

2009

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Recommended Citation

Dycus, Stephen (2009) "Responses to Ten Questions," *William Mitchell Law Review*: Vol. 35: Iss. 5, Article 4.
Available at: <http://open.mitchellhamline.edu/wmlr/vol35/iss5/4>

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RESPONSES TO THE TEN QUESTIONS

Stephen Dycus[†]

1. Do Americans need to give up more privacy to be safer?

Frightened people may be willing to sacrifice some valued rights, including privacy, if they think it will make them safer. Today the willingness to sacrifice is the product of a balance between a perceived risk of deadly terrorist attacks and the need to assume some such risk in order to live in an open society. But in our democracy the surrender of privacy rights must be knowing and voluntary. That is, the American people must be aware of the tradeoffs and must agree to the surrender, at least in a general way. We have not always followed this practice since 9/11.

It is, of course, impossible to answer the question posed here without more information about the threats we face and about the sacrifices that Americans have already made unknowingly and thus involuntarily in the name of security. More important, we cannot determine the willingness of Americans to surrender privacy rights without asking them. And ask them we must, if we are to be true to our democratic ideals.

The USA PATRIOT Act (the Act), approved just weeks after 9/11, reflected a conscious decision to give the Government greater latitude in conducting domestic surveillance for counterterrorism.¹ Executive officials should perhaps not be faulted for interpreting their delegated authority under the Act as aggressively as possible—“right up to the line” was a term often used. Still, few Americans and, apparently, few members of Congress suspected that the Act might be viewed as permitting the

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1. *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001*, Pub. L. No. 107-56, 115 Stat. 272 (codified in scattered sections of the U.S.C.).

collection of library patrons' borrowing records,² or as dismantling the long-standing "wall" between intelligence and law enforcement officials.³ These losses of privacy, and perhaps others yet to be revealed, can hardly be called knowing or voluntary.

Other legislation is so broadly drawn that neither Congress nor the public could guess, except in the most general terms, what sort of surveillance is actually authorized or what can be done with the information collected. For example, the FISA Amendments Act of 2008⁴ permits the Attorney General and the Director of National Intelligence to conduct warrantless intercepts of some electronic communications, with only the vaguest standards and no meaningful oversight or accountability.⁵ While such a clumsy, open-ended surrender is in some sense both voluntary and knowing, it is based on an assumption—a hope, really—that the authority it confers will not be abused, that the only individuals targeted will be those reasonably suspected of wrongdoing, and that data collected inadvertently on innocent persons will not be stored and later used against them. Congress, as representative of the American people, has clearly failed in this instance to play a meaningful role in husbanding its constituents' privacy rights.

Even more problematic are claims that legislation, which says nothing about surveillance, nevertheless authorizes invasions of personal privacy. The Bush administration insisted, for example, that the National Security Agency's secret warrantless wiretaps, dubbed the Terrorist Surveillance Program, were tacitly approved by Congress in the 2001 Authorization for Use of Military Force,⁶ as an "incident of waging war."⁷ But news of the existence of the

2. See generally Michael J. Woods, *Counterintelligence and Access to Transactional Records: A Practical History of USA PATRIOT Act Section 215*, 1 J. NAT'L SECURITY L. & POL'Y 37 (2005); see also Press Release, Am. Library Ass'n, Library Connection is "John Doe"—Board Speaks About NSL Order for Library Records (May 30, 2006), <http://www.ala.org/PrinterTemplate.cfm?Template=/ContentManagement/HTMLDisplay.cfm&ContentID=128280>.

3. See *In re Sealed Case*, 310 F.3d 717 (FISA Ct. Rev. 2002).

4. FISA Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436.

5. The FISA Amendments Act of 2008 is described in Professor Banks' responses. See *supra* at 5007–17.

6. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. §1541 (Supp. V 2005)).

7. See Letter from William E. Moschella, Assistant U.S. Attorney Gen., to Pat Roberts, Chairman, Senate Select Comm. on Intelligence, at 3 (Dec. 22, 2005), available at <http://www.fas.org/irp/agency/doj/fisa/doj122205.pdf>.

program in December 2005,⁸ as well as the claims of statutory authority, caught almost everyone, including most members of Congress, completely by surprise.

Some losses of privacy have occurred without legislation and without any government effort at concealment. Examples include enhanced airport security screening, RFID chips in passports, and increased deployment of surveillance cameras in public places.⁹ The failure to enact statutory prohibitions of these measures might be thought to reflect a kind of acquiescence in them.

Yet the right to privacy plays such a critical role in the functioning of our open, democratic society that it should not be yielded so easily. Like other treasured constitutional protections, its surrender ought to be deliberate and unmistakable, not the product of inadvertence or inaction. In an analogous case, the Supreme Court held in 2001 that habeas corpus petitioners cannot be denied access to federal courts without a “clear statement of congressional intent to repeal habeas jurisdiction. . . . Congress must articulate specific and unambiguous statutory directives to effect a repeal”¹⁰ The losses of personal privacy described here do not meet this test.

Should the right of privacy be viewed more restrictively in the light of the crisis currently facing the Nation? The expectation of privacy that normally undergirds the Fourth Amendment might, under the circumstances, simply be unreasonable. “[S]pecial needs,” the Government has maintained, justify abandonment of the warrant requirement in the fight against terrorism.¹¹ But in *Boumediene v. Bush*, the Supreme Court expressed skepticism about such an appeal based on exigency: “The laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law.”¹²

8. The story broke in James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

9. Some of these measures have been challenged and upheld in litigation. See, e.g., *Gilmore v. Gonzales*, 435 F.3d 1125 (9th Cir. 2006), *cert. denied*, 549 U.S. 1110 (2007) (requirement to show ID at airports); *MacWade v. Kelly*, 460 F.3d 260 (2d Cir. 2006) (random subway bag checks).

10. *Immigration & Naturalization Serv. v. St. Cyr*, 533 U.S. 289, 298–99 (2001).

11. See Letter from Moschella, *supra* note 7, at 4.

12. 128 S. Ct. 2229, 2277 (2008). Here the Court echoed its earlier pronouncement in *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 76 (1866) (“No doctrine, involving more pernicious consequences, was ever invented by the wit of man than

Privacy and security can be reconciled. I am not suggesting here that Americans should know and approve every detail of each measure taken to keep us safe from our enemies. The Framers understood that some such details must be entrusted to our elected representatives. At the same time, we are entitled to know about such measures unless disclosure would unreasonably jeopardize our security.

The Bush administration repeatedly refused to inform or seek the approval of the American people or their representatives for invasions of privacy, although in some instances disclosure of such invasions clearly would not have threatened security. While I do not seek to minimize the difficulty of determining what can safely be revealed, the Bush administration's refusal appears to have been based at least in part on a fear that approval of its actions would be withheld. Such arrogance betrays the trust reposed in government to act on our behalf in secret only when we have given our reasonably informed consent. Until that trust is restored, no one can answer the question posed at the beginning of this essay.

4. What is left for the Supreme Court to decide after the Boumediene decision?

To the lasting gratitude of law teachers everywhere, the Supreme Court provided many more questions than answers in its June 12, 2008, decision in *Boumediene v. Bush*.¹³ In the wake of the 2008 presidential election, however, we can now predict that the answers it did provide will not be abandoned quickly.

The *Boumediene* majority ruled that the extraterritorial reach of the constitutional writ of habeas corpus "turn[s] on objective factors and practical concerns, not formalism."¹⁴ In reaching this conclusion, the Court relied heavily on its earlier decisions in the *Insular Cases*,¹⁵ *Johnson v. Eisentrager*,¹⁶ and *Reid v. Covert*.¹⁷ The

that any of [the Constitution's] provisions can be suspended during any of the great exigencies of government.") and the concurring opinion of Justice Jackson in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 649 (1952) ("The appeal . . . that we declare the existence of inherent powers *ex necessitate* to meet an emergency asks us to do what many think would be wise, although it is something the forefathers omitted.").

13. 128 S. Ct. 2229 (2008).

14. *Id.* at 2258.

15. *See* *Dorr v. United States*, 195 U.S. 138 (1904); *Hawaii v. Mankichi*, 190 U.S. 197 (1903); *Dooley v. United States*, 182 U.S. 222 (1902); *Downes v. Bidwell*, 182 U.S. 244 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *DeLima v.*

Court quoted with approval, for example, from Justice Harlan's concurring opinion in *Reid*, which argued that constitutional protections should be extended abroad unless it would be "impracticable and anomalous" to do so.¹⁸

The *Boumediene* Court indicated that the geographical reach of constitutional habeas depends on several factors in indeterminate degrees, including: (1) the citizenship of a detainee; (2) the detainee's status, as well as the adequacy of the process used to determine that status; (3) the nature of the places where the detainee was apprehended and where he is currently held; and (4) the "practical obstacles inherent in resolving the prisoner's entitlement to the writ."¹⁹ In this instance, the petitioners were aliens, but their status as "enemy combatants" was disputed, and they had not yet been accorded sufficient process to give them a fair opportunity to refute that status. They were not apprehended on a battlefield, and they were being held at Guantanamo, where the United States exercised "complete and total control."²⁰ And the Court found no prudential barriers to judicial intervention, most importantly no undue burden on the military.²¹ The *Boumediene* majority also seemed troubled by the risk of error in a process that was "closed and accusatorial" and that might result in confinement of the detainee for a generation or more.²² Upon these facts, the Court ruled that the constitutional writ was available to the petitioners. But in future cases, without more refined criteria, it may be very difficult to predict the outcome.

The Court went on to declare that if Congress seeks to suspend the writ, as it did in section 7 of the Military Commissions Act of 2006,²³ it must provide an "adequate substitute," to give a prisoner a reasonable opportunity to show that he is wrongly held. According to the Court, the procedures in the Detainee Treatment Act for reviewing a prisoner's status are not such a substitute. But the

Bidwell 182 U.S. 1 (1901).

16. 339 U.S. 763 (1950).

17. 354 U.S. 1 (1957).

18. *Boumediene*, 128 S. Ct. at 2255, 2262 (quoting *Reid*, 354 U.S. at 74 (Harlan, J., concurring)).

19. *Id.* at 2259.

20. *Id.* at 2262.

21. *Id.* at 2274–76.

22. *Id.* at 2270.

23. Military Commissions Act of 2006, Pub. L. No. 109-366, § 7, 120 Stat. 2600, 2635 (to be codified at 28 U.S.C. § 2241(e)).

Court was careful to avoid offering “a comprehensive summary of the requisites for an adequate substitute for habeas corpus,”²⁴ leaving for the future a more precise articulation of those requisites.

Reid and *Eisentrager*, which the Court analyzed in detail, involved constitutional protections in addition to the writ, namely, rights under the Fifth and Sixth Amendments. We might therefore guess that the Court is now prepared to extend the protections of these and other provisions of the Bill of Rights to aliens abroad, applying the same practical considerations. Indeed, the *Boumediene* Court seemed to invite such an extension, declaring that “our opinion does not address the content of the law that governs petitioners’ detention.”²⁵

In 2005, U.S. District Court Judge Richard J. Leon ruled that some of the *Boumediene* petitioners, as aliens held abroad, had no rights to be vindicated in a habeas proceeding, and he accordingly dismissed their application for a writ.²⁶ On remand, in November 2008, Judge Leon declared that detainees must be given a fair opportunity to refute their characterization as enemy combatants.²⁷ According to Judge Leon, the *Boumediene* Court also left open the definition of “enemy combatant” that would, if satisfied, justify the holding of a prisoner.²⁸ His determination of process due and his application of the Defense Department’s definition of “enemy combatant” may be the subject of further interpretation by the Supreme Court.

Other tantalizing questions are left hanging. For example, Judge Leon noted that he had “no knowledge as to the circumstances under which the source obtained the information as to each petitioner’s alleged knowledge and intentions,”²⁹ suggesting that he might have excluded evidence obtained by abusive interrogations.

24. *Boumediene*, 128 S. Ct. at 2266.

25. *Id.* at 2277. The Court seemed to signal its readiness to recognize such rights earlier in *Rasul v. Bush*, 542 U.S. 466, 484 n.15 (2004), where it remarked in dictum that allegations of wrongful detention by aliens held at Guantanamo “unquestionably describe ‘custody in violation of the Constitution or laws or treaties of the United States.’”

26. *Khalid v. Bush*, 355 F. Supp. 311 (D.D.C. 2005).

27. *Boumediene v. Bush*, 579 F. Supp. 2d 191, 194 (D.D.C. 2008) (citing *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004)).

28. *Id.*

29. *Id.* at 196.

Three things, at least, are clear in the *Boumediene* majority opinion. The Court called the writ of habeas corpus “an indispensable mechanism for monitoring the separation of powers.”³⁰ It also declared that “[t]he laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law.”³¹ Thus, the Court confirmed that, even in the midst of a great crisis, we are a nation of laws, that assertions of unilateral executive emergency power will be reviewed carefully, and that courts will do the reviewing.

8. *Is global warming a threat to American national security?*

After eight years of denial and delay by the Bush administration, the Nation’s new leadership appears ready to respond to the overwhelming scientific evidence that global warming is changing the world in ways that will be dramatic, highly unpredictable, and extremely dangerous.³² And not a moment too soon. Even if most predictions are off by an order of magnitude, the prospects for America’s future are truly frightening.

The onset of climate change threatens the national security of the United States in a variety of ways.³³ This new kind of asymmetric threat must guide U.S. strategic planning for the

30. *Boumediene*, 128 S. Ct. at 2259.

31. *Id.* at 2277.

32. The growing body of scientific evidence may be found in INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: SYNTHESIS REPORT (Nov. 17, 2007), available at <http://www.ipcc.ch/ipccreports/ar4-syr.htm>, and in the numerous sources cited therein.

33. Some of the ways are spelled out in JOSHUA W. BUSBY, CLIMATE CHANGE AND NATIONAL SECURITY: AN AGENDA FOR ACTION (2007), available at http://www.cfr.org/publication/14862/climate_change_and_national_security.html; KURT M. CAMPBELL ET AL., THE AGE OF CONSEQUENCES: THE FOREIGN POLICY AND NATIONAL SECURITY IMPLICATIONS OF GLOBAL CLIMATE CHANGE (2007), available at http://www.csis.org/media/isis/pubs/071105_ageofconsequences.pdf; CNA CORP., NATIONAL SECURITY AND THE THREAT OF CLIMATE CHANGE (2007), available at <http://securityandclimate.cna.org/report>; NAT’L INTELLIGENCE COUNCIL, GLOBAL TRENDS 2025: A TRANSFORMED WORLD 53-57 (2008), available at http://www.acus.org/files/publication_pdfs/3/Global-Trends-2025.pdf; Jürgen Scheffran, *Climate Change and Security*, BULL. OF THE ATOMIC SCIENTISTS, May-June 2008, at 19; James Stuhltrager, *Global Climate Change and National Security*, 22 NAT. RESOURCES & ENV’T 36 (2008). A classified 2008 CIA study reportedly predicts that climate change may “incubate terrorism” and provoke civil and international conflicts. See Siobhan Gorman, *Global Warming as Security Issue: Intelligence Report Sees Threat*, WALL ST. J., June 26, 2008, at A10.

foreseeable future.³⁴ Likewise, we must reexamine relevant laws and policies concerning the use of force and preparations for war.

In the interest of national security, we must immediately make every reasonable effort to curtail the carbon emissions responsible for global warming. These efforts will require close collaboration among friendly nations and potential foes alike, because climate change does not respect political boundaries. Even heroic efforts now, however, will not slow these changes appreciably for many years.

The most destabilizing economic and political impacts of these changes are likely to be felt outside the United States, although we will not be spared the effects of extreme drought and regional water shortages, which will affect agricultural production, or the impacts of increased storm events and rising sea levels along our coasts. Military forces at home may have to help in responding to pandemic disease or future Hurricane Katrinas.

Such effects will be less easily accommodated in smaller, poorer countries in the developing world. Shortages of food and water, the spread of disease, and flooding of coastal lands will provoke increased competition for resources and mass migrations of people, creating serious threats to regional security. The poverty that accompanies deteriorating economic conditions in some of these countries will foster the growth of terrorism and extremism. Some already fragile governments will become more unstable—or simply fail. And some of these governments have or will soon acquire nuclear weapons.

Faced with the prospect of unprecedented chaos and conflict, the United States and its allies must work through the United Nations and other international coalitions to help the most vulnerable nations adapt to these changes, for example, by furnishing substantial material and technical assistance.³⁵ If such

34. Section 951 of the National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 951, 122 Stat. 3, 290 (2008), directs military planners to “assess the risks of projected climate change to current and future missions of the armed forces,” and to “update defense plans based on these assessments,” including the next quadrennial defense review, national security strategy, and national defense strategy.

35. The United Nations Framework Convention on Climate Change art. 4(4), (8), *opened for signature* May 9, 1992, 1771 U.N.T.S. 164 (1992), *reprinted in* 31 I.L.M. 851 (1992) (not yet ratified by the United States), commits party states to assist developing nations with funding, insurance, and the transfer of technology needed to adapt to the effects of climate change.

assistance fails, we may be asked to send military forces to support humanitarian relief efforts. We must also be prepared to deploy peacekeeping forces, with or without an invitation from such nations, perhaps even unilaterally. And we must be ready to respond militarily to other resulting international threats to peace.

Other sources of potential conflict are emerging. As the global climate warms, new shipping routes have begun to open up in the Arctic. Previously inaccessible resources there have become the subject of international competition. Rising sea levels are, through submersion and erosion, changing coastlines and may affect the rights of coastal states over their maritime zones. Some island states will simply disappear.³⁶

The future security of the United States depends on an immediate, large-scale, concerted effort. Congress should create a new agency, headed by a cabinet-level officer, with the task of coordinating government and private responses to the challenge. We need to reorient the funding, equipping, training, and deployment of U.S. military and intelligence assets. A variety of statutes and regulations must be reviewed carefully as we gird ourselves for the coming crisis. For example, the War Powers Resolution³⁷ might be amended to clarify the President's authority to deploy U.S. armed forces in hostile conditions, for humanitarian relief, or on peacekeeping missions. The Insurrection Act³⁸ might be amended yet again to make it clearer when troops could be deployed domestically in an emergency.

The American people will be called on to make unprecedented financial and lifestyle sacrifices. To gain their full cooperation, they must be educated as quickly as possible about the gravity of the threat, and they must be involved in planning the U.S. response. Finally, if we are to survive as a nation with our core principles intact, including our commitment to the rule of law, the government actions outlined here must be marked by as much

36. The Law of the Sea Convention, United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1834 U.N.T.S. 4, U.N. Doc. A/CONF.62/122 (1982), *reprinted in* 21 I.L.M. 1261 (1982), along with other international and domestic norms, will play an important role in avoiding violent responses to these developments. *See generally* Charles Di Leva & Sachiko Morita, *Maritime Rights of Coastal States and Climate Change: Should States Adapt to Submerged Boundaries?* (World Bank Law & Development Working Paper Series No. 5) (n.d.), and sources cited therein.

37. 50 U.S.C. §§ 1541-1548 (2000).

38. 10 U.S.C. §§ 331-335 (2006).

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transparency and accountability as the circumstances allow.