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# Responses to Ten Questions

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## RESPONSES TO THE TEN QUESTIONS

Gregory E. Maggs<sup>†</sup>

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

The United States has undoubtedly drawn many lessons from detaining enemy combatants at Guantanamo Bay, Cuba, but I will address only three of them. I have singled out these three because, in my view, they are unfortunate lessons for the United States to have learned and because they have received surprisingly little public attention.

The first lesson learned is that the United States should not take prisoners in the war on terror.<sup>1</sup> Put simply, the United States has discovered through hard experience that the Nation is generally better off if its military and intelligence forces do not detain enemy combatants. Although capturing our enemies and holding them prisoner may incapacitate them and may yield useful intelligence, detaining terrorist suspects ultimately comes at a prohibitively high cost. Since 2001, the Government has become embroiled in enormous litigation over detainee issues, with no end to the lawsuits in sight.<sup>2</sup> It has spent stupendous sums in constructing and maintaining detention facilities.<sup>3</sup> And as anyone

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1. The discussion of this lesson builds upon an earlier essay that I have written, Gregory E. Maggs, *Enemy Combatants After Hamdan v. Rumsfeld*, 75 GEO. WASH. L. REV. 971, 999–1006 (2007). I have included some of the same citations to support my assertions.

2. See Warren Richey, *Can U.S. Judges Order Detainees Released?*, CHRISTIAN SCI. MONITOR, Nov. 25, 2008, at 25 (reporting that the United States is litigating more than 200 habeas corpus cases).

3. See Alan Gomez, *Pentagon Touts Progress at Gitmo Facility*, USA TODAY, Dec. 12, 2008, at A10 (reporting that the detention facilities alone cost more than \$400

who reads the newspapers knows, despite all of this effort, the United States has subjected itself to unending domestic and international criticism for its treatment of detainees at Guantanamo.

In recognition of the burdens and costs associated with detainees, the United States has decided to change the way it fights terrorism. In January 2005, U.S. Army Colonel Gary Cheek, then the U.S. Commander for Eastern Afghanistan, described a new policy that runs contrary to customary thinking about how to win wars: "I've told our commanders, for example, to minimize the number of Afghan nationals or others that they detain."<sup>4</sup> According to the *Washington Post*, "[t]he U.S. military is taking as few prisoners as possible in its campaign against al-Qaeda and the Taliban in Afghanistan, in part to forestall [more] complaints about its conduct."<sup>5</sup> Indeed, the United States has not transferred new prisoners to Guantanamo in more than five years.<sup>6</sup> It is a safe bet that the United States will not move any more terrorist suspects there in the future.

Perhaps the United States should have learned not to take prisoners sooner. Whenever you hear complaints about how the United States has handled Guantanamo, you might ask yourself what America's most loyal NATO allies—those who have been fighting beside the United States in Afghanistan for seven years—are doing with their prisoners. Where is the French equivalent of Guantanamo where French forces hold their captured detainees? And where are the German, Dutch, or Canadian detainee facilities? Do any of the domestic courts of these countries have jurisdiction over the detainees? Have there been allegations of abuse or calls for release of their prisoners?

These are all fine questions, but they have no answers for a simple reason: our NATO allies have been wise enough not to take and hold prisoners in Afghanistan.<sup>7</sup> They have avoided this

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million).

4. *World in Brief: U.S. Military Is Directed to Take Fewer Prisoners in Afghanistan*, WASH. POST, Jan. 4, 2005, at A12.

5. *Id.*

6. See Tim Golden, *U.S. Says it Fears Detainee Abuse in Repatriation*, N.Y. TIMES, Apr. 30, 2006, at 1 (reporting that the last new detainees were transferred into Guantanamo on September 22, 2004).

7. See David Bosco, *A Duty NATO Is Dodging in Afghanistan*, WASH. POST, Nov. 5, 2006, at B7 ("NATO countries have essentially opted out of the detainee business. Before committing their troops to combat areas, the Canadian, Dutch

controversial task and consequently have not endured the concomitant hazards, controversy, expense, and litigation.<sup>8</sup> Only the United States made the blunder of thinking that it should take prisoners in this war. But surely it has learned its lesson now.

Is the new policy of not taking prisoners something to celebrate? Opponents of the United States' counterterrorism policies initially might think so. After all, their mounting of criticism and filing of lawsuits helped to achieve this result. But if critics have welcomed the new approach, perhaps they did not think through all of the consequences.

In my view, the United States' decision not to take prisoners has not been an improvement for anyone. As the United States has been driven to stop taking and holding enemy combatants as prisoners, it has put more emphasis on alternatives. Perhaps the most important of these alternatives is targeted killing. Rather than capturing al Qaeda kingpins, the United States dispatches them with guided missiles and bombs.<sup>9</sup> Or the United States simply plans military operations that use such overwhelming firepower that no enemies will survive.<sup>10</sup>

Think of the consequences: unlike the detainees at Guantanamo, the suspects who are targeted and killed receive no combatant status hearings to determine whether they really are fighters, no determination of their guilt of war crimes, and no habeas corpus rights.<sup>11</sup> They just receive the death penalty. Yet, surprisingly, for whatever reason, the United States generally gets a "pass" in public relations. The killing of a suspected al Qaeda leader may make the news for a few days—usually accompanied by celebratory editorials, even from what are otherwise the most

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and British governments signed agreements with the Afghan Government stating that any captured fighters would be handed over to Afghan authorities rather than to American forces.”).

8. See *id.* (“[T]hey don’t want any part of the prisoner scandals that have dogged American forces.”).

9. For a more detailed discussion of targeted killing, see Maggs, *supra* note 1, at 1001–03. See also Peter M. Cullen, *The Role of Targeted Killing in the Campaign Against Terror*, 48 JOINT FORCE Q. 22 (2008); Daniel Byman, *Targeted Killing, American Style*, L.A. TIMES, Jan. 20, 2006, at B13; Josh Meyer, *CIA Expands Use of Drones in Terror War*, L.A. TIMES, Jan. 29, 2006, at A1.

10. See Maggs, *supra* note 1, at 1002–03 (discussing military press releases that describe these tactics).

11. See Douglass W. Cassel, *Targeted Killings: What We Don’t Know*, CHI. DAILY L. BULL., Feb. 28, 2007, at 6.

questioning newspapers.<sup>12</sup> After a day or so in the news, no one ever hears about the killing again.

Another alternative to taking prisoners is to turn them over to Afghan authorities.<sup>13</sup> Again, this is not necessarily an improvement: Can you think of anyone who would rather be held in an Afghan prison than the safe and now heavily scrutinized facilities at Guantanamo? But still no one complains; for purposes of public relations, leaving detainees in someone else's hands has clearly turned out to be preferable.

Finally, the United States has resorted to the alternative of simply letting many of its prisoners go free. This practice may make for good media coverage, but it is extremely dangerous. In his dissent in *Boumediene v. Bush*, Justice Scalia described some of the consequences of freeing Guantanamo detainees:

At least 30 of those prisoners hitherto released from Guantanamo Bay have returned to the battlefield. . . . Some have been captured or killed. . . . But others have succeeded in carrying on their atrocities against innocent civilians. In one case, a detainee released from Guantanamo Bay masterminded the kidnapping of two Chinese dam workers, one of whom was later shot to death. . . . Another former detainee promptly . . . murdered a United Nations engineer and three Afghan soldiers. . . . Still another murdered an Afghan judge. . . . [Another] released detainee carried out a suicide bombing against Iraqi soldiers in Mosul, Iraq.<sup>14</sup>

Because the United States thoroughly has learned the lesson not to take or hold prisoners, we can expect more releases. Their post-detention conduct is likely also to be harmful. Yet, despite all of the violence and death that results, calls for releasing the Guantanamo prisoners continue to pressure the United States.

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12. Editorial, *A Good Day in Iraq*, WASH. POST, Jun. 9, 2006, at A22 (cheering the United States' targeted killing of Abu Musab al-Zarqawi, the leader of al Qaeda in Iraq).

13. See Matthew Waxman, *Beyond Guantanamo*, WASH. POST, Aug. 20, 2005, at A17 (describing agreement to turn detainees over to Afghan authorities).

14. *Boumediene v. Bush*, 128 S. Ct. 2229, 2294–95 (2008) (Scalia, J., dissenting).

A second lesson that the United States has learned from detaining enemy combatants at Guantanamo is not to rely on Supreme Court precedent. The Department of Defense used to take the Supreme Court's word very seriously. In December 2001, shortly after the President issued his executive order directing that enemy combatants be tried by military commission,<sup>15</sup> I received orders as an Army Reserve judge advocate to report to the Pentagon. Over several months, both on active duty and in a reserve status, I took part in a team effort to devise rules for military commissions. Like everyone else involved, I dutifully read and analyzed what appeared to be the leading precedents on the treatment of enemy war criminals: *Quirin*,<sup>16</sup> *Yamashita*,<sup>17</sup> *Eisenrager*,<sup>18</sup> and so forth.

In retrospect, we were awfully naïve to think that these old decisions would matter much. Although a plurality partly relied on *Quirin* in *Hamdi*,<sup>19</sup> the Supreme Court gave almost no weight to *Quirin*, *Yamashita*, and *Eisenrager* in *Rasul*,<sup>20</sup> *Hamdan*,<sup>21</sup> and *Boumediene*.<sup>22</sup> The Court, to be sure, did not expressly overrule any of these decisions. Instead, in one case after another, the Court cleverly distinguished them,<sup>23</sup> deemed them to have been already overruled by other cases or new treaties,<sup>24</sup> or characterized features

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15. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, 57,834 (Nov. 13, 2001).

16. *Ex parte Quirin*, 317 U.S. 1 (1942) (upholding trial of Nazi saboteurs by military commission).

17. *In re Yamashita*, 327 U.S. 1 (1946) (upholding conviction of Japanese military officer for war crimes despite challenges to the charged crime and procedures).

18. *Johnson v. Eisenrager*, 339 U.S. 763 (1950) (concluding that the federal courts did not have jurisdiction over German war criminals, convicted of war crimes by a military commission in China and then transferred to Germany).

19. *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (plurality opinion) (concluding that the United States has authority to detain enemy combatants captured in the war on terror).

20. *Rasul v. Bush*, 542 U.S. 466 (2004) (holding the federal habeas corpus statute, as then written, reached detainees held at Guantanamo).

21. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (exercising habeas corpus jurisdiction over detainee at Guantanamo and striking down plans to try him by military commission).

22. *Boumediene v. Bush*, 128 S. Ct. 2229 (2008) (holding that the detainees at Guantanamo have a constitutional right to habeas corpus).

23. *See, e.g., id.* at 2257 (distinguishing *Eisenrager* based on differences between Landsberg Prison in post-war occupied Germany and the detention facilities in Guantanamo Bay, Cuba).

24. *See, e.g., Hamdan*, 548 U.S. at 617–18 (concluding that “[t]he force of [the *Yamashita*] precedent . . . has been seriously undermined by post-World War II

of the cases as non-essential to their holdings.<sup>25</sup> But however the Court may have described its recent decisions, the Department of Defense surely no longer views the Court's precedents regarding detainees in the same way. It has learned the lesson that the Supreme Court is not simply interpreting prior decisions. On the contrary, the Court is actively setting and resetting the United States' detainee policy. I would not be surprised if its attorneys now ask themselves questions such as: What would Justice Kennedy (the author of *Boumediene*) think? Or what would Justice Stevens (the author of *Hamdan*) say?

The third important lesson is that the United States stands alone in the world when it comes to the application of the law of war and humanitarian law issues, especially with respect to detainees. Our enemies—members of al Qaeda and the Taliban—do not follow these laws and no one expects them to do so. And our allies, with rare exceptions, do not take and hold prisoners. So the laws do not generally apply to them. When issues arise, in courts or in international discussions, they almost always involve the United States. Because other nations have different political and diplomatic agendas, and do not share the United States' military burdens, the United States has learned that it cannot expect them to interpret the laws of war and humanitarian laws in exactly the same ways that it does.

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

The Supreme Court left open several questions in *Boumediene*. Most notably, while the Court decided that federal courts may assert habeas corpus jurisdiction over all of the detainees at Guantanamo Bay, Cuba, the Supreme Court did not determine what substantive rights the detainees have or whether their substantive rights are adequately protected.<sup>26</sup> As long as detainees

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developments"); *Rasul*, 542 U.S. at 479 (concluding that a subsequent case already overruled "the statutory predicate to *Eisentrager's* holding").

25. See *Hamdan*, 548 U.S. at 605 (concluding that the law of war does not recognize conspiracy to commit war crimes as an offense even though the defendants in *Quirin* had been charged with conspiracy to commit war crimes because the Court in *Quirin* had "declined to address whether the offense actually qualified as a violation of the law").

26. *Boumediene*, 128 S. Ct. at 2277 ("It bears repeating that our opinion does not address the content of the law that governs petitioners' detention. That is a matter yet to be determined.").

remain at Guantanamo, federal courts will be busy answering these questions.

Because the Supreme Court has acknowledged that these basic questions are undecided, I will address another open issue that has received less attention. In *Boumediene*, the Supreme Court rejected the Government's argument that federal courts could not exercise habeas corpus jurisdiction over the U.S. Naval Base at Guantanamo Bay because the base is located within the sovereign territory of Cuba, a foreign country.<sup>27</sup> The Court held (arguably overruling *Eisentrager*) that habeas corpus jurisdiction turns on functional considerations rather than actual sovereignty.<sup>28</sup> Applying a functional test, the Court concluded that the federal courts could exercise jurisdiction based largely on the following key factor: "The detainees . . . are held in a territory that, while technically not part of the United States, is under the complete and total control of our Government."<sup>29</sup>

The Supreme Court, in my estimation, must not have appreciated the full implications of making actual control of territory rather than sovereignty the determinative factor for habeas corpus jurisdiction. Indeed, this factor, if applied literally, might have sweeping and problematic effects in the future. It threatens to give almost any prisoner captured by the United States in any likely future conflict a right to have a federal habeas corpus petition heard.

This possible consequence bodes trouble because the United States is the dominant military power in the world. When the United States fights an enemy anywhere, our forces almost always are quickly in "complete and total control" of the territory in which they fight. For example, when the United States invaded Iraq in 2003, the Iraqi Government quickly collapsed. Although the United States did not claim sovereignty over Iraq, it did become the occupying power in total and complete control of the country.<sup>30</sup> Similarly, when the United States invaded Afghanistan in 2001, the Taliban Government disintegrated, and the United States

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27. *Id.* at 2248.

28. *See id.* at 2258. On the tension between *Boumediene* and *Eisentrager*, see *id.* at 2298–302 (Scalia, J., dissenting).

29. *Id.* at 2262.

30. *See* S.C. Res. 1483, U.N. Doc. S/RES/1483 (May 22, 2003), available at <http://daccessdds.un.org/doc/UNDOC/GEN/N03/368/53/PDF/N0336853.pdf> (recognizing the United States and the United Kingdom as occupying powers in Iraq).



temporarily took control.<sup>31</sup> Likewise, our forces took no orders from Serbia when occupying Kosovo in 1999.<sup>32</sup>

Under the functional approach of *Boumediene*, would any prisoners taken during those invasions or other similar conflicts have a right to habeas corpus in federal court? If so, this result could be very problematic. In Operation Desert Storm in 1991, for example, the United States took over 50,000 Iraqi prisoners in just three days.<sup>33</sup> The United States—and no one else—was in complete control of the areas of Kuwait and Iraq where the United States captured these prisoners. But surely the Supreme Court would not hold that all of them would have a right to habeas corpus. The federal courts would be overwhelmed. Yet, how the Court would reach this result under its new functional test remains to be seen.

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

The most important *legal* issue in national security is what body of law should regulate governmental responses to terrorism. As I have described in a separate article, opponents of counterterrorism measures typically argue that they should be judged by legal guarantees designed to protect criminal suspects.<sup>34</sup> But governments typically respond that they are not addressing mere crime.<sup>35</sup> Instead, they are fighting a war against terrorism, and that the law applicable to armed conflict should govern their actions.

These two bodies of law often point in different directions. The police, for example, cannot simply shoot criminal suspects; the police have to try to arrest them first.<sup>36</sup> But the military generally can attack and kill enemy combatants—that's why targeted killing

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31. In Afghanistan, unlike in Iraq, the United States quickly handed over formal sovereignty to a transitional administration. See Grant T. Harris, *The Era of Multilateral Occupation*, 24 BERKELEY J. INT'L L. 1, 48–49 (2006).

32. The United States led a two-month air war against Serbia and then occupied the Kosovo province with other NATO forces. See Joseph C. Sweeney, *The Just War Ethic in International Law*, 27 FORDHAM INT'L L.J. 1865, 1883 (2004).

33. See Eric Schmitt, *War in the Gulf: POW's; General's "Wild Guess": 50,000 Prisoners, So Far*, N.Y. TIMES, Feb. 28, 1991, at A10.

34. Gregory E. Maggs, *Assessing the Legality of Counterterrorism Measures Without Characterizing Them as Law Enforcement of Military Action*, 80 TEMP. L. REV. 661, 663 (2007).

35. *Id.*

36. *Id.* at 674.

can occur.<sup>37</sup> Similarly, the police cannot detain criminal suspects without charges, but the military can hold enemy combatants as prisoners for the duration of a conflict.<sup>38</sup> And while the police cannot wiretap a criminal suspect's telephone calls without a warrant, the military constantly eavesdrops on enemy communications.<sup>39</sup>

I do not believe that this important issue has a simple answer. Modern terrorism resembles both criminal conduct and military aggression. Likewise, the perpetrators of terrorism resemble both criminals and combatants. Accordingly, good arguments may exist for judging counterterrorism actions under criminal law standards or judging them under the laws of war. Even seven years after the attacks of September 11, 2001, a consensus view has not emerged.

My proposal for addressing this question is easily stated, but certainly difficult to accomplish: we should develop a third body of law to address counterterrorism efforts.<sup>40</sup> The laws regulating law enforcement will apply to traditional crime fighting measures, the laws of war will apply to traditional military actions, and this new body of law would apply to government actions aimed at suppressing terrorism and catching and punishing terrorists. This body of law might resemble the rules governing law enforcement in some respects and the laws of war in others. But the content of the new body of law should be determined based on policy considerations, not simply by analogizing terrorism to crime or warfare.

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37. *Id.* at 675–76.

38. *Id.* at 677–78.

39. *Id.* at 684–85.

40. *Id.* at 702–09.

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