

2007

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Recommended Citation

Turner, Robert F. (2007) "Ten Questions: Responses of Robert F. Turner," *William Mitchell Law Review*: Vol. 33: Iss. 5, Article 3.
Available at: <http://open.mitchellhamline.edu/wmlr/vol33/iss5/3>

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TEN QUESTIONS: RESPONSES OF ROBERT F. TURNER[†]

1. *Has modern warfare rendered the Geneva Conventions quaint?*

I don't think so. Throughout history, methods, tools, and principles of warfare have changed to meet new threats, exploit new technologies, and embody the moral principles of the time. The '49 Conventions were designed primarily to address the experiences of World War II, and are subject to change.¹ But the core principle that noncombatants and combatants who have been seriously wounded or captured by their enemies ought to be treated humanely strikes me as being as valid today as it was in 1949.

2. *Is the Justice Jackson concurrence in the Steel Seizure case really that helpful in sorting out separation-of-powers questions?*

There is a great deal of confusion about what Jackson was trying to say in *Youngstown*. In footnote 2, he carefully distinguished the case from the controlling paradigm governing foreign affairs and external relations, the 1936 *Curtiss-Wright* decision.² Properly understood, *Youngstown* had nothing to do with the constitutional powers of Congress or the President to conduct diplomacy, gather foreign intelligence, or conduct war outside our borders. Rather, it involved a

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1. See, e.g., Protocol Additional (No. 1) to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, adopted June 8, 1977, 1125 U.N.T.S. 3; Protocol Additional (No. 2) to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, adopted June 8, 1977, 1125 U.N.T.S. 609.

2. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 635 n.2 (1952) (Jackson, J., concurring) (“That case [*Curtiss-Wright*] does not solve the present controversy. It recognized internal and external affairs as being in separate categories”).

claim by the President to be able to seize and operate privately-owned steel mills in this country for the purpose of insuring that labor strikes would not affect the ability of the military to obtain steel to use in the Korean War. Thus, *Youngstown* was less of a “war powers” or “foreign affairs” case than a Fifth Amendment case. That Amendment guarantees that “No person . . . shall be deprived of . . . property without due process of law” Both Justice Black for the Court majority and Justice Jackson in his famous concurring opinion repeatedly emphasized that they were not seeking to limit presidential power dealing with the external world, but rather were only addressing *domestic* issues. See also the concurring opinion of Justice Rehnquist (joined by Chief Justice Burger and two other members of the Court) in *Goldwater v. Carter*, which rejected Senator Goldwater’s claim that *Youngstown* ought to resolve a dispute over presidential power to terminate a mutual security treaty with Taiwan because *Goldwater*, like *Curtiss-Wright*, was a foreign affairs case.³

3. *Have the executive branch’s recent assertions of the state secrets privilege broken from the doctrinal moorings of the Reynolds decision?*

I am not sure I have followed all of the assertions, but those of which I am aware seem consistent with the *Reynolds*’ holding that “even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake.”⁴ That case involved alleged “military secrets,” but the same principle clearly applies to intelligence and diplomatic secrets. As Chief Justice Marshall explained in *Marbury v. Madison*:

By the constitution of the United States, the president is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience [A]nd whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive. The application of this remark will be perceived by adverting to the act of congress for

3. *Goldwater v. Carter*, 444 U.S. 996, 1004–05 (1979).

4. *United States v. Reynolds*, 345 U.S. 1, 11 (1953).

establishing the department of foreign affairs⁵

In *Curtiss-Wright*, the Court added with respect to presidential power over foreign affairs:

Not only, as we have shown, is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it. As Marshall said in his great argument of March 7, 1800, in the House of Representatives, “The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.”⁶

Since Vietnam, we have lost sight of these important principles and Congress has often broken the law (the higher law of the Constitution) in its efforts to usurp or control executive discretion.

Now, obviously, the Constitution is not suspended during wartime or national emergency, and neither Congress nor the President may use their legitimate powers in such a manner as to usurp powers given by the people to another department of government or rights guaranteed to the people. The Fourth Amendment, for example, remains fully in force during the “War on Terror”—but what constitutes an “unreasonable search or seizure” may well change as the threat to the nation changes from peace to war. During wartime, I believe both courts and Congress ought to be especially deferential to the executive, but if the courts perceive that individual rights are being clearly trampled, I don’t think *Reynolds* precludes all inquiry. But even when a claim involves the possibility of a civil liberties violation (e.g., where a plaintiff alleges that without access to highly-classified information she can’t tell whether someone’s civil liberties might be being violated), as a prudential matter courts ought to be cautious about compelling the disclosure of information that might ultimately compromise sensitive sources and methods of intelligence gathering, weaken the war effort, and ultimately perhaps cost many thousands of American lives. Just as by allowing the Commander-in-Chief to authorize a lieutenant to exercise battlefield discretion about where to direct mortar fire without prior judicial or

5. 5 U.S. 137, 165–66 (1803).

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

legislative authorization we run an increased risk that innocent lives may be lost as a result of bad intelligence (the building being targeted may turn out to be the location of a wedding rather than an al Qaeda safe house) or poor execution (the private aiming the device may dial in the wrong coordinates), we have to be willing to tolerate some additional risks to our civil liberties rather than impose elements of delay in the war-fighting process that may easily jeopardize operational success and lead to the deaths of thousands or even the loss of freedom for all Americans.

4. Should any responsibility for gathering domestic intelligence remain with the Federal Bureau of Investigation?

If you are talking about gathering *foreign* intelligence information from targets located within the United States (e.g., engaging in surveillance of an Egyptian national lawfully in the United States on a student visa but believed by authorities to be an al Qaeda agent planning an attack on the Capitol Building), I share John Jay's view voiced in Federalist No. 64 that the Constitution left "the business of intelligence" to be managed entirely by the President "as prudence might suggest." Thus, this is a decision for the President to make. If asked for my opinion by the President, I would favor making full use of the talents and resources of the FBI in this task. If you are talking about gathering information on purely domestic groups that have no ties to foreign powers or their causes, both Congress and the courts have a proper role here. But there, too, I believe the FBI has an important role to play in addition to their law enforcement responsibilities.

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

No. This power was vested exclusively in the President, and when Congress attempts to usurp that power, it violates the law. To again quote Chief Justice John Marshall in *Marbury*: "[A] legislative act contrary to the constitution is not law [A]n act of the legislature repugnant to the constitution is void."⁷

I worked in the Senate when the Foreign Intelligence Surveillance Act (FISA) was enacted in 1978. Historically, as I documented in my testimony last year before the Senate Judiciary Committee, all three

7. 5 U.S. at 177.

branches of government recognized that collecting foreign intelligence information was an exclusive presidential role.⁸ When the Supreme Court in *Katz v. United States*⁹ declared that wiretapping was a “seizure” under the Fourth Amendment and thus required a warrant, it expressly excluded from the holding foreign intelligence collection by authority of the President. And when Congress implemented this holding by enacting Title III of the Omnibus Crime Control and Safe Streets Act of 1968, it expressly provided that “Nothing contained in this chapter ... shall limit the constitutional power of the President to take such measures as he deems necessary ... to obtain foreign intelligence information deemed essential to the security of the United States.”

In the 1972 *United States v. United States District Court* (the *Keith* case) case, the Supreme Court held that for purely domestic national security wiretaps—involving groups like the Black Panthers, that had no ties to foreign powers—a warrant would be required.¹⁰ As a result, Congress might have wanted to enact a new law setting standards for such domestic national security wiretap warrants (which might be lower than those required for normal law enforcement wiretaps). But Congress was already heady with its raid on presidential power in the wake of Vietnam, and it elected instead to enact a *Foreign Intelligence Surveillance Act*, seizing powers it had long recognized to have been vested in the President by the Constitution.

Among other consequences of this illegal power grab may have been the success of the attacks of 9/11. Former National Security Agency (NSA) Director General Michael Hayden has stated publicly¹¹ that had the terrorist surveillance program been in effect in 2001, the NSA probably would have located some of the 9/11 terrorists and identified them as such. But FISA made it a felony for a U.S. intelligence officer to “spy” on foreign nationals in this country in violation of FISA.

Similarly, *Time* named FBI lawyer Coleen Rowley one of its “Persons of the Year” in 2002 for the scathing memo she wrote FBI Director Robert Mueller because the national security law unit of the FBI Office of General Counsel had refused to even *request* a FISA warrant so she could search the contents of Zacharias Moussaoui’s laptop computer.

8. Robert Turner, Statement Before the Senate Committee on the Judiciary (March 31, 2006), *available at* http://judiciary.senate.gov/testimony.cfm?id=1841&wit_id=5217.

9. 389 U.S. 347 (1967).

10. 407 U.S. 297 (1972).

11. Turner, *supra* note 8.

She, like *Time* and several Senators who subsequently attacked the FBI for its behavior, was clueless about the requirements of FISA, and did not understand that Congress had failed to make any provisions for surveillance of “lone wolf” terrorists like Moussaoui—terrorists who may have been a serious threat to our security, but were not an “agent” or employee of any foreign terrorist group. In December 2004, Congress quietly amended FISA to correct this oversight.

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

It seems clear that at least some of the reports of serious physical abuse of some detainees are true, and if so, those incidents constitute war crimes for which the interrogators and their superiors who knew, or should have known, that abuse was taking place will be vulnerable to trial in any of more than 190 countries for the rest of their lives. This is a great tragedy.

One of the many misunderstandings that have resulted from a failure of many Americans to understand national security law, is that it is standard practice during armed conflict to detain enemy combatants for the duration of hostilities without access to legal counsel or a “day in court.” Detainees have a right to be treated humanely (a much higher standard than just not to “torture” them), and if they are accused of war crimes committed prior to being captured or common crimes while being detained (e.g., attacking a guard or fellow detainee), they have a right to certain minimum standards of due process—including a presumption of innocence, right to legal counsel, right to be present and have the proceedings translated into a language they can understand, and so forth. But the Third Geneva Convention provides that any such trials are to be conducted in military courts, not domestic courts. The trials may when necessary be held in secret, and the death penalty is a lawful punishment for some offenses.

We had nearly half-a-million German POWs detained in camps in more than forty states across America during World War II without access to lawyers or a day in court, and we did not complain when our POWs in North Vietnam did not receive lawyers or a day in court. (We did complain when we learned they were being tortured, and the world community has every right to complain about any detainee abuse carried out by Americans.)

My guess is that most of the detainees will eventually be sent back to their countries of origin. A few may be held for intelligence purposes

longer, and a larger number of more fanatical detainees will be detained for the duration simply because if let go they have the clear wish to come to America and blow themselves up to kill as many Americans as possible. But we are already down to about 300 “enemy detainees” at Guantanamo, not counting about 85 who have been approved for transfer home but that has not yet occurred. That’s less than half the number of detainees once held there.¹²

It is expensive to maintain this facility, and I can’t imagine anyone who might want to detain anyone there longer than is necessary. But some of them are truly fanatical and openly pledge that at the first opportunity they will return to kill as many Americans as possible. It is lawful for us to detain them for the duration and to try them before a properly constituted military tribunal for any crimes they may have committed. With the most fanatical, I believe it would be imprudent to simply let them go. (Several of those already released have been recaptured in Afghanistan fighting with al Qaeda.)

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

Both are important cases, but if your name is not Hamdi or Hamdan, I’m not sure it is easy to declare one or the other “most significant.” I think the Court got most of the issues right in both cases. But I think Justices Scalia and Kennedy were correct in their conclusion that *Hamdi* effectively reversed *Eisentrager*, which I felt was a good decision. I think Justice Scalia, in his *Hamdi* dissent, also scored some strong points with his critique of the majority’s assessment of English recognition of habeas corpus outside the kingdom involving foreign nationals. (I think the majority confused cases involving British subjects outside the kingdom with a situation involving foreigners in other countries.) But I can’t easily declare one opinion more significant than the other.

8. *Between the Director of the Central Intelligence Agency and the Director of National Intelligence, who should be responsible for presenting covert action proposals to the National Security Council and to the President?*

This, again, is the President’s call. I first met John Negroponte in October 1984 in Honduras and have long been very impressed with him. I am told that his successor is also an extraordinarily able individual.

12. See Press Release, Office of the Assistant Secretary of Defense, United States Department of Defense, Detainee Transfer Announced (February 21, 2007), available at <http://www.defenselink.mil/Releases/Release.aspx?ReleaseID=10536>.

Having said that, I have never been certain that adding a new layer of bureaucracy was the best “fix” for some real problems we had in the Intelligence Community (IC).

But given the new system, it seems to me that the Director of National Intelligence (DNI) is the key IC contact with the President and thus the DNI is probably the person to take the lead in this role. However, I can see situations in which he or she would want to be accompanied by one or more experts from other parts of the IC in making such a presentation in case detailed substantive questions arise.

9. Should Congress pass a law (along the lines of H.R. 4392, Intelligence Authorization for Fiscal Year 2001) that makes the “unauthorized disclosure of classified information” a crime?

I think yes. One of the reasons that protecting U.S. national security is so important is because of our remarkable system of government. And the First Amendment is a central part of that system. But (while I’m not greatly offended by decisions extending its reach to “commercial speech” and related areas), in my view the core of the First Amendment is the protection of the right of everyone to express any political opinion they wish. Even during wartime, journalists (and the rest of us) should be free to denounce the war and everyone associated with it.

But there are certain things we ought to be able to protect. We ought to be able to make it a crime to say, “This is a stickup, give me all of the money” in a bank, or to falsely shout “fire” in a theater or crowded stadium. Written or spoken words that promote fraud or other criminal activities or pose an immediate threat to the safety of children ought also to be actionable. And I think the government ought to be able to make it a crime to knowingly give aid and comfort to an enemy (and our Constitution clearly recognizes that right), or to publish the sailing dates of troop transport ships, the codes used by our military, the names of intelligence agents, and a variety of other national security information as well.

During World War II, Ernie Pyle and most other American journalists covering the war thought of themselves as “Americans” first and understood that there was a difference between FDR and Hitler. They wanted our side to win. Since Vietnam (actually it was very evident during Vietnam), too many journalists seem to believe that it is unprofessional to take sides in such matters and see their job as to write whatever is necessary to move their story from page twenty-five to page one (which is the path to Pulitzer prizes and promotions).

I first went to Vietnam in 1968 with a press card that allowed me to

travel the country and stay in U.S. military press centers at almost no cost. (A bunk for the night cost well under \$5, as I recall, and a nice T-bone steak dinner at the local officers' club was \$2.25.) One night I got into a bit of an argument with a "real" journalist, and I pointed out that his most recent stories had focused on mistakes or misconduct by Americans with very little criticism of our enemy. He didn't disagree. Instead, he replied—and after thirty-nine years I can't be sure my memory is perfect, but this is close—"Bob, your problem is that you don't understand journalism. I'm not interested in writing stories about dogs biting men. I want to find stories about men biting dogs. Everyone at home knows most of our soldiers are great kids who are serving bravely and trying to do the right thing. And everyone knows the Communists are the bad guys. But if I want my stories to get published where people will read them, I need to find the exceptions." The problem was that, after reading his stories, people at home started questioning what they "knew" about American troops and our enemies, and in the end, in my view, he and many of his colleagues contributed to the loss of the war. Robert Elegant has written a great short article on this problem.¹³

If a journalist stole the formula for *Coca Cola* and published it, the First Amendment would not protect him from civil and criminal liability. One might argue that exposing government secrets is different—the government belongs to us all, and thus no intellectual property rights are at risk. But publishing national security secrets may well run the risk of getting good people killed and undermining important activities of the government we elected. And, not infrequently, the potential harm would not be apparent to someone who did not understand the details of the program.

Imagine for a moment that when Canada agreed during the 1979 Iran hostage crisis to covertly assist us in getting American embassy personnel who had been outside the embassy when it was taken over out of the country, a journalist learned of the operation. Thinking it would be the path to a Pulitzer and a new job with bigger bucks, she published the story in the *New York Times* or *U.S.A. Today*. The next day, radical students in Tehran were in control of the Canadian Embassy—and no foreign intelligence service was willing to even talk to Americans again.

When the *New York Times* published a front-page story about the NSA warrantless wiretap program, and when *U.S.A. Today* followed

13. Robert Elegant, *How to Lose a War: The Press and Viet Nam*, Vol. LVII ENCOUNTER, No. 2, 73 (August 1981), available at <http://www.wellesley.edu/Polisci/wj/Vietnam/Readings/elegant.htm>.

with an exclusive of its own reporting that some phone companies were assisting the government in identifying potential al Qaeda terrorists in our midst by so-called “data mining” (comparing phone records to determine which phone numbers had been in frequent contact with other numbers known or believed by the government to be used by foreign terrorists), they did the country a great disservice. As I explain in the above-referenced testimony to the Senate Judiciary Committee, both programs were fully consistent with existing judicial precedents; and I haven’t found any serious person who believes it is a bad idea for our government to try to identify foreign terrorists in our midst. (Not a single member of the Judiciary Committee argued during the two hearings where I testified that we ought not be monitoring these communications.) In 2002, the FISA Court of Review, set up by Congress to consider appeals from the FISA Court and composed of federal appeals court judges, unanimously declared that Congress could not take away the President’s constitutional power to authorize foreign intelligence intercepts by mere statute. Only a constitutional amendment can do that.

Imagine for a moment what would have happened if some of our modern journalists had been around during World War II and had learned that we had broken the German and Japanese codes? Talk about a Pulitzer story! Then our enemies would have quickly changed their codes, and if we weren’t all speaking German or Japanese today we can at least be confident that many of us would not be here because our fathers or grandfathers would not have made it back home alive. For even if we had eventually won the war it would have taken years longer.

Congress passed a law attaching criminal penalties to reporting classified information near the end of the Clinton Administration, but under pressure from CNN and the major media, President Clinton vetoed it. Politicians rely on journalists to stay in business. Make a friend in the media and voters may hear about all of the wonderful things you do. Anger the media, and you may pay a price. Few members of Congress seem to understand that, while it is true that most journalists they deal with are “patriotic” and “Americans,” not everyone who reads their stories falls into that camp. Some of the most important intelligence available about this country can be found in the pages of the *New York Times*, the *Congressional Record*, and *Aviation Week & Space Technology*. Most of it is not even classified, but some of it is. (I remember when a report of the House Permanent Select Committee on Intelligence inadvertently disclosed that we were monitoring communications between Communist guerrillas in a Central American

country, and almost immediately they abandoned their means of communications and switched to high-tech burst transmitters (presumably provided by the East Germans) and one-time code pads that contain no internal logic and thus cannot be broken.)

This, in my view, is a very serious problem, and attaching criminal penalties to the knowing publication of properly classified government secrets is a great idea. I recognize that such laws might have a chilling effect upon press disclosures of governmental wrongdoing. But there are lots of avenues for redress for any government employee who has access to classified information and believes criminal or otherwise wrongful activities are occurring. Between 1981 and 1984 I worked in the White House as Counsel to the President's Intelligence Oversight Board. Any employee of the IC who believed something illegal was taking place had a right to come see me, and the agency heads, generals counsel, and inspectors general had an obligation pursuant to Executive Order 12,334 to bring any such matters to my attention. The small board I served had direct access to the President on very short notice.

Candidly, I didn't see a lot of serious "abuse" during that period. Most of the people I dealt with were dedicated public servants with very strong senses of honor and propriety. Even during the Church and Pike hearings of 1976 (and as a Senate staff member I sat through some of them), the case for abuse was in my view overstated. For example, the Church Committee released a massive report on the issue of CIA "assassinations," and anyone who bothered to actually read it (as I did) discovered that the lengthy investigation did not produce a single name of anyone who had ever been "assassinated" by the CIA. To be sure, they found several plots to kill Fidel Castro (motivated by requests from Presidents Eisenhower and Kennedy), and one other plot to kill an African revolutionary (Patrice Lumumba) who was killed by his domestic rivals before the CIA could put its plan into operation. There were lots of other allegations, but the Committee found them without merit. And before the hearings even began, Directors of Central Intelligence Richard Helms and William Colby (an old friend of mine and frequent guest lecturer in one of my seminars) had issued internal CIA regulations prohibiting any involvement in assassination.

What would happen if President Bush actually directed the NSA to monitor the phone conversations of Senators Ted Kennedy and John Kerry? Certainly at least one of the one hundred employees in the NSA Inspector General's office would report the violations to someone. And if the government then tried to punish a "leaker" for making that story public, what are the odds that a jury would find them guilty? But there is

no evidence that such abuse is going on, and if it did occur the internal executive branch checks are sufficient to deal with the problem.

Harm is done by leaks—often far greater harm than the “leaker” realizes. There is no constitutional right to disclose government secrets, few modern journalists seem to be able to resist the lure of fame and fortune that comes from publishing such material, and the easiest solution is to attach strong criminal penalties to such behavior and then enforce those laws.

10. What is the most important question in national security law today?

How do we educate the American people about these issues? For we can't win our wars and our national security policies are likely to fail in the long run without the support of the people. And when people are told that detaining enemy combatants without giving them a day in court is illegal, and that it is a crime for the President to authorize the NSA to monitor communications between known or suspected foreign terrorists abroad and people within this country, it quite understandably makes them mad. No one wants the President to be a “lawbreaker,” and there is great partisan profit to be gained from denouncing an incumbent from the opposite party as a “liar” and a “crook.” (The Republicans did it to Truman in 1950, the Democrats paid them back during Vietnam, and the game has gone on—with only a brief respite following 9/11—since then.)¹⁴

On the other side of this coin is the problem of the real “lawbreaking” that has been going on. That includes the inhumane treatment of detainees, and a variety of congressional acts pursuant to laws that are clearly unconstitutional. (The problem of congressional lawbreaking is a serious one. In the years since the 1983 Supreme Court *INS v. Chadha* decision declaring legislative vetoes unconstitutional, Congress has enacted hundreds of new unconstitutional legislative vetoes without an apparent second thought.)

So if I had a magic wand and could make all things better, high on my list would be educating the public about the relevant laws, and in the process educating government servants as well. I suspect some of the war criminals who abused al Qaeda detainees had no idea what they were doing was unlawful, and the result saddens me.

I would try to educate everyone involved about the importance of

14. See Robert F. Turner, *Truman, Korea, and the Constitution: Debunking the “Imperial President” Myth*, 19 HARV. J. L. & PUB. POL. 533 (1996).

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upholding the rule of law. It is very much in our interest to do so. And if we decide that we are so powerful that we need no longer be concerned about our laws and legal obligations, we will have little chance of gaining and maintaining the support of people of goodwill around the globe. And without that understanding and support, I have serious doubts about whether we can in the end prevail. Put simply, we can't do it alone.
