny and analysis has been largely lacking when it comes to assessing the Bush administration's domestic surveillance program. Instead, we have many critics of

the Bush administration's program who suggested that any departure from the FISA structure was both illegal and unconstitutional, and from the Bush administration we had the argument that in a time of war, the President's inherent though unspecified constitutional authority coupled with a general congressional authorization gave the President virtually limitless authority. It seems to me that gravitating to either of these extremes will not allow us to effectively manage the inherent tension between collective security and individual liberty. I suggest that one of the most important lessons we can learn from this episode is that we already have in place a flexible and workable structure that allows Congress, the courts, and the public to assess the nature and scope of claimed exigencies and, more importantly, to place reasonable limits on the executive's claims of exigency in the national security context.

A second example where I believe the Bush administration's policies resulted in diminished individual liberty with little or no improvement to our collective security is with the detention and prosecution of enemy combatants, primarily at Guantanamo. Much has been written on this, and this is an area where Congress eventually legislated and where the Supreme Court and the lower courts have been actively involved. To put it gently, President Bush's efforts to detain and try these so-called "enemy combatants" have not been well received.

Rather than focus on any particular aspect of the Bush administration's initial or subsequent policies or programs in this area, I want to focus on a broader point, which I think underlies much of the criticism to date. A primary failing of the Bush administration was its attempt to pick and choose only certain portions of the law of armed conflict applicable to the treatment of detained persons. The expectation by the Bush administration was that certain aspects of the law of armed conflict would aid and justify the long-term detention and expeditious prosecution of these detainees. What was missing in the Bush administration's approach was any recognition that the law of armed conflict also includes a number of legal obligations and protections that are owed to the detainees. The broader lesson we should learn from this episode is that in order for the rule of law to have any meaning, the executive must comply with all relevant legal obligations. He should not be allowed to manipulate the law to reach a desired outcome. Otherwise, the rights and liberties of all

of us are put at risk, not just those who are detained in Guantanamo.

As an example of the Bush administration's attempts to "cherry pick" aspects of the law of armed conflict that were favorable to its objectives, consider the administration's initial formulations of the military commissions process. Under the initial order that established the military commissions, the presiding officer could direct the closure of the proceedings or a portion of the proceedings to prevent the disclosure of protected information. As part of the closure, the presiding officer could exclude the accused and the civilian defense counsel from the proceedings. Though detailed military defense counsel could not be excluded, they were restricted from disclosing any information presented during the closed sessions to the client or the civilian defense counsel without the prior approval of the presiding officer.

The Bush administration's rationale for these extremely restrictive rules was the claimed need to protect secret evidence and sources of information. Clearly, such a procedure would not have been allowed if the cases were tried in a U.S. district court. So, the Bush administration's decision to try these cases by means of a military commission was motivated at least in part by a desire to create a judicial forum that was more favorable towards the Government's interests.

There is no question that the use of military commissions to try enemy forces for law of war and other violations has a long historical precedent. Such a process is even codified under Articles 18 and 21 of the Uniform Code of Military Justice.⁶ However, when the use of such forums is motivated primarily as a matter of convenience and by a hope that these forums will more likely reach an outcome favorable to the Government, their legitimacy is undermined. To help prevent this, part of the customary law reflected in Common Article 3 and the Four Geneva Conventions requires the passing of sentences to be pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

In their formulation of the military commissions procedures and the use of secret evidence, the Bush administration ignored this requirement. In part, this served as the basis for the Supreme Court's invalidation of the Bush administration's military

6. See Uniform Code of Military Justice, 10 U.S.C. §§ 818-821 (2006).

commission procedures in *Hamdan v. Rumsfeld*.⁷ The Court did not precisely define what the term “regularly constituted court” means under Common Article 3, other than to indicate that it likely excludes special tribunals unless those tribunals incorporate recognized principles governing the administration of justice. At a minimum, for the military commission procedures established by the President to qualify as regularly constituted courts, any departures from the standards of the military justice system must be justified by some practical need. The *Hamdan* Court found no such justification.

There are other circumstances in which the Bush administration selected out certain aspects of the law of armed conflict in order to serve its own purposes, without considering the obligations that the law imposes. The Bush administration’s broad definition of enemy combatant, which included those who “purposely and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant,” is one such example.⁸ By defining and applying the term in such a broad manner, the Bush administration undermined the principle of military necessity that serves as a justification for the continued detention of enemy combatants. Likewise, the Bush administration’s inclusion of conspiracy and material support to terrorism as violations of the law of armed conflict, in order to cast the net of war crimes liability as broadly as possible, is without historical precedent and violates the principle of legality. A critical lesson that we should learn from the Bush administration’s attempts to cherry pick the law of armed conflict as applied to Guantanamo detainees is: violating the rule of law in such a manner undermines the moral and legal authority of the United States and it has the exact opposite effect than was intended. Instead of making it easier to fight the terrorists who would seek to do us harm, Guantanamo has become a recruiting tool for future terrorists. It has also severely undermined our ability to develop strong coalitions with other countries who share our interests. In that way, we are less, not more secure.

Additionally, the Bush administration’s disregard for the rule of law has made us less free. If the President can significantly limit access by a defendant and his attorney to relevant and material

7. 548 U.S. 557 (2006).

8. See Military Commissions Act of 2006, Pub. L. No. 109-366, sec. 3(a)(1), § 948a(1)(i), 120 Stat. 2600 (to be codified at 10 U.S.C. § 948a).

evidence based on the defendant's status, a status that the President alone can determine, because it would be difficult to convict the defendant if he had access to that evidence in a military tribunal, then these same steps could be taken to limit a service member's or a citizen's access to this kind of evidence in a future situation where the President alone believed a similar justification existed.

The lesson here is simple, but profound. Departure from the rule of law is fraught with danger. Even in the arena of national security, leaders must be careful not to jettison the time-tested values reflected in the rule of law, for either the quick fix or the seemingly expeditious alternative. As frustrating as it may be to abide by the rule of law, as we see now, the alternative is likely to be much worse.