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RESPONSES TO THE TEN QUESTIONS

Robert Knowles[†]

8. DOES AL QAEDA POSE AN EXISTENTIAL THREAT TO THE UNITED STATES?

10. WHEN WILL THE UNITED STATES CEASE TO BE THE WORLD'S NUMBER-ONE POWER?

The United States cannot effectively pursue its national security interests without taking into account its unique position in the world. How powerful is the United States? Is it an empire? Is its influence in decline? Who are its major rivals? And who—or what—represents an existential threat?

These questions are crucial for U.S. national security law as well, but their importance is often overlooked. Debates about the scope of executive power in foreign affairs are framed as necessity versus the rule of law. The political branches establish a foreign policy and the means of pursuing it, and the President does what is necessary to protect the nation. The courts' task is not to determine what works. It is to decide whether, and how much, to constrain the exercise of power if the law requires it.

The result is a very high level of deference by the courts to the executive branch in national security cases. Even compelling constitutional values like liberty and due process can seem like abstractions in light of the urgent, concrete need to protect the nation. And if those whom the Government acts against—such as noncitizens captured and detained abroad—have no connection to U.S. society, the courts are likely to defer even more. When the Constitution was drafted and ratified, America pursued neutrality to avoid

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all entanglements with stronger European powers.¹ In this context, could the Framers have intended for the rights enumerated in the Constitution to apply to everyone, everywhere in the world? Would the public have interpreted the language this way?²

The world has changed, of course. The United States is no longer a weak power, but—at least for now—the strongest power. And it plays a very different role in the world today than it did at the end of the eighteenth century. The Constitution's original meaning—to the extent we can discern it—still matters. But where original meaning and history are indeterminate, courts and scholars turn to functionalism to decide the appropriate allocation of power among the branches in national security cases. Functionalism is about what works. Effectiveness in national security law, as in national security policy, depends on taking into account how the United States relates to the rest of the world.

It may seem strange that views of international relations should affect the courts' views of its role. But the impact has been there, if usually unarticulated, since at least the early twentieth century. In perhaps the most influential foreign affairs decision, *Curtiss-Wright*, the Supreme Court connected the nature of the world—a “vast external realm, with its important, complicated, delicate and manifold problems”—to relaxed constraints on delegations of power to the President.³ *Curtiss-Wright*, which is still cited by the Government to justify broad executive power in foreign affairs, was decided against the backdrop of a world in crisis, with Nazi Germany and Imperial Japan on the rise and World War II just three years away.⁴ Since 9/11, scholars applying functional approaches have tended to conclude that terrorism represents a danger justifying greater deference by the courts to the President.⁵ Transnational terrorist

1. HENRY KISSINGER, *DIPLOMACY* 32-36 (1994).

2. See generally J. Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 GEO. L.J. 463 (2007) (arguing from history and the text and structure of the Constitution that noncitizens abroad lack constitutional rights).

3. *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936).

4. See G. JOHN IKENBERRY, *LIBERAL ORDER & IMPERIAL AMBITION* 150-51 (2006).

5. See, e.g., BRUCE ACKERMAN, *BEFORE THE NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN AN AGE OF TERRORISM* 101-03 (2006); ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* 180-81 (2007). But see Robert Knowles, *American Hegemony and the Foreign Affairs Constitution*, 41 ARIZ. ST. L.J. 87 (2009) (applying international relations theory to the separation of powers and concluding that courts should not give special deference to the executive branch in foreign affairs cases); Deborah N. Pearlstein, *Form and*

groups such as al Qaeda are labeled an existential threat equivalent to the Soviet Union during the Cold War, and Nazi Germany and Imperial Japan during World War II. Now, as then, an unstable world requires the speed, expertise, secrecy, and uniformity found only in the executive branch. The federal courts, by contrast, move slowly, lack special foreign affairs expertise, and rarely reach uniform decisions.

But al Qaeda is a far different enemy from Nazi Germany. Though al Qaeda has enjoyed the support of governments at one time or another, it draws recruits and financial support from all over the world. It operates across borders. Unlike a nation-state, it does not sign treaties or possess sovereignty. It has no army in the traditional sense and cannot conquer territory. It does not operate a government or embassies. These differences matter for the way courts should view their role in national security cases.

It is important for courts to be aware of American power because it determines how the United States interacts with the rest of the world. In the 1930s, the world was divided into spheres of influence by great powers with roughly equal economic and military capability. During the Cold War, the United States vied with the Soviet Union for dominance. Since 1991, however, the United States has been the only nation capable of projecting military force anywhere in the world. Debates have raged for decades about how to measure America's power and how to describe the international system.

The United States has been labeled the lone superpower, a hyperpower,⁶ a hegemon,⁷ and an empire.⁸ These descriptions have long co-existed with predictions of more or less imminent U.S. decline.⁹ During the 1980s, for example, scholars complained

Function in the National Security Constitution, 41 CONN. L. REV. 1549 (2009) (using organization theory to argue that a functional approach to the separation of powers in national security cases requires more court supervision).

6. See, e.g., Eliot A. Cohen, *History and the Hyperpower*, FOREIGN AFF., July-Aug. 2004, at 49, 49.

7. See, e.g., LEA BRILMAYER, AMERICAN HEGEMONY: POLITICAL MORALITY IN A ONE-SUPERPOWER WORLD (1994) (arguing that American hegemony is a form of international governance and must be evaluated by liberals in the same way they would evaluate the legitimacy of domestic political arrangements).

8. Daniel H. Nexon & Thomas Wright, *What's at Stake in the American Empire Debate*, 101 AM. POL. SCI. REV. 253, 253 (2007) (observing that scholars on both the left and right describe the United States as an empire); Joseph S. Nye, Jr., *U.S. Power and Strategy After Iraq*, FOREIGN AFF., July-Aug. 2003, at 60, 60 (same).

9. See PAUL KENNEDY, THE RISE AND FALL OF THE GREAT POWERS: ECONOMIC

about U.S. imperialism in Central America while concluding that Japan's economic strength would allow it to surpass the United States as the world's preeminent power. During the 1990s, realist international-relations scholars began to struggle with understanding the behavior of nations in the unipolar system that had replaced the bipolar Cold War system. In the first half of the 2000s, the already vast United States-as-empire literature bloomed on both ends of the political spectrum, in part as a response to the more aggressive foreign policies of the Bush administration following 9/11.¹⁰ During the second half of the decade, however, the narrative of U.S. decline and the rise of its rivals again gained momentum.¹¹

Many of these disagreements result from semantic differences and a loose use of the term "empire."¹² In addition, assessments of the U.S. global position will vary, depending on the importance one places, respectively, on military, economic, and soft power.¹³ But as measured in terms of military power, the United States still predominates. It accounted for half of the world's military spending in 2007 and holds enormous advantages in defense technology that far outstrip would-be competitors.¹⁴ No other great power has possessed such a relative advantage in modern history.¹⁵ This advantage is so vast that it will likely prevent rivals from counterbalancing the United States on a global scale for decades.

America's advantage is compounded by other factors. First, the United States enjoys geographic isolation from its major poten-

CHANGE AND MILITARY CONFLICT FROM 1500 TO 2000 514 (Vintage Books 1989) (1987) (predicting the decline of the United States); JOHN J. MEARSHEIMER, *THE TRAGEDY OF GREAT POWER POLITICS* 392 (2001) (arguing that regional hegemons will arise to challenge American dominance).

10. See, e.g., NIALL FERGUSON, *COLOSSUS: THE PRICE OF AMERICA'S EMPIRE* (2004); CHALMERS JOHNSON, *THE SORROWS OF EMPIRE: MILITARISM, SECRECY, AND THE END OF THE REPUBLIC* (2004).

11. See, e.g., PARAG KHANNA, *THE SECOND WORLD: EMPIRES AND INFLUENCE IN THE NEW GLOBAL ORDER* (2008); FAREED ZAKARIA, *THE POST-AMERICAN WORLD* (2008).

12. Nexon & Wright, *supra* note 8, at 253.

13. See Nye, *supra* note 8 (observing that the United States occupies a different global position with respect to military, economic, and soft power). For many realists, soft power is least important, if it can even be considered a form of power at all. See MEARSHEIMER, *supra* note 9, at 5 (defining power in military terms).

14. ZAKARIA, *supra* note 11, at 181-82.

15. See William C. Wohlforth, *The Stability of a Unipolar World*, 24 INT'L SECURITY 5 (1999) (observing that America's military's advantage is larger now than any analogous gap in the history of the modern state system).

tial rivals—including China, Russia, Europe, and India—who are located relatively near one another in Eurasia.¹⁶ This mutes the security threat that the United States seems to pose while increasing the threats that potential rivals seem to pose to one another.¹⁷ Second, because unipolarity is now entrenched as the status quo, nations seeking to counter-balance the United States must overcome free-rider problems in order to do so. Third, nuclear weapons make the concentration of power in the United States appear less threatening. Just as other powers cannot conquer the United States, they, too, cannot be conquered. This makes war between great powers in today's world much less likely and reinforces the stability of the international order.¹⁸ Finally, globalization—the increasing integration and standardization of markets and cultures—also tends to stabilize the global system and reduce conflict.¹⁹

While in military terms the world remains unipolar for now, the picture is more complicated when it comes to economic and soft power. The gross domestic product of the Eurozone now exceeds that of the United States. Although 2007 projections had the U.S. economy remaining substantially larger than China's for the next two decades, China will overtake the United States in some measures—such as manufacturing output—before then. Some also believe that China's large investment in U.S. currency—above \$1 trillion (more than twenty percent of total foreign-held U.S. Treasury securities) in 2009—gives it leverage over the United States and constrains U.S. foreign policy.²⁰ America's soft power—the ability to get what you want through attraction rather than coercion or payments—is much harder to measure.²¹ Global regard for the

16. Potential rivals include China, Europe, Japan, and India. See ZAKARIA, *supra* note 11, at 81–86.

17. Stephen G. Brooks & William C. Wohlforth, *International Relations Theory and the Case Against Unilateralism*, 3 PERSP. ON POL. 509, 511 (2005) [hereinafter Brooks & Wohlforth, *Unilateralism*].

18. Stephen G. Brooks & William C. Wohlforth, *Hard Times for Soft Balancing*, 30 INT'L SECURITY 72, 106 (2005) [hereinafter Brooks & Wohlforth, *Hard Times*].

19. See G. John Ikenberry, *Liberalism and Empire: Logics of Order in the American Unipolar Age*, 30 REV. OF INT'L STUD. 609, 617 (2004).

20. China's ownership of U.S. debt can also be seen as limiting China's options, however, because China owns far too much in U.S. currency to sell off a significant amount without reducing the value of its remaining dollar-dominated assets. See WAYNE M. MORRISON & MARC LABONTE, CONGRESSIONAL RESEARCH SERVICE, CHINA'S HOLDINGS OF U.S. SECURITIES: IMPLICATIONS FOR THE U.S. ECONOMY 9 (2009).

21. See JOSEPH S. NYE, JR., *SOFT POWER: THE MEANS TO SUCCESS IN WORLD POLITICS* (2004) (observing that soft power arises from the attractiveness of a

U.S. Government's policies waxes and wanes, and varies a great deal from region to region. United States culture remains highly influential. Global public opinion of the United States improved during 2009, but the degree that this measures soft power is uncertain.²² But it is the relative decline in economic and soft power that has led many scholars to conclude that the world is now multipolar.

These measures of U.S. power do not tell the whole story, however. The United States plays a unique role in the world. It provides a number of global public goods.²³ These include security guarantees, the protection of sea lanes, and support for open markets.²⁴ Because of its overwhelming military might, the United States possesses what amounts to a "quasi-monopoly" on the use of force.²⁵ This prevents other nations from launching wars large enough to truly destabilize the international system. After World War II, the United States forged a system of military alliances that still preserve stability around the world. The United States provides security for allies such as Japan and Germany by maintaining a strong military presence in Asia and Europe.²⁶ The United States also provides a public good through its efforts to combat terrorism and confront rogue states.²⁷ In the economic realm, the United States supports crucial underpinnings for the system of global trade. The U.S. dollar is still the world's reserve currency. The United States led efforts to create the World Trade Organization and other institutions—such as the International Monetary Fund

country's culture, political ideals, and policies).

22. See PEW GLOBAL ATTITUDES PROJECT, CONFIDENCE IN OBAMA LIFTS U.S. IMAGE AROUND THE WORLD (July 23, 2009), available at <http://pewglobal.org/reports/display.php?ReportID=264>.

23. Public goods are "nonrivalrous"—capable of being simultaneously consumed by the provider and others—and "nonexcludable"—impossible to keep others from consuming. John O. McGinnis & Ilya Somin, *Should International Law Be Part of Our Law?*, 59 STAN. L. REV. 1175, 1236 (2007).

24. MICHAEL MANDELBAUM, *THE CASE FOR GOLIATH: HOW AMERICA ACTS AS THE WORLD'S GOVERNMENT IN THE TWENTY-FIRST CENTURY* 34–62 (2005) (describing the public goods provided by the United States for the world).

25. Ikenberry, *supra* note 19, at 618 ("The United States possesses a quasi-monopoly on the international use of force while the domestic institutions and behaviors of states are increasingly open to global—that is, American—scrutiny.").

26. *Id.* at 609.

27. See, e.g., MANDELBAUM, *supra* note 24, at 163 (observing that forceful U.S. measures to prevent rogue states from acquiring nuclear weapons permitted Europe and China to adopt more conciliatory postures toward those regimes); see also TODD SANDLER, *GLOBAL COLLECTIVE ACTION* 144–61 (2004) (applying public goods theory to the control of rogue states).

and the World Bank—that remain in place today. The United States does not produce these global public goods from altruism: as the largest consumer of these goods, it benefits from them the most.

Of course, the United States supplies these public goods imperfectly. Pirates prey on shipping in some places (often with impunity), and rogue states continue to develop nuclear weapons. And while the United States intervened to stop human rights violations in some instances, such as ethnic cleansing in Kosovo,²⁸ it took no action with respect to others, like the genocide in Rwanda.²⁹ Moreover, there are many important global public goods—such as addressing “weakest-link” collective-action problems like climate change—that the United States cannot provide alone.³⁰ Nonetheless, no other nation currently has the capacity to provide these goods. Were the United States to withdraw from its global-governance role, chaos would result. As the largest public-goods consumer, the United States would suffer the most.

The difficulty is that other nations frequently resent the outsized role that the United States plays in international affairs. Why should the United States enjoy the benefits of having the dollar as the world’s reserve currency when the Eurozone has a larger GDP? The vast overseas military presence required to provide security guarantees, and the combat operations required to fight terrorism and confront rogue states, inevitably result in blowback. The 2003 Iraq invasion brought the relative power of the United States into stark relief and contributed to weariness of American power.

On the other hand, other nations seem unwilling, for now at least, to relinquish the benefits that come from U.S. leadership. Germany and Japan, for example, can focus on developing their economies rather than their militaries, confident that the United States will provide security. When China holds U.S. dollars, it can export manufacturing goods to the United States more cheaply.

28. See Bartram S. Brown, *Humanitarian Intervention at a Crossroads*, 41 WM. & MARY L. REV. 1683, 1690 (2000) (“Military action to aid the Kosovar Albanians was the right thing to do.”); Ruth Wedgwood, *NATO’s Campaign in Yugoslavia*, 93 AM. J. INT’L L. 828, 828 (1999) (noting that NATO’s action in Kosovo “may also mark the emergence of a limited and conditional right of humanitarian intervention” in international law).

29. See SAMANTHA POWER, *A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE* (2003).

30. See Paul G. Harris, *Collective Action on Climate Change: The Logic of Regime Failure*, 47 NAT. RESOURCES J. 195 (2007).

And while few other nations are willing to invest blood and treasure to combat terrorism in Afghanistan, most nations enjoy the benefits of keeping al Qaeda at bay.

But there is another reason why other nations are willing to bandwagon with, rather than seek to counter-balance, the United States. They have a voice in American government, which provides multiple access points. Foreign citizens, corporations, and governments can lobby Congress and executive branch agencies in the State, Treasury, Defense, and Commerce Departments, where foreign policy is made.³¹ Even “rogue states” such as Myanmar have their lobbyists in Washington.³² They use the media to broadcast their point of view in an effort to influence the opinion of decision-makers.³³ Because the United States is a nation of immigrants, many American citizens have a specific interest in the fates of particular countries and form “ethnic lobbies” for the purpose of affecting foreign policy.³⁴ The courts, too, are accessible to foreign nations and non-citizens, whose involvement in U.S. litigation grows larger each year. The benefit of multiple access points is that if one fails, another can be tried: foreign governments facing unfavorable court decisions can and do appeal or seek reversal through political channels.

It is the uniqueness, rather than just the level, of American power that has led some to label the United States as an empire. But the label does not really fit. Empires consist of a “rimless-hub-and-spoke structure,” with an imperial core—the preeminent state—ruling the periphery through intermediaries.³⁵ The United States is very powerful and maintains a military presence throughout the world. The Status of Force Agreements (“SOFAs”) that govern legal rights and responsibilities of U.S. military personnel and others on U.S. bases throughout the world are typically one-sided.³⁶

31. The post-Cold War era has seen an acceleration in the trend that began in the mid-1970s, away from foreign policy conducted by an elite group within the executive branch toward one involving a much broader community. See John T. Tierney, *Interest Group Involvement in Congressional Foreign and Defense Policy*, in CONGRESS RESURGENT 89, 95–98 (Randall B. Ripley & James M. Lindsay eds., 1993).

32. Michael Isikoff, *Mac's Convention Quandary*, NEWSWEEK, May 19, 2008, at 5.

33. See MANDELBAUM, *supra* note 24, at 165.

34. McGinnis & Somin, *supra* note 23, at 1245.

35. Nexon & Wright, *supra* note 8, at 258.

36. See Ryan M. Scoville, *A Sociological Approach to the Negotiation of Military Base Agreements*, 14 U. MIAMI INT'L & COMP. L. REV. 1, 6 (2006) (“With great consistency, the United States has . . . leveraged its international power to obtain base agreements that heavily favor U.S. interests over those of receiving states.”).

And the United States performs many global-governance functions. But it does not rule other nations. Although the United States may exercise pseudo-imperial influence in a few nations like Iraq and Afghanistan, “empire” does not describe the relationship between the United States and the rest of the world.

Moreover, stability in empires depends on the imperial core keeping nations on the periphery from communicating with one another and forming alliances. All roads must lead to Rome. Although many roads lead to Washington, it would be impossible for the United States to maintain imperial rule in an era of globalization, even if it wanted to. The United States simply lacks sufficient control over the flow of information. When the United States strikes a bargain with one nation, others know about it immediately. The SOFAs with Iraq and Afghanistan are the subject of much public debate. When things go awry with the exercise of American military might—as with Guantanamo, secret prisons, and Abu Ghraib—the world pays attention. And other powers, such as China, have formed their own relationships with nations across the globe.

In the end, the label for America’s role probably does not matter as much as the reality. How should courts take cognizance of this reality? There are two important consequences for the U.S. separation of powers. First, the unipolar nature of the international system puts the United States at the center of the action in world affairs. The stability and legitimacy of the system depends more on successful functioning of the U.S. Government *as a whole* than it does on balancing alliances crafted by elite statesmen practicing *realpolitik*. “[W]orld power politics are shaped primarily . . . by the foreign policy developed in Washington.”³⁷ For better or worse, the laws that will be applied in combating terrorism worldwide will be in large measure the laws—domestic and international—that the U.S. Government chooses to apply.

Second, unipolarity increases the power of the U.S. executive branch, which faces fewer external constraints than it would in a world with several great powers balancing one another militarily.³⁸ This became especially apparent with America’s post-9/11 detention policies. At one time, the executive branch faced much more

37. Campbell Craig, *American Realism Versus American Imperialism*, 57 *WORLD POL.* 143, 169 (2004).

38. Daniel Abebe, *Great Power Politics and the Structure of Foreign Relations Law*, 10 *CHI. J. INT’L L.* 125, 125 (2009).

exogenous pressure from other great powers to comply with international law in the treatment of captured enemies. If the United States strayed too far from established norms, it would risk retaliation upon its own soldiers or other sanctions from powerful rivals. Today, there are few such constraints: enemies such as al Qaeda are not great powers in the traditional sense and are not likely to obey international law anyway. Instead, the danger is that American rule-breaking will undermine the legitimacy of U.S. leadership. America's military predominance enables it to set the rules of the game. When the United States breaks its own rules, it loses legitimacy.

With U.S. legitimacy at stake, it follows that courts should be more, not less, active in national security cases. Courts are widely regarded as rule-based institutions, rather than political institutions, that can ensure that the political branches do not short-circuit processes for changing the law or act to violate fundamental constitutional principles. The approval of courts lends legitimacy to government action. When other nations see the United States following the law, they are more likely to acquiesce in U.S. leadership. This makes this task of providing global public goods—such as fighting terrorism—easier for the United States. As the largest public-goods consumer, the United States benefits the most from perceptions of its own legitimacy.

Legitimacy becomes especially important in view of declining U.S. influence relative to other powers. The world may not be multi-polar today, but it could be by mid-century. America's enormous military advantage will decrease over time, and its reduced share of global economic output will give it less ability to throw its weight around. Although the costs for the United States of disregarding international legal norms may seem worth it now, those costs will increase from year-to-year. To the extent that international institutions—including frameworks of international law—provide some "stickiness," the United States is better off investing its own legitimacy in these institutions now, while it has maximum influence. If the United States leaves its imprint on international law and institutions, they will be less costly for the United States to comply with in the future and much more costly for a rising rival, such as China, to ignore.

Nonetheless, there are some who argue that we are already living in a multi-polar world, and that rogue states and terrorist groups like al Qaeda are our true rivals. Advances in technology

will—if they do not already—enable terrorists or rogue states to deploy small nuclear and biological weapons to threaten American cities, making up in sheer mayhem what they lack in armies and navies. A nuclear explosion in a large metropolitan area—such as New York—has the potential to change life as we know it. In this sense, al Qaeda can be viewed as an existential threat.³⁹

However, the capacity for small groups to leverage extremism into great destruction does not alter the fundamental structure of geopolitics. Not all existential threats are the same. A nuclear device would be just as dangerous in the hands of a domestic group or a lone wolf as it would be in the hands of al Qaeda. It would be a mistake to assume that these new threats are best pursued by giving the executive branch greater deference. In fact, the dangers from terrorism make even clearer the need to adhere to established principles. The United States will occupy a global leadership role for decades to come. Successful management of global crises—including a catastrophic terrorist attack—lies not in counterbalancing rivals, but in better management of the international system. The United States cannot hope to tackle large-scale global problems—terrorism especially—if the rest of the world loses confidence in American leadership. The best way for courts to help carry out this task is to ensure that the political branches adhere to the rule of law.

39. See PHILIP BOBBITT, *TERROR AND CONSENT: THE WARS FOR THE TWENTY-FIRST CENTURY 201-02* (2008) (stating that an existential threat “is precisely the sort of threat that terror poses”). *But see* Fareed Zakaria, *True or False: We Need a Wartime President*, *NEWSWEEK*, July 14, 2008, at 48 (rejecting arguments that al Qaeda or Iran represent existential threats to the United States).
