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Responses to the Ten Questions

John T. Parry

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RESPONSES TO THE TEN QUESTIONS

John T. Parry[†]

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1. WOULD PRESIDENT OBAMA HAVE THE AUTHORITY TO HOLD A U.S. CITIZEN WITHOUT CHARGE IN A MILITARY BRIG FOR SIX MONTHS IF THAT CITIZEN—WHO LIVES IN MINNESOTA—IS SUSPECTED OF LINKS TO AL QAEDA FOLLOWING A ONE-MONTH TRIP TO SOMALIA?

Initially, the answer to this question appears simple. The Government suspects a U.S. citizen who is present in the United States of links to al Qaeda, which raises the possibility of a criminal prosecution for crimes such as material support of terrorism.¹ Investigators may seek to question him, but they must inform him of some of his rights, and he can invoke his right to remain silent and/or counsel and thereby end the interrogation. In addition, investigators cannot keep him in custody unless they arrest him, but they ordinarily cannot arrest him unless they have probable cause to believe he has committed a crime. Similarly, they probably cannot conduct a search of his home without a warrant, which again requires probable cause. Once arrested, he has a right to bail—that is, to qualified liberty—unless the Government can show exceptional circumstances (flight risk or danger to others) to justify holding him in pretrial detention.² At some point, he will be brought to trial and, if convicted, will serve a sentence. If the sentence is less than life imprisonment, he will at some point be released.³

Contrast this approach with an equally straightforward scenario.

1. See 18 U.S.C. §§ 2339A, 2339B (2009).

2. See *United States v. Salerno*, 481 U.S. 739 (1987). As David Cole has pointed out, there have long been exceptions to this approach, and those exceptions have seen significant and in some circumstances abusive use in the context of anti-terrorism activities. See David Cole, *Out of the Shadows: Preventive Detention, Terrorism, and War*, 97 CAL. L. REV. 693, 695, 698 (2009). Despite these exceptions, the presumption of freedom from physical restraint absent a warrant or probable cause has remained a general rule.

3. The Non-Detention Act is also important to this hypothetical: “No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.” 18 U.S.C. § 4001(a) (2006). In *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), the Supreme Court held that the Authorization to Use Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001), satisfied the terms of the Act with respect to citizens who were also enemy combatants involved in the conflict in Afghanistan. *Hamdi*’s analysis does not automatically apply to a person who is linked to al Qaeda but not to the conflict in Afghanistan, and who is present in the United States. At that point, the questions become (1) does the AUMF trump the Non-Detention Act nonetheless, (2) are there other statutes that would allow non-criminal detention, and (3) is there some inherent executive authority to detain notwithstanding the Act? These are critical legal issues, which the Supreme Court deliberately avoided answering in *Rumsfeld v. Padilla*, 542 U.S. 426 (2004). My analysis of this question will take a different path, however.

The Government suspects an alien in another country of engaging in criminal activity. The Government could ask the government of that other country to extradite the person to the United States to face trial. Or, in certain circumstances, the person could become the target of covert actions, including searches, kidnapping, or perhaps even killing.⁴ Actions of this kind are obviously controversial for a variety of reasons, but they nonetheless take place, and until recently the extent to which the Constitution had anything to say about them was debatable.⁵ Importantly, too, military action has generally been thought to be entirely separate from both of these scenarios, and it has had its own set of rules, including rules relating to detention.

Over the past decade and more, these simple scenarios have become increasingly uncertain. Military and law enforcement activities often overlap, particularly but not exclusively with respect to terrorism.⁶ Good reasons exist to take seriously the claim that the United States should have the authority to hold some people in custody without charges for extended periods of time, perhaps even indefinitely.⁷ Even as courts have begun to craft more constitutional rules to govern the conduct of U.S. officials outside the incorporated territory of the United States,⁸ the protections assumed to apply to citizens (and aliens) inside that territory have become less clear.⁹ That is to say, the blurring of old boundaries between territorial and extraterritorial powers and rights, which at first appears to have led to the expansion of rights, has also upset previously settled links between citizenship, territory, government powers, and individual rights.¹⁰ The

4. See *infra* answer to Question Two.

5. See *United States v. Alvarez-Machain*, 504 U.S. 655 (1992); *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990); Ethan A. Nadelmann, *The Evolution of United States Involvement in the International Rendition of Fugitive Criminals*, 25 N.Y.U.J. INT'L L. & POL. 813 (1993); see also *infra* answer to Question Two.

6. See John T. Parry, *Terrorism and the New Criminal Process*, 15 WM. & MARY BILL RTS.J. 765, 767 (2007). An early example might be the military invasion of Panama in part for the purpose of arresting Manuel Noriega.

7. See Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079 (2008); Cole, *supra* note 2; Amos N. Guiora & John T. Parry, Debate, *Light at the End of the Pipeline?: Choosing a Forum for Suspected Terrorists*, 156 U. PA. L. REV. PENNUMBRA 356 (2008).

8. See *Boumediene v. Bush*, 128 S. Ct. 2229, 2259 (2008); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

9. As the Supreme Court's failure to reach the merits in *Rumsfeld v. Padilla*, 542 U.S. 426 (2004), makes clear. See also *al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008) (en banc), in which the Fourth Circuit divided 5-4 on executive power to detain as an enemy combatant an alien residing in the United States.

10. For a good discussion of extraterritoriality in U.S. law, see KAL RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG? THE EVOLUTION OF TERRITORIALITY IN

result is a more functional approach to legal rules relating to citizenship and territory, both in general and with respect to individual rights.

Put somewhat differently, I do not think it is clear as a formal matter that a citizen inside the United States automatically can claim the full package of federal constitutional rights. Rather, the extent to which such a person can claim rights must depend on an analysis of functional considerations. Justice Souter said as much in his *Hamdi* concurrence: “in a moment of genuine emergency, when the Government must act with no time for deliberation, the Executive may be able to detain a citizen if there is reason to fear he is an imminent threat to the safety of the Nation and its people.”¹¹ As Justice Souter’s statement also suggests, the result of the functional analysis will usually be that the claimed rights will apply. Thus, the specific answer to the specific hypothetical posed in Question One is “No.” But it remains critical that the analysis that produces this answer is (1) different from the analysis with which I began my answer, and (2) capable of generating different results in a subset of cases—such as emergencies—in which functional considerations favor the exercise of government power despite a claim of right.

In short, the answer to Question One is less interesting than the fact that the answer is uncertain enough to make the question worth asking. Reaching a conclusion requires what appears to be a shift of thought, a realigning of legal categories and legal balances away from the relatively formal analysis with which I began. It is tempting to say that 9/11 is the reason for this shift, but these changes were well underway long before 2001. The War on Terror only accelerated them. In the end, the question whether the President can hold a U.S. citizen without charge in a military brig for six months if that citizen is suspected of links to al Qaeda is not very different from any other inquiry into the relative scope of government powers and individual rights. As the Supreme Court observed in a case that had nothing to do with national security or terrorism, “the precise content of most of the Constitution’s civil liberties guarantees rests upon an assessment of what accommodation between governmental need and individual freedom is reasonable.”¹²

AMERICAN LAW (2009).

11. 542 U.S. at 552. Justice Souter did not limit his statement to situations involving citizens detained overseas.

12. *Anderson v. Creighton*, 483 U.S. 635, 643–44 (1987); *see also* Parry, *Terrorism*, *supra* note 6, at 796–822.

2. WOULD IT BE LEGAL FOR THE OBAMA ADMINISTRATION TO LAUNCH A PREDATOR STRIKE ON OSAMA BIN LADEN IF HE HAS BEEN TRACKED TO A HOUSE ON THE OUTSKIRTS OF KARACHI, PAKISTAN?

The facts of this question are not very hypothetical. The Obama administration, like its predecessors, uses Predator drones to kill specific, targeted individuals and likely will continue to do so.¹³ Indeed, “the number of drone strikes has risen dramatically since Obama became President,” and drones killed well over 300 people in Pakistan in 2009.¹⁴ From an operational perspective, then, the only reason the administration would not send a drone to kill Osama bin Laden would be if it did not want to kill him—that is, if it preferred to take him alive or leave him at large. With respect to that choice, I read the question to exclude the politics, wisdom, ethics, or morality of using Predator drones for military or other purposes, and so I will not address those issues.¹⁵

U.S. statutory law permits executive officials to use Predator drones in an attempt to kill Osama bin Laden.¹⁶ The Authorization to Use Military Force provides “the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001.”¹⁷ Bin Laden is one of the “persons” determined to have been responsible

13. See Jane Mayer, *The Predator War: What are the Risks of the C.I.A.'s Covert Drone Program?*, THE NEW YORKER, Oct. 26, 2009, at 36–45 (“The U.S. government runs two drone programs. The military’s version, which is publicly acknowledged, operates in the recognized war zones of Afghanistan and Iraq. . . . The C.I.A.’s program is aimed at terror suspects around the world, including in countries where U.S. troops are not based.”).

14. *Id.*

15. I am not asserting a strong separation between these issues and legal issues, and I recognize that the legal doctrines I will discuss do implicate and draw upon ethical, moral, and political judgment. But I will make no effort to shade my legal discussion to suit my views on these other issues; nor will I advocate for changing the law to reflect my views.

16. The word “attempt” is important, especially to the politics, wisdom, ethics, and morality of drone strikes. Predator drones usually go where they are supposed to go, but the intelligence information that guides targeting decisions frequently is not accurate, so that instead of killing the intended target, drones tend to kill people who were not targets and—often—who had no connection to the targeted person. See Mayer, *supra* note 13; Mary Ellen O’Connell, *Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004–2009*, in SHOOTING TO KILL: THE LAW GOVERNING LETHAL FORCE IN CONTEXT (Simon Bronitt ed.) (forthcoming), available at <http://ssrn.com/abstract=1501144>.

17. Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001).

for the 9/11 attacks, and drone strikes are obviously a form of force. Although one can debate what kinds of force are “necessary and appropriate,” the use of Predator drones seems to fall well within the kinds of actions that the Bush and Obama administrations have taken pursuant to the statute.¹⁸ Thus, the hypothetical does not require asking the harder question of what inherent or emergency authority the President might have in such a situation.

Nor is there much question about the general constitutionality of engaging in Predator drone strikes under the auspices of the AUMF.

When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. . . . If his act is held unconstitutional under these circumstances, it usually means that the Federal Government, as an undivided whole, lacks power. A seizure executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.¹⁹

The decision that drone strikes should be an option for accomplishing military or national security goals that Congress has validated seems easily to fit within the power of the federal government. Congress has expressly authorized the President to use force against people involved in the 9/11 attacks. Speaking generally, the Constitution allows the government to use offensive and defensive military force to accomplish national goals. Under Justice Jackson’s analysis, the wisdom or appropriateness of acts authorized by Congress and permitted by the Constitution—in this case, the wisdom or appropriateness of using drone strikes to target and kill specific individuals—is not an issue for judicial review.

From a constitutional perspective, then, the only significant question would be whether the Constitution imposes any requirements on *how* the government carries out drone strikes in specific cases. In particular, do the potential targets of such strikes have any rights that would limit the ability of the United States to carry out an attack? Richard Murphy and John Radsan have argued that due process (1)

18. See William C. Banks & Peter Raven-Hansen, *Targeted Killing and Assassination: The U.S. Legal Framework*, 37 U. RICH. L. REV. 667, 724, 736–37 (2003); see also *id.* at 682–737 (canvassing non-constitutional U.S. law on the legality of targeted killing).

19. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–37 (1952) (Jackson, J., concurring).

permits judicial review of targeted killing decisions and (2) demands internal executive review.²⁰ Put differently, under their analysis, targeted killing is constitutional so long as the government complies with relatively lenient due process requirements.

A slightly different answer to the question of rights—one which I think is consistent with my answer to Question One—might begin with the fact that in the hypothetical, bin Laden is not on U.S.-controlled territory of any kind and is not in U.S. custody. He is also not a U.S. citizen; nor does he have any of the legal rights sometimes accorded to aliens under U.S. statutes. His only connections to the United States are his actions against the United States and U.S. citizens and residents, and the efforts of U.S. personnel to track him down. Under these circumstances, which are quite different from those of detainees at Guantanamo (or at other locations around the world), his rights against U.S. action are minimal and possibly nonexistent. In *Boumediene v. Bush*, the Supreme Court stated that extraterritorial enforcement of the Constitution turns on a functional analysis of three factors: citizenship, the “nature of the sites” at which the relevant conduct took place, and “practical obstacles.”²¹ With respect to the third factor, the Court seemed to indicate that the burden of proving “obstacles” would rest with the government, for it stressed the question whether issuing the writ of habeas corpus “would be ‘impracticable or anomalous.’”²²

In contrast to Murphy and Radsan’s interpretation of *Boumediene* as requiring due process review, the alternative argument would stress that the first two factors—citizenship and location—clearly weigh against enforcement of due process rights, and that allowing due process review of Predator drone strikes would be impractical and anomalous. One could use this flexible framework—especially the third factor, to the extent it has overriding weight—to conclude that due process requires some kind of executive review. But, I think one could just as easily determine that due process does not apply at all or that, if it does, it simply requires compliance with ordinary government processes, which congressional passage of the AUMF would

20. Richard Murphy & Afsheen John Radsan, *Due Process and Targeted Killing of Terrorists*, 31 CARDOZO L. REV. 405 (2009). For a somewhat different view, written before *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), see Banks & Raven-Hansen, *supra* note 18, at 678–79 (concluding the Constitution does not prohibit targeted killing).

21. *Boumediene*, 128 S. Ct. at 2259. The specific issue for the *Boumediene* Court was “the reach of the Suspension Clause.” *Id.*

22. *Id.* at 2262 (quoting *Reid v. Covert*, 354 U.S. 1, 74 (1957) (Harlan, J., concurring)).

satisfy. By contrast, people in different situations could claim greater levels of protection under due process or other constitutional rights.

Under either approach, the Constitution places few constraints on the President's ability to use Predator drone strikes against non-citizens outside the United States.²³ The legal issues thus reduce to whether the use of Predator drone strikes complies with international law. In *Hamdan v. Rumsfeld*, the Supreme Court held that the United States is engaged in a non-international armed conflict with al Qaeda for purposes of the Geneva Conventions.²⁴ The Court did not define "al Qaeda" or its membership, but it is difficult to imagine any U.S. definition that would not include bin Laden. As a state engaged in an armed conflict, the United States can target and kill combatants, but any use of force must be consistent with military necessity and avoid harm to civilians. Defining the border between "combatant" and "civilian" can be difficult both practically and theoretically. Murphy and Radsan suggest that "all of these limits are hazy and subject to interpretation," but they also argue that these limits impose some restrictions on the use of drone strikes no matter whom the target.²⁵

In addition, the hypothetical provides that the attack would target bin Laden in Pakistan, where the United States is already using drone strikes. But the United States is not engaged in an armed conflict with Pakistan. Perhaps the United States still can make the attack—otherwise how could it ever go after members of al Qaeda? But Mary Ellen O'Connell argues that in the absence of an armed conflict, international human rights law should apply, such that the use of drone strikes is illegal. Further, to the extent an armed conflict now exists within Pakistan, and to the extent the United States is assisting the government of Pakistan in its efforts to maintain order, she points out that the use of drone strikes must comply with the law

23. A third due process analysis might focus less on bin Laden and more on the fact that the decision to target him would be made by U.S. officials, at least some of whom would be in the United States. Thus, whether or not bin Laden can claim any rights, due process still should constrain official action because "[t]he United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution." *Reid*, 354 U.S. at 5–6 (plurality opinion) (making this statement in the context of rights claimed by a citizen). Under this analysis, which circles back toward that of Murphy and Radsan, some form of process and authority is necessary before the use of a Predator drone. But passage of the AUMF and the use of established military and intelligence processes might well be sufficient.

24. 548 U.S. 557, 630 (2006).

25. See Murphy & Radsan, *supra* note 20.

of armed conflict.²⁶ Whether the United States can claim to be assisting Pakistan is also not clear. The increasing use of drone strikes has drawn protests from some Pakistani officials even as the Obama administration is reportedly cooperating with the Pakistani government on some targeting decisions.²⁷

I will not provide any independent analysis of these issues. Suffice it to say that the answers are not entirely clear. Murphy and Radsan argue that international law should limit, and O'Connell argues that it should prevent, the use of Predator drone strikes under the circumstances presented by the hypothetical. Jordan Paust appears to disagree with O'Connell and to agree somewhat with Radsan and Murphy.²⁸ The United States could, of course, offer a legal justification for these strikes. Further, to the extent some of these rules are customary international law and are not *jus cogens*, the United States is permitted to engage in conduct that seeks to change them. Yet the United States is not doing either of these things. Instead, it has largely ignored international law,²⁹ which is fairly easy to do because the status and enforceability of these rules in U.S. domestic law is uncertain.³⁰ That is to say, the conduct of the United States reflects Brian Tamanaha's observation that "the most powerful states . . . disregard international law by their leave when they consider it necessary for perceived national interest."³¹ For supporters of an international rule of law, this disregard is potentially devastating.³²

From the perspective of U.S. law, in short, no legal constraints exist that would place meaningful or enforceable limits on the use of Predator drone strikes. The perspective of international law on this

26. See O'Connell, *supra* note 16.

27. See Mayer, *supra* note 13; O'Connell, *supra* note 16.

28. See Jordan J. Paust, *Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 *TRANSNAT'L L & POL'Y* (forthcoming 2010), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1520717.

29. See O'Connell, *supra* note 16 ("The United States has apparently not put forward a position as to why it believes its use of drones in Pakistan is lawful under international law."). State Department Legal Advisor Harold Koh gave a speech in March 2010 at the annual meeting of the American Society of International Law, in which he asserted that the United States is limiting its attacks to military objectives and is seeking to minimize collateral damage, but he provided little supporting analysis.

30. I will not attempt to address the myriad issues that surround the status and enforceability of international law in U.S. courts and the U.S. legal system.

31. BRIAN TAMANAHA, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY* 128 (2004).

32. *But see id.* at 131 (suggesting a basis for perceiving an international rule of law even when international law is violated).

issue seems to matter little to the executive branch under Bush or Obama. The real issues are therefore the ethical, moral, and political questions that are beyond the scope of the hypothetical, and which reduce to the question of when, if ever, is it appropriate and wise to use such strikes.

3. DID MEMBERS OF THE JUSTICE DEPARTMENT'S OFFICE OF LEGAL COUNSEL COMMIT MALPRACTICE IN 2002 BY ADVISING THAT THE GENEVA CONVENTIONS DID NOT APPLY TO AL QAEDA AND THE TALIBAN?
4. DID MEMBERS OF THE JUSTICE DEPARTMENT'S OFFICE OF LEGAL COUNSEL COMMIT MALPRACTICE IN 2002 BY ITS WRITTEN GUIDANCE TO THE CENTRAL INTELLIGENCE AGENCY ON INTERROGATION STANDARDS?

“Legal malpractice” is the “failure to render professional services with the skill, prudence, and diligence that an ordinary and reasonable lawyer would use under similar circumstances.”³³ In assessing an attorney’s compliance with this standard, courts usually hold that “an error of judgment on an unsettled proposition of law” is not malpractice, so long as the attorney complied with the duty to “research and investigate doubtful propositions.”³⁴ Further, “courts usually agree that violation of an ethics rule alone does not create a cause of action, constitute legal malpractice *per se*, compel disqualification or necessarily create a duty.”³⁵ Yet because the standard is objective negligence, “good faith” is not a defense. Thus, an attorney can act in complete good faith yet still commit malpractice. Finally, malpractice liability usually runs between attorney and client, although the doctrine of privity is not as strong as it once was, and attorneys are sometimes liable to non-clients for intentional torts.³⁶

Within this framework, I do not have enough expertise in the laws of war to give a definite answer to Question Three. I am inclined to say, however, that OLC’s advice on the Geneva Conventions was not malpractice in a legal or rhetorical sense. Despite the fact that the Geneva memoranda espouse what I think are extreme positions

33. BLACK’S LAW DICTIONARY 978 (8th ed. 2004).

34. 2 Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice* § 19.1 at 1226 & § 19.6 at 1241 (2009). *See also id.* § 20.1 at 1305 (“Negligence . . . cannot be inferred from a bad result or even from an error.”).

35. *Id.* § 15.5, at 691.

36. *See id.*, chs. 6 & 7.

on the constitutional scope of presidential power, they also take account of and discuss the applicable rules, evaluate at least some opposing views, and canvass some of the secondary literature.

Importantly for public policy purposes, OLC's advice on this issue came as part of a debate with State Department attorneys over the proper approach.³⁷ Thus, the people, including the President, who actually made the relevant decisions were able to weigh and consider a fairly broad range of views—to the extent they cared to do so. Yet one could argue that this debate strengthens the claim that something about OLC's conduct on this issue fell short of appropriate standards, for rather than giving advice, OLC took what I would describe as a litigation posture against the State Department. Its Geneva memoranda tend to read like adversarial documents, not like the measured analysis and advice that many people, including many former OLC attorneys, believe is the appropriate genre or stance for the OLC to adopt.³⁸

With respect to Question Four, the argument for malpractice is much stronger. First, the famous August 1, 2002 “torture” memorandum fails the non-doctrinal test of measured analysis and advice that I mentioned above. And, although I am willing to believe that OLC attorneys acted in good faith when they wrote the memoranda, the existence of good faith has little or no relevance to the question of

37. The various memoranda from officials in the Defense, Justice, and State Departments and the White House, as well as President Bush's decision memorandum, are in *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* 38–143 (Karen J. Greenberg & Joshua L. Dratel eds., 2005) [hereinafter *THE TORTURE PAPERS*].

38. See Walter E. Dellinger, et al., Principles to Guide the Office of Legal Counsel (Dec. 21, 2004) (“When providing legal advice to guide contemplated executive branch action, OLC should provide an accurate and honest appraisal of applicable law, even if that advice will constrain the administration's pursuit of desired policies. The advocacy model of lawyering, in which lawyers craft merely plausible legal arguments to support their clients' desired actions, inadequately promotes the President's constitutional obligation to ensure the legality of executive action.”), *available at* http://www.acslaw.org/files/2004%20programs_OLC%20principles_white%20paper.pdf. Note that nearly all of the attorneys who signed this statement of principles worked for OLC during the Clinton administration. Whether or not the motives of those who wrote and signed the document were political, it does not read as a partisan document. Whether it is a historically accurate picture of how OLC has operated during other administrations—including during the Clinton administration—is a topic well outside the scope of Questions Three and Four. For additional perspectives on these issues, see HAROLD H. BRUFF, *BAD ADVICE: BUSH'S LAWYERS IN THE WAR ON TERROR* 67–91 (2009); David Cole, *Introductory Commentary: Torture Law, in THE TORTURE MEMOS: RATIONALIZING THE UNTHINKABLE* 11–13 (David Cole ed. 2009); and JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 32–39 (2007).

malpractice. Still, to the extent the specifics of malpractice doctrine are relevant to the question, the posture in which a malpractice claim over this memorandum could arise is important. To whom did OLC attorneys owe a duty? Was their client the Department of Justice, the CIA, the President or executive branch in general, the nation, or the American people? Should the memorandum be read as part of a conspiracy to commit intentional torts against people detained as suspected terrorists, so that they could be liable to third parties? Was the memorandum the proximate cause of injury? To the extent the issue is ordinary negligence that comprises a breach of a duty owed to a client defined in relatively narrow terms—for example, the executive branch³⁹—then Question Four poses a hypothetical that will probably never be litigated.

But, whether or not the analysis in the torture memorandum is malpractice in a strict doctrinal sense, it goes at least to the edge of ethical conduct and arguably could support criminal charges.⁴⁰ More bluntly and most certainly, it was very bad advice.⁴¹ For example, Kathleen Clarke has laid particular stress on three major substantive inaccuracies: reliance on a Medicare statute to set the standard for severe pain under the federal torture statute; the discussion of available defenses under the statute, particularly the necessity defense; and the scope of executive power.⁴² I differ a bit from Clarke on exactly what is wrong with the memorandum, but I agree that it is severely flawed, particularly with respect to the level of pain necessary to constitute torture.⁴³

Last spring, the Department of Justice released several previously classified memoranda, including another from August 1, 2002 (which David Luban has labeled the “techniques” memorandum to distinguish it from the “torture” memorandum of the same date) and three

39. See Dellinger, et al., *supra* note 38, at 4–6 (referring to “client agency” or “agencies”).

40. See Jens Ohlin, *The Torture Lawyers*, 51 HARV. INT’L L.J. 193 (2010).

41. See BRUFF, *supra* note 38, at 237–52.

42. Kathleen Clark, *Ethical Issues Raised by the OLC Torture Memorandum*, 1 J. NAT’L SEC. L. & POL’Y 455, 459–62 (2005); see also Cole, *supra* note 38, at 19–25; GOLDSMITH, *supra* note 38, at 144–51; *What Went Wrong: Torture and the Office of Legal Counsel in the Bush Administration: Hearing Before the Subcommittee on Administrative Oversight and the Courts of the Senate Committee on the Judiciary*, 111th Cong. May 13, 2009 [hereinafter *What Went Wrong*] (written statement of David Luban) (discussing these and other flaws in the memorandum, including failure to cite controlling or relevant cases, including a 1984 federal case on water torture).

43. See JOHN T. PARRY, UNDERSTANDING TORTURE: LAW, VIOLENCE, AND POLITICAL IDENTITY 175–77 (2010).

from May 2005.⁴⁴ As Luban notes, these additional memoranda claim to provide OLC's "best" and "authoritative" understandings of the law that should govern the executive branch with respect to coercive interrogation techniques.

The August 1, 2002 techniques memorandum gave specific legal approval to ten coercive interrogation practices that the CIA wanted to use on a high-ranking member of al Qaeda. The practices were:

(1) attention grasp, (2) walling, (3) facial hold, (4) facial slap (insult slap), (5) cramped confinement, (6) wall standing, (7) stress positions, (8) sleep deprivation, (9) insects placed in a confinement box, and (10) the waterboard.⁴⁵

One easily could conclude that some or most of these methods are illegal and/or torture under U.S. or international law. Yet OLC applied the torture memorandum of the same date to conclude that these methods, whether used singly or in combination, would not violate U.S. law, in part because they "would not inflict severe physical pain or suffering" and would not cause "any prolonged mental harm."⁴⁶

The May 2005 memoranda—which technically are not part of Question Four—also gave approval to a similar set of specific techniques used together or in combination. I agree with David Luban's assessment that, although the analysis in these memoranda is "more cautious," it remains "troubling" and is at times "so implausible that it seems clear that Mr. Bradbury was straining to reach a result."⁴⁷

In sum, whether or not the 2002 memoranda (or the 2005 memoranda) meet the standards for malpractice liability, OLC attorneys clearly failed their client, whether that client was the CIA, the executive branch, or the country. Their advice was bad advice not simply because it was sometimes incorrect or unbalanced, but also

44. All of the available interrogation memoranda are collected in *THE TORTURE MEMOS: RATIONALIZING THE UNTHINKABLE*, *supra* note 38.

45. Jay S. Bybee, Assistant Att'y Gen., Memorandum for John Rizzo, Acting General Counsel of the Central Intelligence Agency, re: Interrogation of al Qaeda Operative 2 (Aug. 1, 2002).

46. *Id.* at 11, 16–17.

47. *What Went Wrong*, *supra* note 42; *see also* Cole, *supra* note 38, at 27–34. One reason Bradbury's memoranda are more cautious is that they had to take account of OLC's withdrawal of the August 2002 torture memorandum and the substitution of a December 30, 2004 memorandum written by Daniel Levin. The Levin memorandum still allows room for coercive practices, but it retreats from many of the claims in the earlier memorandum. For somewhat different discussions of these events and the December 2004 memorandum, *see* Cole, *supra* note 38, at 25–26, and GOLDSMITH, *supra* note 38, at 141–61, 164–65.

and perhaps even more because OLC knew that the administration wanted a green light to use rough tactics, and the CIA wanted to be able to claim that it relied on OLC's favorable interpretation of the relevant laws. One need not be an expert in malpractice or legal ethics to conclude that it is precisely when a client seeks to go to the limit of what the law might allow that a lawyer has a duty to ask hard questions and exercise prudence. As Clarke puts it, "OLC lawyers had a professional obligation to give accurate legal advice to their client, whether or not the client's constituent wanted to hear it."⁴⁸ Instead of doing that, as David Cole summarizes, "on every question, no matter how much law had to be stretched, the OLC lawyers reached the same result—the CIA could do whatever it had proposed to do."⁴⁹

Finally, in addition to failing to ask hard questions or provide balanced legal analysis, OLC also failed to take the further step of giving wise counsel. This omission may not be criminal, unethical, or malpractice, but it is a marked failure nonetheless.

7. HOW DO THE ABUSES OF CIVIL LIBERTIES UNDER THE GEORGE W. BUSH ADMINISTRATION COMPARE TO THE INTERNMENTS OF JAPANESE ALIENS AND JAPANESE-AMERICANS DURING WORLD WAR II?

My initial response is that Question Seven asks the impossible because it provides no standard (legal, moral, or something else) for making a comparison between things that are incommensurable. How does one compare all of the alleged abuses of civil liberties under the George W. Bush administration—such things as abuse of wiretapping prohibitions and excessive immigration roundups, as well as torture and other violations of international human rights and humanitarian law—to a single, albeit enormous, event such as the internments?

In addition, many of the worst alleged or documented abuses of civil or human rights by the Bush administration took place in locations that are outside, or at least arguably outside, the United States. By contrast, the internment was a largely domestic phenomenon. Yet during World War II, the Roosevelt and Truman administrations also engaged in conduct that violated the civil liberties or human rights of many people outside the United States.⁵⁰ If these

48. Clark, *supra* note 42, at 468.

49. Cole, *supra* note 38, at 4.

50. See, e.g., GILES MACDONOGH, *AFTER THE REICH: THE BRUTAL HISTORY OF THE ALLIED OCCUPATION* (2007); ROBERT A. PAPE, *BOMBING TO WIN: AIR POWER AND COERCION IN WAR* 87–136, 254–313 (1996).

things were added to the equation, would the abuses during World War II equal or surpass those committed by the Bush administration? I think the answer would have to be yes, at least with respect to the sheer numbers of people subjected to arbitrary or abusive treatment.

Other than the satisfaction of condemning all of the relevant conduct, I am also unsure about the goal or value of such a comparison. Nor am I certain about how to perform the comparison so as to produce an answer that is not a polemic. Perhaps it would be more fruitful to compare deliberate policies during World War II and the Bush administration to violate civil or human rights in ways that appeared exceptional to large numbers of people at the time. That is to say, it might make sense to ask what practices or policies seemed at the time to be abusive conduct, as opposed to what seems in hindsight to have been abusive. Although I can see some value to this method, even this comparison requires some inquiry into where the standards for “exceptional” or “abusive” come from. Many of the practices of the Bush administration, for example, have been denounced as abusive by human rights groups—and some have been struck down by the Supreme Court—even as large numbers of people appear indifferent or perhaps even approving.

All of that said, and with respect to the specific comparison that is the focus of this question, there is certainly a good case that the internments were worse. The Roosevelt administration concentrated tens of thousands of people, including citizens, into camps. They were not subjected to systematic physical abuse, but their lives were upended, they were branded as potential enemies or traitors, and many lost their livelihoods and property. Relatively few received any kind of meaningful compensation,⁵¹ and the Supreme Court upheld the internment policy.⁵² Further, the total number of people interned in the United States during World War II easily exceeds the number of people in the United States whose civil rights were violated in ways that are unique to the Bush administration. I suspect that it also exceeds the number of people inside or outside the United States whose rights were violated in ways unique to the Bush administration.

The best argument for contending that the Bush administration comes out on the losing side of any comparison may require taking a particular kind of progressive or whiggish view of American history

51. See COMM’N ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED 117–34 (1982).

52. See *Korematsu v. United States*, 323 U.S. 214, 223–24 (1944); *Hirabayashi v. United States*, 320 U.S. 81, 98–99 (1943); see also *Ex parte Endo*, 323 U.S. 283 (1944).

and politics, such that later Presidents not only are bound to learn from and avoid the sins of their predecessors, but also that the bar of appropriate or legitimate conduct continually rises. Since World War II, the United States has often claimed to be a leader in human rights. The Bush administration also advanced claims of this kind. At the same time, however, it pursued policies that violated civil and human rights. Even as it engaged in these violations, it also advanced legal and political justifications for them, while continuing to claim leadership on human rights. Perhaps the sheer brazenness of this sequence makes the case that the actions of the Bush administration are worse than Roosevelt's internment policy. But that answer might require more faith in progress than I can muster.

8. DOES AL QAEDA POSE AN EXISTENTIAL THREAT TO THE UNITED STATES?

No.