

2009

Responses to Ten Questions

Michael J. Kelly

Follow this and additional works at: <http://open.mitchellhamline.edu/wmlr>

 Part of the [Military, War, and Peace Commons](#), and the [National Security Law Commons](#)

Recommended Citation

Kelly, Michael J. (2009) "Responses to Ten Questions," *William Mitchell Law Review*: Vol. 35: Iss. 5, Article 7.
Available at: <http://open.mitchellhamline.edu/wmlr/vol35/iss5/7>

This Article is brought to you for free and open access by the Law Reviews and Journals at Mitchell Hamline Open Access. It has been accepted for inclusion in William Mitchell Law Review by an authorized administrator of Mitchell Hamline Open Access. For more information, please contact sean.felhofer@mitchellhamline.edu.

© Mitchell Hamline School of Law

RESPONSES TO THE TEN QUESTIONS

Michael J. Kelly[†]

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

Possibly. But it should be in the hands of the citizenry as to how far this should go on a case-by-case basis. Several airports have already worked out a program calling for regular flyers to voluntarily provide them more background information in exchange for less hassle going through security. This is a voluntary, fee-based program, so the choice is really with the passenger.¹ A more onerous, non-voluntary intrusion on privacy rights is that of cell-phone service providers post-9/11. At the request of the Government, most of the providers allowed intelligence agencies access to all the cell phone traffic without notifying their customers.

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

That depends upon whether President Obama insists on treating terrorism as a war issue, requiring the heavy involvement of the military, or whether he decides to treat terrorism as a crime, requiring the traditional tools of investigation, case-building, arrest, and prosecution. With the notable exception of Zacarias Moussaoui, foreign terrorists are being held and prosecuted by the Defense Department at Guantanamo. Domestic terrorists remain prosecuted by the Department of Justice (DOJ), as was the case with Timothy McVeigh. President Obama has ordered closing down Guantanamo, and if he wants the DOJ to prosecute foreign terrorists, then more expertise within the DOJ would be necessary.

[†] Professor of Law, Creighton University School of Law. Professor Kelly is Chair of the American Association of Law Schools (AALS) Section on National Security and Contributing Editor on national security issues to JURIST, the on-line legal news and research site.

1. Joe Sharkey, *Express Lanes Moving Slowly*, N.Y. TIMES, Nov. 27, 2007, at C7.

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

The chief lesson from Gitmo is that U.S. detention and treatment of people in what is considered a “legal black hole” is not worth the disastrous negative consequences to America’s image in the world. Because of Gitmo, torture at Abu Ghraib prison, the illegal invasion of Iraq, and other errors in judgment committed by the Bush administration, America is no longer regarded as a leader in human rights and an adherent to the rule of law. As such, the United States is literally unable to wage a winning campaign for hearts and minds in the battlefields on which it is currently deployed.

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

*Boumediene v. Bush*² triggered a flood of habeas corpus petitions from Gitmo to U.S. federal courts, which were ill-equipped to deal with them. The district court for D.C. ordered the release of seventeen Uyghurs (Chinese Muslims) from Gitmo into the United States, but this order was stayed, and later reversed by the D.C. Circuit.³ Justice Kennedy’s opinion in *Boumediene* was vague enough to create judicial confusion at the lower levels; thus, another Supreme Court decision clarifying a firmer process would be welcome if Gitmo remains open. If it is closed, then the Supreme Court may have to deal with new legislation relating to the prosecution of former Gitmo detainees in the naval detention center in South Carolina or at Fort Leavenworth unless the Defense Department decides that proceeding under the Uniform Code of Military Justice, as required by the Geneva Conventions, is proper.

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

The discretion of an administration to expand or contract what information is deemed classified is problematic. The Classified Information Procedures Act (CIPA) allows a president carte blanche in this area. The Bush administration has expanded

2. 128 S. Ct. 2229 (2008).

3. *Kiyemba v. Obama*, No. 08-5424, 2009 WL 383618 (D.C. Cir. Feb. 18, 2009) (publication in F.3d forthcoming).

classified status to such a large volume of material post-9/11 that the definition encompasses vastly more than that originally intended by Congress in 1980 when it passed CIPA. This Act balances defendants' right to know and use classified information about them in their own defense against the interest of the Government in keeping the information secret for national security purposes. Courts do not have the authority to overturn executive determinations of classified status.⁴ Perhaps Congress could amend CIPA to allow federal judges more leeway than merely balancing the competing interests.

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

The abuses of the FBI that have come to light since the wall between criminal prosecution and domestic spying to collect foreign intelligence post-9/11 argue in favor of re-erecting this wall. The two endeavors are different enough to justify this. Building a criminal case for prosecution is vastly different from spying for the purposes of intelligence collection—which does not require one to make sure that evidence is admissible and reliable, that chains of custody have been followed, that due process restrictions are adhered to, and that constitutional guarantees have been followed.

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

After the 2002 National Intelligence Estimate (NIE) on Iraq's weapons of mass destruction was revealed to be faulty and politically influenced, changes in the NIE process were undertaken. Chiefly, these included more rigorous sourcing, more interagency collaboration (NIEs are the joint product of the Nation's sixteen intelligence services), and inclusion of agency disagreement together with the underlying rationale for the disagreement. This would have been helpful in the 2002 NIE on Iraq's WMD, as the State Department's intelligence service, the Bureau of Intelligence and Research, did not agree with the CIA's findings.

The 2007 NIE on Iran's nuclear capability, finding that Iran

4. United States v. Fernandez, 913 F.2d 148, 154 (4th Cir. 1990).

had halted its nuclear weapons program in 2003, was a product of the changed NIE process. It was a 140-page document that was heavily sourced, underwent extensive interagency review, and contains alternate theories. The language used in the 2007 Iran NIE was also more specific than the vague language used in the 2002 Iraq NIE, which led to creative and expansive interpretation by administration officials eager to go to war.

Thus, the changes undertaken appear to have already produced a better product. It remains to be seen whether further changes will be necessary.

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

Yes, global warming is the biggest long-term threat to U.S. national security. This is acknowledged by the Department of Defense, and every major policy group has caught up to scientific associations in acknowledging the devastating potential of global warming. Specific threats to U.S. national security include lethal extreme weather; drought; destabilization of volatile areas of the world; sea level rise and coastal urban inundation; economic dislocation; collapse of agricultural resource bases; mass cross-border population migrations; increased pandemics of tropical diseases; depletion of fresh water reserves; and, finally, partial destruction of civilization.⁵

Early effects of climate change are already being felt around the world with mass casualties (35,000 deaths) in Europe during the 2003 extreme heat wave, more frequent famine in Africa, mudslides and inundations in Asia and Central America, and the melting of the polar ice cap. Short of adequate preparation and response, which proved troublesome in the wake of Hurricane Katrina in 2005, not much can be done to negate these short-term threats.

However, the much more devastating long-term threats stemming from climate change can and must be addressed with aggressive emissions capping and a national shift to non-carbon based energy sources. Only by leading in this area can the United States bring other large carbon-emitting nations like India and China to cooperate and convince Indonesia and Brazil to undertake serious efforts to protect their quickly shrinking

5. See, e.g., CNA CORP., NATIONAL SECURITY AND THE THREAT OF CLIMATE CHANGE (2007), available at <http://securityandclimate.cna.org/report>.

rainforests.

A key symbolic move on this issue that would catapult the United States back into a leadership position on climate change would be for the Obama administration to convert the military base at Guantanamo Bay, Cuba from a naval station into a first-class climate change research facility. I have written about this idea extensively elsewhere.⁶ Essentially, the big advantages (aside from converting a public relations disaster into a triumph) would be from making this change part of a broader foreign relations improvement initiative with Cuba; generating reliable data for the United Nation's Intergovernmental Panel on Climate Change; and supporting a much-needed scientific effort in this area.

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

The FISA Amendments Act of 2008 should be held unconstitutional, but until the district court in New York rules that way in *Amnesty International v. McConnell*,⁷ it remains the law of the land. While the retroactive immunization provisions designed to protect private telecommunications companies that colluded with the Government in warrantless wiretapping are particularly offensive, the real threat is to the privacy interests of Americans who have no idea that they may be under surveillance by a government agency that is largely unaccountable to the judiciary. Unchecked power is the real danger here.

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

The long-term and short-term national security threats faced by the United States are distinct. While the biggest long-term national security threat is climate change, as discussed above, the

6. Michael J. Kelly, *Charting America's Return to Public International Law under the Obama Administration*, 3 J. NAT'L SECURITY L. & POL'Y (forthcoming 2009); Michael J. Kelly, *Guantanamo Is Closing: Now What?*, JURIST (Jan. 22, 2009), available at <http://jurist.law.pitt.edu/forumy/2009/01/guantanamo-is-closing-now-what.php>; Michael J. Kelly, *Converting Gitmo into a Front Line Post in the War Against Global Warming*, JURIST (Nov. 10, 2008), available at <http://jurist.law.pitt.edu/forumy/2008/11/converting-gitmo-into-front-line-post.php>.

7. Compl., *Amnesty Int'l v. McConnell*, No. 08-6259 (S.D.N.Y Oct. 28, 2008), available at http://www.aclu.org/images/nsaspying/asset_upload_file531_37629.pdf.

biggest short-term national security threat faced by the United States is a loss of standing in the world under the Bush administration.

Alienated from its allies, mistrusted by the world, enmeshed in an illegal war, and unable to quell Afghanistan, the United States is ill-equipped to deal with traditional geo-political issues like a resurgent Russia, an unstable Pakistan, and a rising China, let alone new asymmetric threats from non-state actors. Due to bad decisions in Washington, America's soft power is depleted and its hard power is over-extended. Consequently, the United States has lost considerable leverage to effectively confront national security threats.

The Bush administration began frustrating America's allies and the international community in 2001 by pulling out of the Kyoto Protocol on climate change, actively undermining the new International Criminal Court, and withdrawing from the ABM treaty. However, the world rallied around the United States after 9/11 and supported the counter-attack against al Qaeda and the Taliban. But the decision to invade Iraq a year-and-a-half later, based upon exaggerated and fabricated intelligence, without significant international support and in clear violation of state sovereignty principles, effectively threw all of that post-9/11 goodwill into the wind.

Because the Bush administration went to war in Iraq without U.N. or NATO backing, America shouldered the principle burden of invasion, counter-insurgency operations, and prolonged occupation. Thus, the United States was unable to supply sufficient troops to Afghanistan in support of the NATO mission—dooming that mission to inadequate results, making room for a Taliban regrouping, and weakening the Karzai government in the process. As a result, drug lords remain empowered, the Taliban has consolidated gains among the population, and opium production has been allowed to skyrocket to levels not seen since the Soviet exodus.

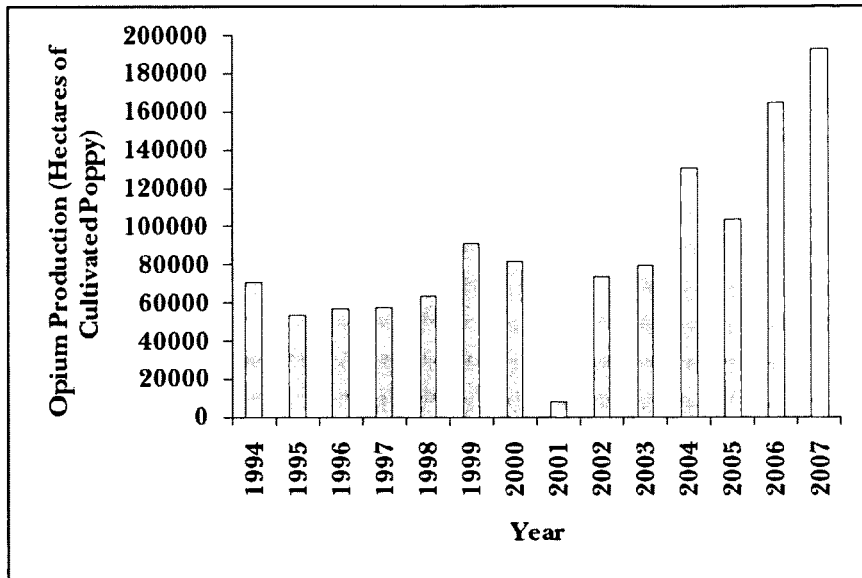


Figure 1: Opium Production in Afghanistan⁸

The American Government's standing in the world continued to sink from 2003 onward, undergirded by unapologetic displays of hypocrisy. For example, Washington propped up the Pakistani dictatorship and sought to nullify expressions of democratic preference in Palestine (which the United States had encouraged) after Hamas garnered an election victory, while simultaneously speaking of freedom and democracy in Iraq and Afghanistan. Torture incidents at Abu Ghraib, abduction and rendition of terrorist suspects to third-party countries and CIA "black sites," together with indefinite unlawful confinement of detainees at Guantanamo only exacerbated the situation.

Such deep disdain for U.S. foreign policy, when combined with a sharp sense of victimhood, economic desperation, and religious motivation, produces more people willing to take up terrorist causes against the United States. Thus, Washington's policies chiefly aimed at tamping down on terrorism ironically have the effect of producing more terrorists, who then become trained

8. United Nations Office on Drugs and Crime & Afghanistan Ministry of Counter Narcotics, *Afghanistan Opium Survey*, 3 (2007), available at http://www.unodc.org/pdf/research/AFG07_ExSum_web.pdf.

to fight against the West in Afghanistan and Iraq.

The fading of American influence combined with a marked antipathy toward U.S. foreign policy affects everything. Not only are more threats and terrorists produced, but the ability to persuade allies, meet new challenges, rally the international community, and speak out against human-rights abuses is nullified by a lack of credibility. The Bush administration has effectively ceded America's leadership role in the world on so many issues that the United States is now reduced to an over reliance on economic and military strength to force its viewpoint onto unwilling ears. That strategy is neither effective nor sustainable. It only produces more mistrust and hatred.

Encouragingly, according to recent polling data most people around the world, even in the Muslim world, separate their intense dislike of the current American Government from their view of America generally. That means the time to begin resuscitating America's image in the world naturally occurred on January 20, 2009, with the inauguration of our new President, Barack Obama. What the new President does to repair this standing and recapture America's leadership role in the world matters a great deal in positioning the United States to meet foreign national security threats.

America has the ability to address both the long-term threat of climate change and the short-term threat of influence and power erosion. But the new government in Washington has to muster the political will to adopt the necessary measures.