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RESPONSES TO THE TEN QUESTIONS

Scott Horton[†]

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

I am not persuaded that they do; in fact, I think in ceding their traditional liberties, Americans may lose their security along with their liberties. In his *Chroniques Algériennes*, Albert Camus looked at the moral swamp that French political leaders—both of the right and left—had made of the war in Algeria and said that any effort to battle a foe that betrayed the basic values of the society for which it fought could not succeed. That was the fundamental lesson he took away from the French experience in Algeria, in which torture and extra-legal methods were routinely employed. Of course, Camus was a French North African, or *pied noir*, and he felt sharply divided loyalties throughout the conflict. But we don't have to look back to the world of French North Africa in the late fifties and early sixties (the world I was raised in as a small child, incidentally) for the answer to this question. Instead just look at the writings and speeches of leaders of al Qaeda like Ayman al-Zawahiri. He says that a major objective of the al Qaeda attacks on the United States is to force us to betray the “sham” of America's liberal ideas. Our freedom, he says, is a fraud. What he means by this is fairly clear: terrorist activities will produce the collapse of civil liberties, in his view it will cause the tyrannical face of an unjust society to reveal itself. This is why our terrorist adversaries sense victory when they see reports about Guantanamo, Abu Ghraib, and the abusive detention of tens of thousands in DHS immigration holding pens.

I contrast this with the legacy of World War II, which has its problems (as we see in *Korematsu v. United States*¹), but rested on advocacy of the Four Freedoms. One of the principles we espoused is summed up in a poster from 1943 that I have in my office: “Torture is the way of the enemy!” The United States upheld and

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1. 323 U.S. 214 (1944).

built the ideal of humanitarian law during that conflict, treated prisoners properly, and acted swiftly and convincingly in dealing with Nazi and Axis leaders at the end of the war. At Nuremberg, trials were convened within months of the end of the war, the most serious of the Nazi kingpins were charged, they were allowed a meaningful defense, and compelling and dramatic evidence was presented against them. The Nuremberg tribunals in the end were a PR masterstroke for the Allies and particularly the United States. Some in America were concerned that the trials would be viewed in Germany as more retribution. But not long after their conclusion, Germans viewed them as justice. An advisor to German chancellor Angela Merkel told me in 2006: “We remember Nuremberg. It is painful for us, but important. And you, why have you Americans forgotten?” That shows the disappointment that many of our friends in the world see: America is not living up to its values—the values we embraced. But the upshot of World War II was brilliant. The world was recast, and Germany and Japan emerged as two of our closest allies. That was an astonishing feat. But the tactics employed in the war on terror strike me as unwise in many respects, particularly in that few in the world recognize America’s conduct as just, and the odds that Iraq and Afghanistan will emerge from this experience as tight allies strikes me as remote—though still possible, if we play our cards better in the coming years.

A final point: the smarter, more surgically poised our counterterrorism efforts are, the more likely they will be successful and will avoid negative repercussions. This is consistent with respect for civil liberties, not trashing them.

2. Should the President maintain a distinct national security division at the Justice Department?

It is time for a careful assessment of how the current division has functioned. I’ve looked at its caseload and have read the study by David Cole and Jules Lobel² and the review done by the Center for Law and Security at NYU Law School. The record is mixed, but frankly the balance is dismal, and the selection of cases reflects doubtful judgment. But this is representative of the Department of Justice. Over the last thirty to forty years, the department has been something close to a model agency of the U.S. Government. It has

2. DAVID COLE & JULES LOBEL, *LESS SAFE, LESS FREE: WHY AMERICA IS LOSING THE WAR ON TERROR* (2009).

been associated with high levels of professionalism, and it has been on the forefront of the struggles that brought civil rights to millions of Americans. It used to attract the best students out of the best law schools. Over the last eight years, its reputation has imploded, and now it registers the lowest numbers ever recorded—lower even than the period after Watergate when two attorneys general, Mitchell and Kleindienst, were prosecuted and convicted. And of course it's been packed with students who graduated from law schools without ABA accreditation who couldn't have landed a decent job anywhere, but were loyal to the most radical elements of the Bush administration's legal agenda. The department badly needs new leadership, and desperately needs to be retired from service as a political shuttlecock. If there is a model for the kind of attorney general we need, then clearly it's Edward Levi, the attorney general selected by Gerald Ford. He had a towering reputation, and he was clearly "above politics." In fact, of all the recent administrations, Ford's stands out as superlative in this way. I am convinced that the national security division was politicized, and indeed my conversations with people who worked there strongly reinforce that view. But it's only one of several divisions which suffered—civil rights, the Office of Legal Counsel, the Office of Juvenile Justice and Delinquency Prevention, for instance, and many of the U.S. Attorney's Offices.

3. *What are the lessons from detaining non-U.S. citizens, labeled enemy combatants, at Gitmo?*

If you spend any time traveling outside the United States, you hear about Guantanamo a lot. And the message is consistent—it's held up as the best-known camp in a new GULAG archipelago. The comparison of this facility to the camps that Stalin built and in which millions perished is simply absurd. But it shows the extent of damage done to the image of the United States—wounds which were senselessly, needlessly self-inflicted. So the first lesson we should take from this is exactly the one that President Obama took in the remarks he delivered to CBS News' *Sixty Minutes* a week after his election: we must restore America's moral standing in the world, and that requires closing Guantanamo and repudiating what it has come to stand for in the eyes of the world. There are three elements to "closing Gitmo" in my mind. The first is stopping what President Bush called "the program," a series of torture techniques including waterboarding, hypothermia, long-time standing, stress

positions, the use of psychotropic drugs and sleep deprivation of two days or more. The second is ending the CIA's program of extraordinary renditions, or torture by proxy. The third is shutting down the military commissions in the unlawful way they were constituted by President Bush because, as former chief prosecutor Moe Davis says, "we can and should do better." With those steps taken, we still have another challenge, which is accountability. I have no doubt that crimes were committed at Gitmo and in other detention camps as a result of policy decisions taken with the authority of President Bush. The details of what happened—including the decisions taken, the steps taken to implement those decisions, and the policymakers involved—must be fully exposed. And then America needs to take a breath and decide what to do about this. Can we just walk away and ignore the crimes that were committed, particularly when they are crimes which we have prosecuted when they were done by Japanese, Germans, Yugoslavs, Bosnians, and Rwandans? And if we do walk away, what claim can we have to moral leadership in the future? These are painful questions to which there are no easy answers, but it would be wrong to walk away and ignore them. On the other hand, we should not repeat the rush to judgment that was the hallmark of the Bush years. This can and should take some time.

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

I read the decision in *Boumediene* very narrowly. It turns on the peculiarities of the U.S. leasehold on Guantanamo, at one level at least. If President Obama makes good on his promises, I am not sure there will be anything remaining to be addressed coming out of this decision.

5. *What changes, if any, should Congress make to the Classified Information Procedures Act?*

The Classified Information Procedures Act (CIPA) strikes a very clever balance between the state's interest in secrets and the defendant's rights of confrontation. I'm impressed with it, and believe that as it has been interpreted and applied, it provides a responsible framework for counterterrorism cases prosecuted in federal courts. I am not convinced as to the need for changes, and, in particular, I am extremely skeptical about proposals which would

allow the Government to make use of secret evidence, that is, evidence withheld from the defense, in connection with a criminal prosecution. That step would take us back to the evidentiary practices of the Court of Star Chamber—in particular the cases just before and after the English Civil War. But our Nation was founded by the dissenters who faced persecution in that very court and by those very practices. I consider it unimaginable that we would adopt them today. The Government, it seems to me, has been profligate in its invocation of state secrets, and I see too many cases in which the doctrine is invoked to protect political figures from embarrassment, or even to cover up the criminal conduct of government actors. That must stop. Holding to CIPA is part of the formula. If the Government wants to use classified information, it has to abide by the CIPA procedures. Otherwise it should refrain from use of the secret evidence.

6. *For purposes of the Foreign Intelligence Surveillance Act (FISA), should Congress (re)erect a wall between criminal justice and foreign intelligence at the FBI?*

I react with amusement to all the attacks that Republicans launched against Jamie Gorelick over her memo. The basic propositions she puts forward in that memo are correct, and it was a mistake to undermine them, I think. But the memo gets mischaracterized. We need the wall to keep intelligence data out of the preparation of a criminal case, unless the Government is prepared to disclose it for the prosecution. But that does not mean that the FBI and CIA should not be sharing data with respect to a wide range of other activities. Indeed, I get troubled by the amount of stovepiping and inter-agency rivalry that exists already.

7. *Are any changes needed to ensure that National Intelligence Estimates are more accurate?*

I am convinced that the problems we had with the Iraq WMD question boil down to a simple proposition: the White House, and particularly Vice President Cheney, improperly pressured and manipulated the analysts to get the National Intelligence Estimate it wanted. This is a risk inherent in the system which is difficult to guard against. If anything, Congress should have been a more effective watchdog against these abuses, but as it happened, we had foxes guarding the chicken coop as this went down.

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

This isn't an issue I have studied. But I'd put it differently—the process of global warming certainly has consequences for the national security environment, in that it may produce crises in the future that need to be anticipated and planned against.

9. *Is the FISA Amendments Act of 2008 good policy? Is it constitutional?*

I haven't fully assessed whether a constitutional challenge can be mounted. I was not happy with the FISA Amendments Act of 2008, but I recognize that it was the result of a process of negotiation. The Bush administration got much less of what it wanted than in prior years. The civil libertarians got a couple of wins, including provisions that closed some loopholes that had been abused in the past. But I am seriously bothered by the amnesty provisions, which strike me as muddleheaded. Moreover, they are another sop to lawlessness in this area. I have had a hard time closing my analysis of much of this because I don't fully understand the parameters of the Terrorist Surveillance Program. What I surmise about it tells me that the Bush administration has systematically misdescribed the program, and particularly the extent to which it intrudes into the communications of Americans, and that the administration engaged in felonious conduct, with the complicity of the telecoms and internet service providers, for a substantial period of time. Also, I do not know how the administration interpreted the law before or after the showdown at John Ashcroft's hospital bed, but when I read James Comey's comments—that the program will prove an embarrassment when it is known—I get unsettled. Any responsible scholar would want to know these details before forming a final judgment. At this point, I want more information about this program in the public sector, and I want rigorous, informed oversight from Congress. We have not had either, and we have had people running this program who are not worthy of our trust. For instance, I worked in Baghdad in the spring of 2006, and I learned while there that my communications were being routinely intercepted and shared with people who had no legitimate intelligence interest in knowing them. That suggests criminal deviations from the requirements of law, and I am convinced that they were rampant.

10. What is the most important issue for American national security?

We've had a war-on-terror monomania for six years now and that, in my view, is dangerous. We need to recognize that the threat presented by al Qaeda and its confederates is serious, but it is not existential. Moreover, it amounts only to a handful of pebbles in the overall mosaic of our threat environment. The gravest risk of the last six years has been in the failure to recognize this. We still live in a world in which one power, which is hostilely disposed towards us, holds 14,000 nuclear warheads which it could hurl down upon us, causing the extinction not just of our Nation, but of life as we know it on the planet. And we live in a world in which nuclear proliferation is a fact, unchecked as a result of negligent foreign policy stewardship over the last eight years. In many ways, I consider U.S. policy towards Pakistan over the last decade to be a demonstration of colossal incompetence and stupidity (proliferation is just a piece of that).

I also feel that the North Atlantic Treaty Organization (NATO) is the most important mutual defense pact of human history. It has been a pillar of American power and prestige in the world. And it has been horribly neglected and misunderstood for the last eight years. American leadership of NATO was parodied at the Bucharest summit, in scenes I never would have thought possible. NATO needs to be carefully rebuilt and given meaning, and our security going forward depends greatly upon this.

But my main point would be that we need a more nuanced, balanced understanding of our national security threats that includes historically understood threats and those which may emerge on the horizon. American society and even the foreign policy community have a dangerous tendency to focus only on what is in today's papers. Our security demands that we focus on what will be in the papers tomorrow and the next day.
