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RESPONSES TO THE TEN QUESTIONS

Hon. James M. Rosenbaum[†]

10. WHAT IS THE MOST IMPORTANT ISSUE TO AMERICAN NATIONAL SECURITY?

THE CHALLENGE

The United States is in the midst of its longest war with no clear end in sight. After almost ten years, one would think the war's goals and legal underpinnings would be clearly defined. Unfortunately, one would be wrong.

America's failure to clearly define the war's goals and legal support presents its greatest challenge. Absent a coherent constitutional basis, the country's decisions appear ad hoc, and without direction. Without defined goals, it is impossible to tell if the war is being won, either at home or abroad.

Until the September 11 attacks, the United States—within its own borders—had been blessed. Its land has almost never been sundered. Setting aside limited periods during the War of 1812, and scattered World War II balloon bombs over the West Coast, the Nation has been sheltered by its surrounding seas. America endured the Civil War's internecine bloodshed, but the combatants were brethren, rather than foreign.

On September 11, 2001, this changed. That assault fell hard on America's alabaster cities—until then—virtually untouched by human tears. Those attacks thrust the Nation into an asymmetric war, against an enemy without either a uniformed army or national base.

The Nation responded. The President was given “all necessary

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powers” needed to reply to the attacks.¹ The Presidency—now, under successive administrations—has shown itself to be the vigorous institution suggested in Federalist 70,² both at home and abroad. But America’s responses must still conform to our constitutional framework. Whether or not the responses do conform is not clear.

Domestic security efforts have obviously increased. Since 2001, the citizenry has been subject to wiretaps and intercepted domestic telephone and electronic communications.³ Many of these have been conducted without legal authorization.⁴ Groups, both inside the country and those with contacts beyond our borders, have faced increased surveillance.

Airport security efforts need hardly be catalogued, except to note that each new attempted assault (be it shoe or underwear bombers, or those, perhaps, yet to come) seems to engender another level of traveler scrutiny and intrusion. It is one thing to pass through a metal detector; but highly intrusive, electronic, full-body scans and near-intimate pat downs of a person’s underwear is quite another. Such scrutiny would have been unthinkable only a few years ago.

These intensive body searches arise in a peculiar context: air travel is completely legal. A person’s desire to do so can be considered probable cause of nothing. The argument that air travel is a privilege, and subject to some qualifications, rather than a right does not justify this intrusion.⁵ If there is an incident at a public concert, or a political rally, or at a political convention, will such searches be imposed there, too?

Other security efforts have changed the way Americans live

1. Authorization for Use of Military Force Against Terrorists, Pub.L. No. 107-40, 115 Stat. 224 (enacted Sept. 18, 2001) (codified at 50 U.S.C. § 1541 (2010)).

2. THE FEDERALIST NO. 70 (Alexander Hamilton).

3. See, e.g., James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1, available at <http://www.nytimes.com/2005/12/16/politics/16program.html>.

4. *Id.*; See also, e.g., In re Nat’l Sec. Agency Telecomms. Records Litig., 700 F.Supp.2d 1182, 1197 (N.D. Cal 2010) (“The court now determines, in light of all the aforementioned points and the procedural history of this case, that there is no genuine issue of material fact whether a warrant was obtained for the electronic surveillance of plaintiffs. For purposes of this litigation, there was no such warrant for the electronic surveillance of any of plaintiffs.”).

5. *Graham v. Richardson*, 403 U.S. 365, 374 (1971) (“[T]his Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a ‘right’ or as a ‘privilege.’”).

and work. Electronic sniffers detect and trace written and spoken communications. Currency transactions between this country and nations of concern are similarly recorded and traced. Travelers to certain destinations may be subjected to ongoing surveillance and review. These kinds of transactions between American citizens and their government represent profound changes in the relationship between the Nation's governed and their government.

There is a dissonance when the government engages in unauthorized surveillance. This country's citizens enjoy a unique relationship with their government. Physical searches and the sanctity of personal communications are carefully defined in the Constitution. The citizens are sovereign. The government, not the citizen, is the servant, subject to dismissal at the next election.

The Fourth Amendment forbids unreasonable searches and seizures.⁶ A constitutional search may only be initiated on probable cause, presented to a neutral magistrate. Warrantless electronic surveillance, or monitoring of verbal and electronic communications, does not fall easily or comfortably within this constitutional rubric.

The executive branch restructured the Nation's self-protective agencies after 9/11. It created the Department of Homeland Security, a new cabinet-level office. That agency instantly became America's largest in the cabinet.

But the very idea of a homeland seems misplaced. Americans are not tied to the land. United States citizens profess fealty to a document—the Constitution—rather than a place, the government itself, or a particular leader. Americans have no homeland. The Constitution and law define citizenship.

The Constitution's only land or homeland-based restriction bars those born beyond the Nation's borders from the Presidency.⁷ In a nation of immigrants, all of whom—excepting only Native Americans—came from other parts of the globe, the very concept of a homeland seems strange. It is of no moment whether this country's citizens were naturalized last week, arrived on the Mayflower, or are Native American.

This new kind of war has also changed our relationships with other countries. Some American citizens have turned against their

6. U.S. CONST. amend. IV.

7. U.S. CONST. art. II, § 1, cl. 5.

country.⁸ Operating from bases beyond our borders, some of these individuals urge and counsel their followers to take arms or engage in sabotage against the United States. According to news reports, the President has authorized the use of pilotless drones to eliminate some of these individuals along with their adherents.⁹ This authorization has been given in the absence of either a criminal charge or a conviction.

The problem, however, lies in the fact that there is no national enemy in this war; its belligerents appear to be ideologically motivated. They operate from bases or cells in the absence of national support. Congress has not declared war against any nation in this conflict. The question is not whether this kind of military action is in the United States' best interest, but whether and how the action fits within the Constitution.

At least two questions flow from the use of offshore drones. They are: first, the legal justification for armed attacks on territory of nations with which we are not at war; and second, the problem of civilian deaths incidental to the bombing. The problems, of course, are intertwined.

The United States bombed unarmed civilians during World War II.¹⁰ Those acts took place, however, during a declared war against belligerent nations. The acts were further justified by claims that the bombings demoralized the target nation's armies and war workers were among the victims.

These justifications do not appear to apply in the War on Terror. In this asymmetric war, the belligerents do not use civilian-provided war material. The local citizenry may have no ties to the combatants at all. Under these circumstances, it seems difficult to justify drone offensives.

The foregoing are only a few of the issues confronting the United States as it engages in a new kind of war against a new kind

8. Andrea Elliott, *The Jihadist Next Door*, N.Y. TIMES, Jan. 31, 2010, http://www.nytimes.com/2010/01/31/magazine/31Jihadist-t.html?_r=1.

9. Peter Bergen, *Bin Laden: Forgotten, but Not Gone*, WASH. POST, Jan. 31, 2011, at B1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/28/AR2011012806832.html>; David Kilcullen & Andrew McDonald Exum, *Death From Above, Outrage Down Below*, N.Y. TIMES, May 17, 2009, at WK13, available at <http://www.nytimes.com/2009/05/17/opinion/17exum.html>.

10. Robert D. Sloane, *The Cost of Conflation: Preserving the Dualism of Jus ad Bellum and Jus in Bello in the Contemporary Law of War*, 34 YALE J. INT'L L. 47, 66 (2009); Stephen E. White, *Brave New World: Neurowarfare and the Limits of International Humanitarian Law*, 41 CORNELL INT'L L.J. 177, 192 (2008).

of enemy. Our Constitution carefully and sharply limits and defines the government's powers in peace or at war.

As citizens, Americans profess their duty to preserve, protect, and defend their Constitution and its expressed principles. Many responses to terrorism appear to redefine or even obviate the Constitution's mandates. For me, then, the most difficult issue in the War on Terror is how to rationalize and balance the Constitution's mandates against the shifting pressures imposed by a new kind of war.

This process should not be conducted in silence. We must engage in our own vigorous debate, aiming to reach a satisfactory balance between our professed ideals and the present realities. If we fail to do so, we undermine our fundamental belief that this is a nation built on principles, and fundamentally unlike those that went before.