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TEN QUESTIONS: RESPONSES OF JOHN CARY SIMS[†]

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

The broad principles reflected in the Geneva Conventions remain as important as ever. Especially in a world afflicted by numerous conflicts being waged with great ferocity, sometimes reflecting religious divisions, or characterized by an effort to label opponents as “terrorists” or “war criminals,” it is essential to respect and adhere to the core doctrine unifying the Geneva Conventions and related aspects of the law of armed conflict: No matter which belligerent may be in the “right” with regard to *jus ad bellum*, the manner in which the hostilities are carried out must be evaluated by reference to *jus in bello*.¹

Certainly the nature of many modern conflicts, be they guerilla wars like Vietnam or urban insurgencies like Iraq, makes it exceedingly difficult to distinguish between combatants and others, as the Geneva Conventions require. There are still some hostilities in which large armies are in the field against each other, openly and in uniform, and operating under a classic command structure—the first Gulf War and the 2003 invasion of Iraq provide examples—but many other conflicts raise difficulties in identifying the enemy and in attempting to direct fire in a manner that does not pose unacceptable risks to non-combatants. However, the difficulties that exist in applying the principles of the Geneva Conventions to modern circumstances in no way justify abandoning them. Given the immense destructive power of modern weapons and the constant reminders of the grave toll that modern irregular warfare takes on the innocent, there should be an energetic effort made to adapt the Conventions, as necessary, and seek a renewed universal commitment to their enforcement, which would be far

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1. See, e.g., MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* 21 (2d ed. 1992) (“War is always judged twice, first with reference to the reasons states have for fighting, secondly with reference to the means they adopt.”).

preferable to the efforts being made by some to marginalize or undercut Geneva.

Some modernization of the Conventions to allow them to deal more definitively with modern irregular warfare was attempted in Protocol I and Protocol II,² with less than overwhelming success. Further codification of an updated law of armed conflict is provided by the definitions of war crimes contained in the Rome Statute creating the International Criminal Court, but that effort has been frustrated by controversy over the Court itself, including especially the determined opposition of the United States. However, as soon as the international climate permits, renewed efforts should be made to build on the solid foundation of the Geneva Conventions to deal more clearly and more specifically with the special challenges posed by modern irregular warfare, including at least some aspects of terrorism and the efforts made to suppress it.

Applying the Geneva Conventions to current conflicts raises challenges that go beyond those inherent in the difficulties posed by combatants who may be wearing no uniform, may choose to mix with civilians, and may utilize abhorrent tactics such as suicide bombings. Because terrorism raises such substantial threats to our society and because the campaign against it is just, the temptation arises to regard all methods that may be used against terrorism as just. The United States has succumbed to that temptation again and again after 9/11. Rather than adhering to our nation's longstanding commitment to the Geneva Conventions, the United States sought to render them inapplicable through hyper-technical and often absurd interpretations. Contempt for the strictures of Geneva was coupled with such cynical maneuvers as creating the Guantanamo camp and "black sites," carrying out renditions, and fending off international and domestic criticism through blatant falsehoods ("The United States does not torture.").

It is vital that the United States recognize that its decision to cast off the Geneva Conventions in conducting the campaign against terrorism was a serious and short-sighted mistake. Rather than undermining or discarding the Conventions, the United States and the other High Contracting Parties should recommit themselves to its basic approach, and work to make the Conventions more definitively and clearly

2. 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.

applicable to conflicts with non-state actors.

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

The concurrence by Justice Jackson in *Steel Seizure* states principles that are easy to articulate but exceedingly difficult to apply. Even their application in *Steel Seizure* itself is somewhat troubling, since Congress had never prohibited the Truman Administration's effort to assume control of productive facilities; it merely had failed to adopt proposals that would have granted such power. *Dames & Moore v. Regan* affirms the vitality of Justice Jackson's approach, while suggesting that it is more of a continuum than a set of three firm categories.³ *Dames & Moore* also infuses the concept of congressional approval with substantial elasticity.⁴

The Jackson approach nonetheless remains very useful. Without it, or some similar system of categories, it is hard to see how courts would avoid the impression that they were off on a free-ranging ramble each time they took on a separation of powers problem that was not easily answered primarily by reference to a single piece of Constitutional text. Justice Jackson's formula is not needed to resolve cases like *INS v. Chadha* (dealing with legislative procedures set out in Article I)⁵ or *Buckley v. Valeo* (applying the Article II, Section 2 text relating to appointments),⁶ but it is very useful, and perhaps even necessary, in setting up an analysis of the many separation of powers cases in which several, or even many, different parts of the Constitution are relevant.

Justice Jackson's intuition is sound, and is often useful, primarily because it is true to the backbone of the Constitution. Congress has substantial, though enumerated, powers under Article I, and under modern constitutional doctrines it has substantial leeway in deciding how to implement those powers, so long as no specific constitutional provision is violated. Thus, the fact that Congress has legislated in a given area (whether to authorize or forbid executive action) makes a huge difference for purposes of constitutional analysis, and Justice Jackson gives appropriate weight to this factor.

The President, too, has very substantial powers under the Constitution, but there are not many areas where it has been established

3. 453 U.S. 654, 669 (1981).

4. *Id.* at 680-82.

5. 462 U.S. 919 (1983).

6. 424 U.S. 1 (1976).

that the President is constitutionally entitled to act alone, even if Congress opposes by means of legislation. *United States v. Curtiss-Wright* is powerful in endorsing the power of the President to act as the “sole organ” of communication with other nations,⁷ but the vigorous efforts sometimes made to extend the rhetoric of that case to control the use of force generally quickly bump up against the congressional power to declare war and the power of the purse. Under Article II, Section 3, the President receives Ambassadors, and no doubt the President has broad power to carry out the foreign relations of the United States, including communicating and negotiating with other nations, but that by no means establishes that the President may unilaterally use military force in a wide range of circumstances not amounting to immediate self-defense. The current Administration often invokes the doctrine of “inherent constitutional authority,” but there is no established body of constitutional law defining an expansive sphere within which Article II entitles the President to act contrary to legislation. After all, *Curtiss-Wright* was a situation in which Congress had *authorized* the presidential action in issue, rather than forbidding it, as would be required to place a situation within Justice Jackson’s Category 3.

The influence exerted by the Jackson formula is in large measure due to the fact that it is firmly grounded in the Article II command that the President “shall take Care that the Laws be faithfully executed.” Circumstances may arise in Category 3 where the President is empowered by the Constitution itself to act contrary to legislation, but Justice Jackson’s approach hardly invites efforts by the executive to bring itself within that narrow realm. A much more congenial approach for the President is to allege congressional approval of the action in question, which effectively disposes of the separation of powers dispute and leaves it to a challenger to demonstrate that some other portion of the Constitution is being violated. *Hamdi v. Rumsfeld* demonstrates this scenario, where the Authorization for Use of Military Force was taken by the Court to authorize the detention of citizens captured in Afghanistan, subject to Due Process concerns.⁸

It has become fairly common for parties to argue that situations fall within Category 1 or Category 3 of Justice Jackson’s system. Thus, on the sound assumption that the Administration’s program of warrantless communication intercepts amounts to “electronic surveillance” within the meaning of the Foreign Intelligence Surveillance Act (FISA), the

7. 299 U.S. 304, 319 (1936).

8. 524 U.S. 507 (2004).

constitutional debate boils down to whether the program was authorized by the AUMF (hence, Category 1, and permissible unless violative of the Fourth Amendment) or prohibited by FISA (in Category 3, and illegal unless FISA violates the President's Article II powers).⁹

In many situations, Justice Jackson's approach is helpful in framing the issues. However, if one wanders into Category 2, there appear to be almost no guideposts, and the Supreme Court itself seems to have made every effort to avoid describing how such a case should be approached. The one case that does seem to involve silence on the part of Congress is *American Insurance Association v. Garamendi*,¹⁰ but even that case is not really helpful since it establishes only the power of the President to make executive agreements that may preempt state law. The more difficult question of how to resolve a case falling into Justice Jackson's Category 2, where Congress has been silent and the President "can only rely upon his own independent powers," but where Congress has or may have authority as well, has not yet been addressed directly by the Supreme Court. In that area, Justice Jackson's formula has not yet been developed enough to be very useful, and perhaps that helps explain why the courts and parties strive mightily to place situations in either Category 1 or Category 3.

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

Yes. Confirmation that the state secrets doctrine has been expanded beyond all reason is provided by the decision in *El-Masri v. United States*.¹¹ Khaled El-Masri, a Lebanese-born German citizen, apparently was detained in Macedonia due to a mistake as to his identity, and he was later flown by the CIA to Kabul, where he was subjected to months of mistreatment.¹² Even though El-Masri's case raises serious questions about, and seeks compensation for, grievous violations of federal statutes and international human rights standards, the district court dismissed it, and now the Fourth Circuit has affirmed the dismissal. The court stated: "Even if we were to conclude . . . that protecting national security is less important than litigating the merits of El-Masri's claim, we are not at

9. See generally John Cary Sims, *What NSA Is Doing . . . and Why It's Illegal*, 33 HASTINGS CONST. L.Q. 105 (2006).

10. 539 U.S. 396 (2003).

11. 479 F.3d 296 (4th Cir. 2007).

12. STEPHEN GREY, *GHOST PLANE: THE TRUE STORY OF THE CIA TORTURE PROGRAM* 79–102 (2006).

liberty to abrogate the state secrets doctrine on that basis.”¹³

The *Reynolds* case itself provides a shaky foundation for the state secrets doctrine, particularly since the accident report withheld from the plaintiffs was later declassified, revealing that the original litigation did not really involve military secrets, but rather concealment of government negligence that caused the B-29 explosion at issue.¹⁴ But at least in that case it seemed plausible that classic military secrets might have been involved. In recent years, the government’s reliance on claims of state secrets has become ubiquitous as a way of shutting down almost any challenge to intelligence policies having anything to do with the “war on terror,” and has led to dismissals in extraordinary rendition cases like El-Masri’s. The defense has also been raised in lawsuits challenging warrantless electronic surveillance.

The state secrets doctrine is quickly becoming an additional and almost-impermeable immunity doctrine, supplementing the many other immunity principles and procedural barriers facing those who seek recovery from the United States. The United States ratification of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and subsequent adoption of implementing criminal legislation, should alone be enough to establish that illegal acts such as those challenged by El-Masri cannot properly be regarded as military secrets shielded by *Reynolds*. Perhaps the time has come for the Supreme Court to revisit the state secrets doctrine and cut back the enormous and poisonous beanstalk that has grown from the *Reynolds* seed. If the Supreme Court will not step in, or if it accepts the virulent expansion of *Reynolds* that the government has succeeded in achieving in recent years, then Congress should enact legislation greatly narrowing the doctrine and providing fairer procedures for its invocation. When *Reynolds* was decided, the ability of courts to deal with classified material had not been established. However, under such modern statutes as the Freedom of Information Act and the Classified Information Procedures Act, the courts frequently consider and make rulings on such secrets, and similar approaches should be used in the area where *Reynolds* is now looked to for guidance.

Reynolds was designed to keep the courts from intruding into military matters in those very rare situations where it would not be appropriate to apply the courts’ methods of legal analysis. The case was rarely invoked in the decades that followed. In recent years, however,

13. *El-Masri*, 479 F.3d at 313 n.6.

14. See LOUIS FISHER, IN THE NAME OF NATIONAL SECURITY: UNCHECKED PRESIDENTIAL POWER AND THE *REYNOLDS* CASE 165–211 (2006).

and especially following 9/11, invocation of state secrets has become the government's automatic response in a broad range of cases touching upon national security, and the tactic is often successful. This development has done serious damage to the rule of law and to principles of accountability, and should be halted or reversed.

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

It would be a grave error to allow the Central Intelligence Agency, the military, or a new domestic security agency to gather domestic intelligence. Our traditions have kept that responsibility in civilian hands, separate from espionage activities, and directly accountable to the courts and the electorate through public trials of alleged offenders. Even so, serious abuses have occurred from time to time, violating due process and chilling the exercise of First Amendment rights. Since 9/11, the investigative powers of the FBI have been supplemented, and coordination between the FBI and other agencies, such as the CIA, has been facilitated. There is no need to share or transfer the power to collect domestic intelligence to any agency outside the FBI, and doing so would create unacceptable risks to civil liberties.

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

There would seem to be little doubt that Congress could regulate such electronic surveillance, at least if it is directed at United States persons. In fact, while FISA excluded United States persons outside the United States from its reach, Attorney General Griffin Bell told Congress during its deliberations that dealing with that issue was the next legislative priority.¹⁵ The Administration has supported proposals that would remove the current FISA requirement that all electronic surveillance within the United States be authorized by the FISA Court. It has argued that in light of the dramatic changes in the nature of the global telecommunications network since FISA was enacted in 1978, it no longer makes any sense to have the statute distinguish between interceptions "within" or "outside" the United States, since communications are often routed from origin to destination in indirect

15. See Sims, *supra* note 9, at 120 n.55.

and unpredictable ways. However, any argument that would make geography irrelevant to the legality of domestic electronic surveillance would suggest that the similar geographical distinction, between U.S. persons within the United States and those outside it, is also inappropriate.

Congress has the *power* to regulate interceptions outside United States territory. As a practical matter it may be difficult or impossible to distinguish domestic from foreign communications with any confidence, and in any event the commerce power reaches both interstate and foreign commerce.

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

Very few, if any, of the almost 400 detainees still held at Guantanamo (other than the “high value” detainees) retain any intelligence value, and many likely never had any intelligence value. Every effort should be made to release or transfer these detainees as soon as possible. It is hard to imagine that when it launched its unsuccessful effort to create a law-free zone at Guantanamo, the Administration contemplated that low-level detainees would still be held there more than five years later. Yaser Esam Hamdi was released by the United States after the Supreme Court decided that he would be entitled to a hearing on his status, and there is no justification for delaying any further the release or transfer of the others like him who remain at Guantanamo. It has proven difficult in some instances to find nations that will accept the detainees being considered for release, but the United States should make the commitment of whatever diplomatic or other resources are needed to find places for them to go and thus speed up the dismantling of Guantanamo.¹⁶ Any accusations that will be brought against detainees, including the contemplated trials of a small portion of them before military commissions, can be resolved in the United States. As the recent controversy over access to the Guantanamo detainees by defense counsel demonstrates, the legal status of detainees can be litigated more conveniently within the United States, and the closure of Guantanamo will clear the way for the United States to begin undoing the damage that establishment of the Guantanamo facilities did to our

16. Cf. Thom Shanker & David E. Sanger, *New to Pentagon, Gates Argued for Closing Guantanamo*, N.Y. TIMES, Mar. 23, 2007, at A1 (Secretary of Defense Robert M. Gates argued unsuccessfully that Guantanamo should be closed down and the remaining detainees transferred to the United States).

nation's reputation and influence in the international community.

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

They are both important, and it may not be possible or necessary to establish a hierarchy. Since *Hamdi* came before *Hamdan*, it played an important role in reasserting the role of the courts in maintaining the rule of law, despite energetic efforts by the Administration to resist all judicial oversight. *Hamdi* also provided important guidance on the effect to be given the Authorization for Use of Military Force, and it established that due process applies even when the government asserts national security interests. *Hamdan* was decided two years after *Hamdi*, so the Supreme Court's willingness to scrutinize the legality of the policies being followed in the government's "war on terror" had already been established by *Hamdi* and *Rasul*. However, *Hamdan* refused to end judicial involvement despite passage of the Detainee Treatment Act, which could have been read to cut off the detainees' access to the courts. The Court in *Hamdan* also took the significant step of invalidating the procedures promulgated to govern military commission trials, but the significance of this holding is potentially limited because it was grounded in statutory interpretation of the Uniform Code of Military Justice. Congress then enacted an entirely new statute regulating military commissions. All in all, these two cases are roughly comparable in significance, with each contributing to the delivery of the broader message from the Supreme Court that "a state of war is not a blank check for the President."¹⁷

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?*

Responsibility for operational planning of covert action should reside with the Director of the Central Intelligence Agency (D/CIA). However, history shows that many of the most troubling issues with regard to covert action are not about how it is to be carried out, but rather *whether* the plan (even if likely to be successful in the short run) is in the long-term interests of the United States. Therefore, the broader perspective to be expected from the Director of National Intelligence

17. *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004), referred to the rights of citizens. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), dealt with the rights of non-citizens.

(DNI) suggests that it is the DNI who should present the proposals to the National Security Council and to the President, satisfy any concerns that may be raised, and accept responsibility for the outcome. I believe there is some risk that a D/CIA is more likely to focus on the operational aspects of a possible covert action, perhaps causing the D/CIA to underrate the possibility that the action should not be attempted and is not in the interests of the United States, even on the assumption that it can be carried out successfully.

I believe that historically there has been an over-enthusiasm for the prospect of covert action by the CIA, although it is not easy to generalize about who is most likely to support a particular operation and who is likely to raise questions or oppose it. For example, it has recently been alleged by the former CIA Chief of Station in the Congo that President Eisenhower authorized the assassination of Patrice Lumumba, and that the murder was not carried out because the Chief of Station chose not to implement the instructions of his CIA superiors.¹⁸ In any current discussion of a possible covert action, I believe that the DNI is more likely to see the potentially broader risks of the operation than the D/CIA, who is more likely to ask if it could be done, and, if so, how. At the highest levels, deliberations should concentrate on whether a particular covert action should be attempted in the first place, not on how it might be done.

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?

No. There is broad agreement that there is rampant overclassification of national security information. As a result, any statute that attempted broadly to make disclosure of classified information a crime would work great mischief. The flood of leaks that is taking place today would probably continue, but prosecutors would have at their disposal a weapon that could be used to punish speech or dissent in the most capricious ways. A very large number of government employees would be at risk of prosecution, and there would be largely unbridled discretion to single out those who would actually be prosecuted. The history of prosecutions under the Espionage Act is hardly reassuring. In prosecuting Daniel Ellsberg and Anthony Russo over the Pentagon Papers, Samuel Morison for innocuous disclosures to a magazine, and now the AIPAC defendants, who did not even receive

18. LARRY DEVLIN, CHIEF OF STATION, CONGO 94–97, 130–31, 260–61 (2007).

any written information, the government certainly has not attempted to punish the leaks most likely to inflict serious damage on national security. Rather, prosecution is a selective and powerful weapon that has a great potential to chill the open discussion of public issues, offers little likelihood of helping to keep secret information that truly could endanger the nation, and is almost certain to be used unevenly and perhaps improperly.

The culture of secrecy that leads to extravagant overclassification is so well entrenched that it is not likely to be changed easily or quickly, even if change were desired by those in a position to alter current practices. As it is, the false currency of “classified documents” that contain no secrets creates and perpetuates the endless stream of leaks in which otherwise responsible government officials routinely disclose information that is nominally classified but is assumed to pose no actual risk to the country.¹⁹ In 2000, Attorney General Janet Reno opposed the proposal to criminalize all leaks of classified information, indicating that the preferable approach was to utilize more effective personnel security practices.²⁰ Two years later, after 9/11, the Bush Administration took the same position.²¹

There is very little connection between designation of a document as “classified,” even at the highest levels, and any real risk that the information contained in it would damage the national security if released. Certainly some classified documents do pose such a risk, but overclassification renders the labeling of a particular document a very poor indicator of whether damage is likely to occur upon unauthorized disclosure. In large measure because of these realities, hundreds or even thousands of leaks of classified information occur every month, and are an essential, if informal, mechanism by which the public is informed

19. See, e.g., Max Frankel, *The Washington Back Channel*, N.Y. TIMES, Mar. 25, 2007, § 6 (Magazine), at 40 (describing in detail the techniques by which “classified” information is used and manipulated, and observing that the trial of I. Lewis Libby revealed “the shameless ease with which top-secret information is bartered in Washington for political advantage”).

20. See Attorney General Janet Reno, Statement Before the Senate Select Committee on Intelligence Regarding Unauthorized Disclosure of Classified Information (June 14, 2000), available at <http://www.fas.org/sgp/othergov/renoleaks.html> (“We have never been forced to decline a prosecution solely because the criminal statutes were not broad enough.”).

21. See Letter from Attorney General John Ashcroft to J. Dennis Hastert, Speaker of the House of Representatives (Oct. 15, 2002), available at <http://www.fas.org/sgp/othergov/dojleaks.html> (“I am not recommending that the executive branch focus its attention on pursuing new legislation at this time”). See generally STEPHEN DYCUS ET AL., NATIONAL SECURITY LAW 1077–79 (4th ed. 2007).

about the activities of the government. A statute of the type suggested would arm prosecutors with a very dangerous weapon that would almost inevitably be used selectively and unfairly, and almost always to dampen criticism of official policies. Such a statute would run directly contrary to the interests protected by the First Amendment, and in actual practice the enforcement of such a statute would almost certainly raise grave constitutional questions.

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

Given the many recent cases accepting a wildly expansive application of the state secrets doctrine, the most important question is the one suggested by question number 3 above: Can use of the *Reynolds* precedent somehow be limited in order to prevent the state secrets doctrine from constituting an almost impermeable barrier to accountability by the intelligence community for illegal or improper actions? If not, should *Reynolds* be overruled? (That second question is a rhetorical one.)