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TEN QUESTIONS: RESPONSES OF LISA GRAVES[†]

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

No. Despite the extreme, reactionary calls of some within the Bush Administration, “modern warfare” has not rendered the Geneva Conventions “quaint.” Nor has the threat of terrorism done so, a threat our great nation and our allies have faced throughout history, just as the threat of nuclear annihilation during the many decades of the Cold War with the Soviet Union did not render irrelevant our commitment to honoring human rights. As the Supreme Court affirmed in *Hamdan v. Rumsfeld*,¹ the Geneva Conventions remain part of the domestic law of the United States and are applicable to the conflict with al Qaeda, despite vigorous arguments by the Administration to the contrary.

The Court held that Common Article 3 of the Geneva Conventions—which were ratified by the United States Senate—requires signatories to treat people who are captured in any armed conflict “humanely,” bars “cruel treatment and torture” as well as “humiliating and degrading treatment,” and provides that sentences imposed on detainees must be pursuant to a “regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples,” even if those captured are not wearing the uniform of a state signatory to the Conventions.² These are the minimum standards for prisoners long honored by our nation, which had been the standard bearer on human rights prior to the secret, unilateral, and dramatic departures from the rule of law directed by President Bush and Vice President Cheney with the advice of then White House Counsel Alberto Gonzales.

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1. 126 S. Ct. 2749 (2006).
2. *Id.* at 2796.

Some commentators have tried to sidetrack this issue, in part, by noting that Gonzales technically did not call the Geneva Conventions as a whole “quaint” when he used that term to refer to provisions affording prisoners of war (POWs) things like “commissary privileges,” meaning the ability to purchase items such as cigarettes or clothing during detention. That term has been correctly seized upon, however, as a catchword for the flip disdain demonstrated by the Administration toward U.S. legal obligations such as the Conventions. The more telling but less evocative phrase used by Gonzales was actually his argument that the “war on terrorism’s” “new paradigm renders obsolete” Geneva’s limitations on questioning the enemy, which he incorrectly told the President allowed the U.S. to ask only the name and rank or role of detainees (on the contrary, Geneva’s protections or limitations are about treatment, not the content of questions). As then-Secretary of State Colin Powell correctly predicted, the approach taken by President Bush on Gonzales’ advice reversed over a century of U.S. policy, has had a “high cost in terms of negative international reaction” and cooperation, eroded public support, and undermined U.S. military culture.³

It is unfortunate that Powell’s advice and the views of uniformed lawyers, such as the numerous Judge Advocates General, were so readily disregarded by the White House, which betrayed our nation’s fundamental values through the President’s secret orders directing CIA agents or its contractors to use interrogation techniques that were not only cruel or degrading but also in some cases constituted torture, and to render prisoners to other countries for torture based on wink-and-nod assurances that the prisoner would not be mistreated. To this day, the Administration denies it authorized “torture,” despite evidence to the contrary from Bagram, Abu Ghraib, and other prisons. The truth of our real policy is only amplified by the infamous Justice Department memos by John Yoo and (now judge) Jay Bybee asserting Geneva does not apply and construing “torture” to allow numerous ineffective and appalling techniques that readers would rightly consider torture if imposed on them, such as waterboarding to near drowning, which passes Yoo-Bybee because the pain caused is not equivalent to organ failure. Although that part of the memo was withdrawn due to public outcry upon its discovery years after it was implemented, the Administration has refused to disavow the severely flawed underlying legal reasoning arguing for virtually unchecked power for the President.

3. See John Barry et al., *The Roots of Torture*, NEWSWEEK, May 24, 2004, at 26, available at <http://www.msnbc.msn.com/id/4989436/>.

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

It is helpful and controlling as a legal matter. As a policy matter, it is unfortunately not sufficient when faced with an intransigent president. As conservative scholar Bruce Fein, a deputy attorney general in the Reagan Administration, has said, our constitutional democracy relies on the leaders of each branch “to exercise some self-restraint.”⁴ The rule of law is more fragile than its words imply. We have seen with this President that an executive determined to act unilaterally and secretly can substantially subvert the rule of law in the name of national security, and that the other branches are not well-suited to checking an executive branch bent on secretly ignoring and thwarting their prerogatives as coequal branches of our government.

The courts are constrained by the cases brought to them, although, thus far, the Supreme Court has stepped up to check some of the extreme arguments President Bush has claimed under his “commander-in-chief” power, which Vice President Cheney has described as “plenary”—a \$3 word for “absolute” or unqualified. We all know well the old axiom by Lord Acton that “power corrupts and *absolute* power corrupts absolutely.” As Fein has noted, President Bush’s policies—such as his secret reinterpretations or repeals of laws duly passed by Congress through his aggressive signing statements—are an attempt by the President “to have the final word on his own constitutional powers, which eliminates the checks and balances that keep the country a democracy . . . moving us toward an unlimited executive power.”⁵

What Justice Jackson did in *Youngstown Sheet & Tube Co. v. Sawyer* was to establish a way to sort through conflicts between the political branches regarding presidential powers during times of war or international conflict, such as the non-declared war in Korea at the time President Truman seized the nation’s steel mills to prevent a labor strike from limiting steel production. The essence of the repeatedly reaffirmed test former Attorney General Jackson outlined was that the President acts at the “zenith” of his power when Congress passes laws supporting his specific actions and the courts will not likely find such acts unconstitutional unless the federal government lacks the power agreed upon by the political branches. When the President acts in contradiction to the express or implied will of Congress (as President Bush did when

4. Charlie Savage, *Bush Challenges Hundreds of Laws*, BOSTON GLOBE, April 30, 2006, at A1.

5. *Id.*

he ordered warrantless wiretapping of Americans in violation of the express language of the Foreign Intelligence Surveillance Act (FISA)), his claim of power is at its lowest ebb. These are sound guidelines for navigating the separation of powers.

When the same party—or “interest group” in the words of the Framers—has captured both political branches, however, the structural separation of powers can be insufficient to protect liberty, as we have seen in the first six years of this Administration. It remains to be seen whether the recent change in power in Congress will result in increased checks on the excesses of this Administration in the modern world of attack-dog politics where no one wants to be called “soft on terror,” but one of the greatest powers the Constitution gives Congress is the power of the purse, if only there is the will to use it.

I urge all students of the law to revisit Justice Jackson’s wise and brilliant analysis in *Youngstown*. He dealt handily with Truman’s claim of “comprehensive and undefined presidential powers” and rightly called “loose and irresponsible” the very terms President Bush and Vice President Cheney have bandied about in defense of their extreme policies. Former Nuremberg war crimes prosecutor Jackson eloquently and correctly took issue with the very concept of “implied,” “inherent,” and “plenary” presidential powers as antithetical to those who cherish the blessings of liberty and promise of democracy guaranteed by our written Constitution of limited powers.

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

Yes. This doctrine is a judicially created evidentiary rule that has been expanded (and invoked numerous times by the Bush Administration) to try to preempt or dismiss challenges to executive branch policies. The seminal case in this area, *Reynolds*, reveals the perils of allowing blanket claims of secrecy to thwart judicial review. In that case, the widows of crewmen whose B-29 bomber crashed in 1948 sought accident reports on the crash. The Supreme Court deferred to the Truman Administration’s claim that revealing the reports would threaten “national security” and allowed the evidence to be withheld. When the accident reports were declassified and released almost 50 years later, they contained no secret or national security information but they did reveal faults in the bomber’s physical condition that would have hurt the Administration’s case.

Perhaps it should come as no surprise that unchecked secrecy could

or would be used to cover-up errors or illegality, which is the very danger of deference to such claims. In recent years, this defensive “privilege” has been increasingly invoked not only to limit access to specific pieces of evidence but also to obtain dismissal of litigation. Recent examples include Administration motions to dismiss cases challenging the illegal wiretapping of Americans in violation of the Fourth Amendment and FISA by President Bush and cases challenging the torture of individuals seized by the Administration, such as Maher Arar, the Canadian whom the U.S. sent to Syria where he was tortured. Arar recently received an abject apology from Canada, which reviewed the secret evidence against him and found it so wanting the Canadian Government paid him damages and removed his name from their watch list.⁶

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

Yes. Recommendations to strip the FBI of domestic intelligence responsibilities and transfer them to the Department of Homeland Security (DHS), while well-intentioned, are infeasible and counterproductive. DHS has thus far proven to have serious and systemic deficiencies in some key areas (such as its catastrophic incompetence during Hurricane Katrina). That is not to say that the FBI’s capacity is optimal—plainly, the Bureau has had severe backlogs in translating lawful national security wiretaps, for example, and has, most recently been found to have abused the National Security Letters expanded by the USA PATRIOT Act. The FBI should not be singled out for its pre-9/11 failures when there is plenty of blame to go around.

For example, it is plain that there was a lack of focus on al Qaeda within the White House in 2001, as described by multiple insider accounts. The FBI’s foreign intelligence work, however, was featured in the infamous Presidential Daily Briefing (PDB) headlined “Bin Laden Determined to Strike in U.S.,” provided to President Bush on August 6, 2001. Indeed, as Ron Suskind pointed out in his book, *The One Percent Doctrine*, CIA analysts were so concerned they intruded on President Bush’s August vacation at the ranch to personally brief him about the intelligence alarms sounding that an attack was imminent. According to Suskind, “All right,” responded Bush to the panicked CIA briefer,

6. Letter from the Office of the Prime Minister of Canada to Maher Arar, (January 26, 2007), available at <http://www.pm.gc.ca/eng/media.asp?category=1&id=1509>.

“You’ve covered your ass now.”⁷ At the same time, it is clear that the CIA did not share all relevant information on the movement of al Qaeda operatives with the FBI. For countless reasons, it is impossible to know for certain if President Bush or any president could have prevented the attack warned of in the PDB. Stripping the FBI of intelligence powers, however, is not the right solution to detecting and thwarting future attacks, consistent with our values.

It is worth mentioning that one of the unstated implications of the question is whether intelligence gathering about U.S. persons should be transferred to the military rather than committed to domestic agencies. The military, with its vast resources and power, poses great risks to democratic processes if its mission is allowed to creep into widespread monitoring of civilians in the U.S. For example, we have already seen how a Pentagon group, the Counterintelligence Field Activity charged with counter-terrorism, compiled information on Americans who live near military bases who oppose the war in Iraq, including religious groups such as the Quakers, who have absolutely no connection to al Qaeda. Such activities can easily be swept in without clear rules, wasting resources that should be focused on genuine terrorist threats and not squandered violating the First Amendment rights of Americans. The military’s surveillance powers are weapons of extraordinarily intrusive power that should remain trained on al Qaeda and not directed at Americans. The military should not be taking on domestic law enforcement functions which are barred to it by the Posse Comitatus Act and long standing U.S. policy. If there were evidence an American were conspiring with al Qaeda in the U.S., it should be investigated by the FBI which has far more institutional experience with conducting investigations of civilians within the norms of their constitutional rights than the military or CIA does.

As Justice Powell observed in the *Keith* case about Nixon’s warrantless wiretapping:

History abundantly documents the tendency of Government—however benevolent and benign its motives—to view with suspicion those who most fervently dispute its policies. Fourth Amendment protections become the more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs. The danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect “domestic security.”

7. RON SUSKIND, *THE ONE PERCENT DOCTRINE: DEEP INSIDE AMERICA’S PURSUIT OF ITS ENEMIES SINCE 9/11* 1–2 (2006).

Given the difficulty of defining the domestic security interest, the danger of abuse in acting to protect that interest becomes apparent.⁸

No matter the instrument or agency investigating, the majority correctly observed that, “Fourth Amendment freedoms cannot properly be guaranteed if domestic security surveillances may be conducted solely within the discretion of the Executive Branch.”⁹

It is notable that “[f]oreign and domestic intelligence operations to protect our security have always been placed in separate agencies and under separate masters.”¹⁰ As my partner at the Center for National Security Studies, Kate Martin, has testified:

As former intelligence and national security officials, including former DCI Robert Gates, John Hamre and Sam Nunn urged, “[e]ven as we merge the domestic and foreign intelligence we collect, we should not merge responsibility for collecting it . . . exclusive responsibility for authorizing and overseeing the act of domestic intelligence collection should remain with the Attorney General. This is the only way to protect the rights of the American people upon whose support a strong intelligence community depends.”¹¹

Furthermore, Martin advised the Commission on the Intelligence Capabilities that:

As William Webster, former director of both the FBI and CIA, testified [in August 2004] concerning proposals to transfer the FBI’s domestic intelligence authorities from the Attorney General to an intelligence official, “the FBI should take its guidance from the Attorney General on its dealings with U.S. persons and the manner in which it collects information in the United States. This has been an important safeguard for the American people, should not be destructive of effective operations, and avoids the risks of receiving vigilante-type instructions, whether from the intelligence community or the

8. 409 U.S. 297, 314 (1972).

9. *Id.* at 316-17.

10. Memorandum from Kate Martin, Center for National Security Studies, to the Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction Regarding Intelligence Activities in the U.S.: Current Proposals’ Risks to Civil Liberties (Feb. 15, 2005), available at <http://www.cnss.org/WMD%20memo%20dom%20intel.doc>.

11. Kate Martin, Center for National Security Studies, Statement Before the Subcommittee on Crime, Terrorism and Homeland Security, Committee on the Judiciary of the House of Representatives (Apr. 28, 2005), available at <http://judiciary.house.gov/media/pdfs/martin042805.pdf>.

White House.”¹²

Webster was correct to stress the importance of the FBI in domestic intelligence as distinct from the role of the CIA. As Martin elaborated:

The historical difference in functions between the CIA and the FBI reflect important differences in missions and methods, which should not be disregarded by the simplistic device of labeling their respective activities in the U.S. and abroad as [national security] ‘intelligence’ [gathering] The CIA acts overseas, in secret, and its mission includes violating the laws of the country in which it is operating when necessary. It is charged with collecting information overseas without regard to individual privacy, rights against self-incrimination, or requirements for admissibility of evidence.¹³

Unlike the CIA, the FBI operates domestically within the United States and has both domestic intelligence and law enforcement responsibilities. As Martin noted, the FBI

must *always* operate within the law of the jurisdiction in which it is operating. It must respect the constitutional limits set by the Fourth Amendment, due process and First Amendment on government dealings with Americans and others located inside U.S. borders While questions have been raised concerning the effectiveness of various FBI efforts, those issues do not undercut the importance of tying domestic intelligence efforts to a law enforcement agency. . . .¹⁴

Accordingly, while the 9/11 Commission recommended some structural changes to the Intelligence Community to improve coordination, it recommended that the FBI should continue to be responsible for domestic intelligence. As the Commission explained, “The FBI’s job in the streets of the United States would thus be a domestic equivalent, operating under the U.S. Constitution and quite different laws and rules, to the job of the CIA’s operations officers abroad.”¹⁵

12. Memorandum from Kate Martin, *supra* note 10.

13. *Id.*

14. *Id.* (emphasis in original).

15. 9/11 COMMISSION REPORT 423 (2004).

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

Yes. The Constitution vests Congress with numerous responsibilities relating to foreign affairs and our nation's defense in conjunction with the President, who is charged with executing the laws duly passed by Congress. Congress is vested with the responsibility to appropriate and oversee funds for the operations of the executive branch, including intelligence activities. Congress created, or ratified the creation of, various intelligence agencies and is charged with deciding whether or not to confirm intelligence nominees to lead those agencies. Congress is also charged with the critical power of deciding whether to declare war and "make rules concerning captures on land and on sea."

Congress passed the National Security Act of 1947 that requires that Congress be fully informed of the intelligence activities of the executive branch, including overseas intelligence activities. Congress has also sought, through FISA and other statutes, to protect the constitutional rights of U.S. persons. Congress has held significant hearings and investigations into such activities, and the executive branch has issued rules to comply with what such agencies acknowledged were the constitutional requirements. For example, presidents have issued Executive Orders, such as EO 12,333, requiring that intelligence must be conducted in a manner "consistent with the Constitution and applicable law and respectful of the principles upon which the United States was founded,"¹⁶ although we worry that this has not provided sufficient protection in practice, especially of late. Such rules restricted the targeting of U.S. persons abroad and required the minimization of the collection of information to or from Americans collected in the process of gathering "foreign intelligence from foreign individuals or entities" outside the U.S.¹⁷

While Congress did not legislate such rules, it is clear that Congress has a responsibility to monitor their implementation as part of its legitimate oversight function, thus regulating foreign intelligence wiretaps outside the U.S. Members of Congress from both parties have recently complained, however, that the current Administration has secretly failed to fully inform them of intelligence activities, causing a

16. Exec. Order No. 12,333, 46 Fed. Reg. 59,941, 59,949 (Dec. 4, 1981).

17. Michael Hayden, National Security Agency Director, Remarks Before the House Permanent Select Committee on Intelligence (April 12, 2000), available at http://www.fas.org/irp/congress/2000_hr/hayden.html.

constitutional crisis as well as a crisis of confidence and trust.

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

This is a particularly complex question considering the various categories of prisoners that have been, or are now, reportedly held there. Al Qaeda leaders who planned the 9/11 attacks who have been captured, such as Khalid Sheikh Mohammed, should be imprisoned and charged with war crimes for planning the unlawful and despicable attacks of 9/11. Others who were kidnapped outside of battlefields in Afghanistan or Iraq should be charged with crimes in civilian courts here or abroad, or released. Those who were captured on the battlefield in Afghanistan or Iraq are entitled to due process to determine whether they are prisoners of war, enemy combatants who took up arms against the U.S., or innocent civilians in the wrong place at the wrong time, as some detainees reportedly were. The U.S. simply cannot uphold the rule of law and still claim a right to imprison anyone the President designates indefinitely or forever without any due process of law.

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

Both are very significant and I would be reluctant to choose one as most significant. Such a determination depends on the issue at stake.

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?*

The more important question is not the bureaucratic relationship between the DCI and DNI as currently constituted, but what are the rules governing covert actions. Congress has defined “covert action” to mean “an activity or activities of the United States Government to influence political, economic, or military conditions abroad, where it is intended that the role of the United States Government will not be apparent or acknowledged publicly.”¹⁸ In 1974, Congress asserted increased control over covert actions based on revelations about President Nixon’s covert actions in Southeast Asia. These provisions were revamped in 1984 due to President Reagan’s secret mining of Nicaraguan harbors and again in

18. 50 U.S.C. § 413b(e) (2006).

1991 in the aftermath of the Iran-Contra scandal.

The current binding law regarding covert actions requires that no appropriated funds be expended by the CIA for covert actions unless the President makes a finding that each such operation is necessary to identifiable foreign policy objectives and gives timely notification of such actions to Congress. Such findings must be in writing, must not be retroactive, and must inform Congress of all agencies involved and whether third parties will be involved. Any covert activity must not violate the Constitution or any statutes of the U.S., and the President may not authorize any action intended to influence U.S. political processes, public opinion, policies, or media. Thus, the important issue is that the President is charged with specifically authorizing any such activities and reporting them, and any significant changes, to congressional leaders in a timely fashion. Covert actions should be decided by policymakers after thorough consideration of consequences, and rogue actions should not be ratified by policymakers after the fact. The stakes are so high that such decisions must be deliberate, clear, and focused, as well as fully disclosed to key congressional leaders of both parties.

One of the most interesting issues in this area that has arisen of late (aside from the question of whether the Administration is fully complying with the National Security Act) is the possible expansion of the Pentagon's covert activities at the direction of Donald Rumsfeld in conjunction with Vice President Cheney, outside of the CIA's purview and reporting. Congress needs to increase its oversight of the executive branch in numerous areas, including Pentagon activities that do not satisfy the exception for "traditional military activities" and that meet the functional definition of covert action, or that attempt to skirt that definition to thwart the law's mandatory disclosure requirements.

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. Even Attorney General John Ashcroft concluded current law is adequate "to prosecute those who engage in unauthorized disclosures," according to his report of October 15, 2002.¹⁹ Current law remains problematic from a First Amendment standpoint, however. Recent proposals by Administration allies unfortunately seem intended to chill

19. Memorandum from the Office of the Attorney General to Representative Dennis Hastert (Oct. 15, 2002), available at <http://www.fas.org/sgp/othergov/dojleaks.html>.

whistleblowers and the press from disclosing illegal activities of the executive branch. Such proposals have received substantial and warranted criticism from the public and Members of Congress—many of whom have learned more about the Administration’s illegal policies from the press than through mandatory disclosure laws.

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

Can our constitutional democracy survive genuine threats commingled with executive branch actions intended to exploit fears about al Qaeda to arrogate unaccountable power to the office of the President? And how will we depoliticize intelligence in the aftermath of the extensive politicization of intelligence by the Bush White House? The Administration’s missteps and malfeasance have alienated our allies, put wind in the sails of our enemies, and undermined the rule of law at home, to the detriment of our security and our liberty. It is unclear how we will repair this damage, but it is very clear that we must.