

2011

# Responses to the Ten Questions

John Cary Sims

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## Recommended Citation

Sims, John Cary (2011) "Responses to the Ten Questions," *William Mitchell Law Review*: Vol. 37: Iss. 5, Article 11.

Available at: <http://open.mitchellhamline.edu/wmlr/vol37/iss5/11>

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## RESPONSES TO THE TEN QUESTIONS

John Cary Sims<sup>†</sup>

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### 3. IS PRESIDENT OBAMA'S USE OF PREDATOR STRIKES IN AFGHANISTAN AND PAKISTAN CONSISTENT WITH INTERNATIONAL LAW AND INTERNATIONAL STANDARDS?

Probably yes. However, it is difficult to give a definitive and

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<sup>†</sup> Professor of Law, University of the Pacific, McGeorge School of Law; Senior Editor, *Journal of National Security Law & Policy*.

comprehensive answer because so many aspects of the use of Predators and other drones<sup>1</sup> remain unknown to the public. It appears to be established that this type of weapon is one of the mainstays of the U.S. campaign against al Qaeda and the Taliban. The Obama administration, upon taking office, quickly increased the number of drone strikes being conducted over the rate that had prevailed during the Bush administration,<sup>2</sup> and the increased tempo has continued.<sup>3</sup> The frequency with which drones have been used, and the wide range of circumstances in which they have brought into action, makes it impossible to give a unitary answer to the legality of the strikes as judged against international standards.

To the extent that U.S. armed forces conduct drone attacks against their adversaries in Afghanistan, the use of drones would seem to be no more likely to violate international law than the use of other weapons, and perhaps less so.<sup>4</sup> If based on sound intelligence, including the extensive surveillance conducted by drones and other aircraft, an appropriately planned and well-conducted attack using a drone or drones may be more likely to hit a proper target, and less likely to kill or injure civilians, than attacks by fixed-wing aircraft, helicopters, or artillery. It is not possible to assess, based on the available information, how close the U.S. military's use of drones in Afghanistan comes to the goal of complete compliance with the Geneva Conventions and other aspects of the law of armed conflict, but I do not believe that the use of drones, as such, suggests that violations of international law are more likely than they otherwise would be in a conflict of the type that is underway there.

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1. The Predator B (often known as the Reaper) is a larger, faster, and more capable version of the Predator. The manufacturer, General Atomics Aeronautical, has described the capabilities of the Reaper. See *Predator B*, GEN. ATOMICS AERONAUTICAL, [http://www.ga-asi.com/products/aircraft/predator\\_b.php](http://www.ga-asi.com/products/aircraft/predator_b.php) (last visited Mar. 28, 2011) ("Predator B has the capacity to conduct multiple missions simultaneously due to its large internal and external payload.").

2. Mark Mazzetti & David E. Sanger, *Obama Expands Missile Strikes Inside Pakistan*, N.Y. TIMES, Feb. 20, 2009, [http://www.nytimes.com/2009/02/21/washington/21policy.html?\\_r=2](http://www.nytimes.com/2009/02/21/washington/21policy.html?_r=2).

3. See, e.g., Tara Mckelvey, *Inside the Killing Machine*, NEWSWEEK, Feb. 13, 2011, <http://www.newsweek.com/2011/02/13/inside-the-killing-machine.html> ("Bush authorized 42 drone strikes . . . . The number has more than quadrupled under President Obama – to 180 at last count.").

4. See, e.g., Isabel Kershner, *Israeli Panel Finds No Crime in 2002 Assassination*, N.Y. TIMES, Feb. 27, 2011, <http://www.nytimes.com/2011/02/28/world/middleeast/28israel.html> (noting that the one-ton bomb, dropped by an F-16, that killed Sheik Salah Shehada also killed at least thirteen innocent civilians).

Somewhat different questions arise with regard to the use of drones to conduct attacks on targets in Pakistan, but my answer is probably the same. U.S. combat operations within Afghanistan do not constitute violations of Afghanistan's sovereignty. Of course, there have been continuing and, at times, strident objections by Afghanistan to particular air strikes conducted by the United States, but those have primarily been in response to civilian casualties resulting from conventional air attacks, not those conducted by drones.<sup>5</sup>

Pakistan's public stance toward drone strikes is different. Plainly, Pakistan has allowed such attacks to be conducted within its territory, but it has never said so publicly and presumably cannot do so in light of the domestic political environment within Pakistan. This does not affect the legality of the program under international law. Under all the circumstances, there cannot be any real doubt about the fact that the United States is not violating Pakistan's sovereignty, but is instead conducting a joint program with that state even though the relationship between the collaborators remains touchy, the boundaries of what is allowed and what is not are imprecise, and public disclosure is minimal.<sup>6</sup>

If one focuses on the drone strikes in Pakistan as opposed to those in Afghanistan, it becomes more necessary to ask who is at the controls of the aircraft and who is pulling the trigger to launch the Hellfire missiles. The strikes in Afghanistan are likely to be conducted by the armed forces. For attacks in Pakistan, it is likely that employees of the Central Intelligence Agency are operating the drones.<sup>7</sup> This raises the question of whether attacks that will have consequences similar to those traditionally associated with armed conflict may be carried out by civilians, who are not in uniform and not subject to a military chain of command.<sup>8</sup>

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5. See, e.g., Alissa J. Rubin, *U.S. Military Apologizes for Civilian Deaths in Afghanistan*, N.Y. TIMES, Oct. 4, 2010, <http://www.nytimes.com/2010/10/04/world/asia/04afghan.html>.

6. Even if Pakistan objected to the use of drones in its territory, international law would not prevent the United States from exercising its right of self-defense under Article 51 of the United Nations Charter by striking those who are participating in an armed attack against the United States from within Pakistan. Jordan J. Paust, *Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 J. TRANSNAT'L L. & POL'Y 237, 249–58 (2010).

7. See, e.g., 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, available at [http://www.newyorker.com/reporting/2009/10/26/091026fa\\_fact\\_mayer](http://www.newyorker.com/reporting/2009/10/26/091026fa_fact_mayer).

8. Gary Solis has emphatically argued that they may not. See Gary Solis, *CIA*

Based on what I know, I believe that the use of drones by the Obama administration complies with international law. However, there are a number of potential implications of the drone program, and possible use or expansion of it beyond the terms of the question, that are potentially troubling. First, since this type of weapon seems to have the potential to conduct a surgical strike that is much more precise than those conducted by traditional weapons, it may generate an almost irresistible temptation to conduct attacks that would never be attempted or even contemplated, except for the availability of drones, thus raising many new and difficult questions. Second, the question as stated concerned only a state in which open combat is underway (Afghanistan), and another that is being used as a refuge and staging area for that war (Pakistan). Different questions are raised by the use of drones to conduct attacks far away from a battlefield. The apparently successful attack conducted in 2002 in Yemen has not generated substantial controversy,<sup>9</sup> but any effort to conduct attacks in the future that are not related to combat could raise difficult questions concerning the position taken by the state within which the drone would be used, the identity of the target or targets, and the availability of other means (law enforcement, diplomatic, or judicial) to go after the contemplated target at the relevant time and place. Third, the question as stated does not present an occasion for delving into the very difficult domestic constitutional questions concerning the

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*Drone Attacks Produce America's Own Unlawful Combatants*, WASH. POST, Mar. 12, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/11/AR2010031103653.html>. Even though Jordan Paust disagrees with much of what Mary Ellen O'Connell has written about the principles of international law applicable to drone attacks, he concurs in her judgment that if those conducting drone attacks "are not members of the regular armed forces of a party to an international armed conflict, they are unprivileged fighters . . ." Paust, *supra* note 6, at 277. He recognizes that some acts not authorized by the law of armed conflict may be permissible if taken under Article 51 as self-defense. *Id.* at 278–79. Kenneth Anderson argues that "[s]elf-defense, not combatancy under armed conflict, is in fact the legal category that applies," and that drone attacks "are as justifiable when the CIA is tasked to carry them out secretly as when the military does so in open armed conflict." Kenneth Anderson, *Predators over Pakistan*, WEEKLY STANDARD, Mar. 8, 2010, <http://www.weeklystandard.com/articles/predators-over-pakistan?page=1>.

9. See James Risen & David Johnston, *Threats and Responses: Hunt for Al Qaeda; Bush Has Widened Authority of C.I.A. To Kill Terrorists*, N.Y. TIMES, Dec. 15, 2002, <http://www.nytimes.com/2002/12/15/world/threats-responses-hunt-for-al-qaeda-bush-has-widened-authority-cia-kill.html> (reporting that in November 2002, the CIA killed al Qaeda leader Qaed Salim Sinan al-Harethi and five others by firing a Hellfire missile at a car in a remote region of Yemen).

manner in which the executive may compile a list of those to be targeted in drone attacks, or the question of whether and how such executive decisions might be subject to judicial review.<sup>10</sup>

#### 4. IS *CURTISS-WRIGHT*'S CHARACTERIZATION OF EXECUTIVE POWER CORRECT?

It is very difficult to quarrel with *Curtiss-Wright*'s disposition of the issue before the Court in that case. The problem was not one of Congress v. the President (as *Steel Seizure* was later considered to be), but rather an explicit authorization by Congress for the President to do precisely what he did. However, at the time, the Supreme Court was still laboring under the very restrictive approach to delegation that constituted one front in the wide-ranging battle over the constitutionality of the legislative program of President Franklin D. Roosevelt. Given the anemic nature of the general nondelegation doctrine that emerged after the court-packing fight and FDR's Supreme Court appointments, there is no reason to doubt the correctness of the conclusion that there was no delegation problem in *Curtiss-Wright*, but there is also little need to rely upon the Court's analysis of that issue.

The well-known "sole organ" language in *Curtiss-Wright*<sup>11</sup> raises entirely different issues. Its atmospheric content is very potent, and therefore the case is one that the executive cites frequently and with enthusiasm. What tends to get lost in this traditional invocation of *Curtiss-Wright* is the fact that Congress had authorized the President to take the action he had, greatly diluting the force of this precedent in the situations in which it is often being relied on most heavily—in separation-of-powers disputes in which Congress has either been silent or has, or is at least alleged to have, legislated contrary to the act taken by the President. The other aspect of *Curtiss-Wright* that tends to get overlooked in the executive's

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10. See, e.g., Richard Murphy & Afsheen John Radsan, *Due Process and Targeted Killing of Terrorists*, 31 CARDOZO L. REV. 405 (2009). A lawsuit brought by the father of a dual U.S.-Yemeni citizen alleged to have been targeted for killing by the United States was recently dismissed for lack of standing and on the basis of the political-question doctrine. *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010). The former Acting General Counsel of the CIA has stated that sometimes "the evidence against an individual would be thin . . . that the person was thought to be at a meeting." Mckelvey, *supra* note 3, at 37. His report that the authorizations were rejected in such cases does not provide adequate assurance that the procedures being followed are acceptable.

11. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

enthusiasm for the case is that the statement by then-Representative John Marshall quoted by Justice Sutherland is only that the President “is the sole organ of the nation in its external relations, and its sole representative with foreign nations.”<sup>12</sup> Of course the President must have a monopoly over the channels through which the United States communicates with other states, and he or she decides what messages to send other states, when, and who the proper recipients of the messages are. However, that does not mean that the President has unbounded unilateral authority to set and implement the policies of the United States toward other states, and it certainly does not mean that the President is entitled to unilaterally threaten the use of force, or use force, in the international realm as an incident of the narrower diplomatic role described by *Curtiss-Wright*.<sup>13</sup>

#### 5. HAS PRESIDENT OBAMA IMPROVED BUSH’S NATIONAL SECURITY POLICIES?

Yes. Understandably, the 9/11 attacks that took place before President Bush had completed even one year in office evoked forceful, far-reaching, and dramatic responses. The devastating losses suffered by the United States that day, and the awareness that additional attacks might well be in preparation, called for urgent and energetic responses. The President had every reason to expect that Congress would give him substantial leeway in deciding how to respond to al Qaeda’s war against the United States, and that it would support the policies he formulated, and he was correct. The AUMF granted him broad authority, including that to initiate and conduct the war in Afghanistan, and it was followed by such sweeping legislation as the USA PATRIOT Act and the massive governmental reorganization that created the Department of Homeland Security.

However, a number of the national security policies adopted and executed by President Bush went beyond what was needed to respond to 9/11, and over time it became increasingly apparent that the administration placed an inappropriately high emphasis on vindicating and expanding executive power, without regard to whether unilateral (and often secret) programs adopted by the executive were the most effective way to neutralize al Qaeda and

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12. *Id.* at 319.

13. *Id.*

other terrorists. Thus, without consulting Congress or drawing upon the expertise of military attorneys, the administration precipitately announced its ill-conceived and ill-fated plan to use military commissions to punish those fighting or plotting against the United States. The President's executive order setting up the commissions was a crude, cut-and-paste effort based on FDR's successful (though troubled) decision to use a military tribunal to try the eight German saboteurs captured on U.S. territory in 1942. Little thought was given to the appropriateness of using a similar approach to punish the hundreds or thousands of enemy fighters who might be captured in Afghanistan, nor was any effort made to draw upon the sophisticated court-martial procedures developed after World War II, or to the principles of international law that govern tribunals convened to punish enemy fighters. As is well known, this cavalier approach led to endless modifications designed to improve the plan originally announced, and three rounds of litigation in the Supreme Court, interspersed with legislation.

Much of the turmoil over the military commissions could have been avoided if the Bush administration had not been so determined to act alone. As the Detainee Treatment Act and the Military Commissions Act demonstrate, it is overwhelmingly likely that Congress would have been supportive, and there is no doubt that much of the wasted effort and delay caused by the commissions' plan could have been avoided. Any plan for detention of enemy fighters and punishment of those guilty of war crimes or terrorism developed in consultation with Congress, military lawyers, and outside interest groups would have been far superior to the plan drafted in secret by the Bush administration and emerging full grown, as from the head of Zeus.

In many other areas, the national security policies of the Bush administration were afflicted with the same obsessive commitment to unilateral executive power that doomed the military commissions. For example, in the USA PATRIOT Act, Congress amended the Foreign Intelligence Surveillance Act (FISA) and other statutes to strengthen the tools available in the fight against terrorism. What the administration did not do was ask Congress to make the additional changes in FISA that were necessary to make legal the domestic wiretapping program unilaterally adopted by the President soon after 9/11 and not disclosed until the end of 2005. A consensus has emerged that at least some parts of the program



authorized by the President were inconsistent with FISA, but after several years of legislative hearings, litigation, and public discussion, Congress accepted the administration's request that FISA be amended to account for changes in telecommunications, such as the increasing use of fiber optic cable rather than satellites for many messages. Congress amended FISA in 2008 to allow the types of communications interceptions that the administration identified as necessary, and provided immunity for the companies that assisted in the prior interceptions carried out by the Bush administration. Surely Congress would have been receptive to a request by President Bush in 2001 to amend FISA to give the authority later approved in 2008, but the administration apparently did not want to ask for that legislation. As with the military commissions, an approach based on extreme claims of executive power and bolstered by secrecy was preferred.

The examples already given are but selected aspects of the defective national security policies of the Bush administration. Equally disturbing and well documented are such programs as extraordinary renditions, the torture of detainees in U.S. custody, and the decision to invade Iraq based on the erroneous theory that the government of Saddam Hussein possessed active programs for manufacturing weapons of mass destruction that were close to success. The urgency with which the Bush administration addressed national security after 9/11 was understandable. However, many of the policies adopted were poorly thought out, insular, weakened by extreme secrecy, illegal, and driven by a determination to rely exclusively on an extreme conception of executive power.

My assessment of the national security policies of the Bush administration is a harsh one. The policies of the Obama administration are harder to judge, since the administration has only been in office for two years and many aspects of the policies being implemented are not known to the public. However, to the extent that it is possible for me to make a judgment at this point, I find the Obama policies to be dramatically improved over those of his predecessor. The illegal torture and rendition programs have ended. The Guantanamo detention facility remains in operation despite President Obama's announcement that it would be closed a year after he took office, yet it seems unfair to blame him for this failure. From all appearances, the administration has done a conscientious job of attempting to assemble the facts relating to

each of the detainees, to assess issues of culpability, proof, and dangerousness, and to explain to judges why it wants to continue to hold certain detainees while pursuing the difficult task of finding places to send those whom it does not want to hold or whom it has been told it cannot continue to hold.

On a number of fronts, the advances made by the new administration have been notable. The United States has begun to resume its proper place in the international community as a supporter of international law and its institutions, as opposed to the reflexively hostile approach taken by the Bush administration. Even as to the International Criminal Court, which had raised concerns even in the eyes of the Clinton administration, and as to which the Bush administration worked itself into a frenzy of opposition, the United States is now pursuing a policy of friendly and constructive engagement, even though party status may well remain far in the future. Secrecy about national security policies and their formulation was given a great emphasis in the Bush administration, while the Obama administration seems to be doing a reasonable job of living up to its commitment to greater openness. For example, many of the details of the harsh interrogation of detainees in CIA custody and the disingenuous justification provided by the Justice Department's Office of Legal Counsel were disclosed, despite misgivings by intelligence officials within the Obama administration. The total amount of the intelligence budget was publicly released for the first time as a routine matter.<sup>14</sup> Overall, the administration seems to be aggressively prosecuting individuals and groups thought to be involved in terrorist plots, and even government officials accused of releasing classified information,<sup>15</sup> without engaging in the inflammatory rhetoric and extreme claims that sometimes characterized the responses of the prior administration.

There has been plenty of continuity to go with the change in national security policies. The Obama administration continues to

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14. Steven Aftergood, *A New Milestone in Intelligence Budget Disclosure*, *SECURITY NEWS* (Feb. 15, 2011, 1:51 PM), [http://www.fas.org/blog/secrecy/2011/02/intelbud\\_request.html](http://www.fas.org/blog/secrecy/2011/02/intelbud_request.html).

15. *See, e.g.*, Greg Miller, *Former CIA Officer Jeffrey A. Sterling Charged in Leak Probe*, *WASH. POST*, Jan. 6, 2011, <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/06/AR2011010604001.html?nav=emailpage> (reporting that Steven Aftergood of the Federation of American Scientists stated that the five leaks cases brought by the Obama administration "exceed the total for all previous administrations").

aggressively assert the state secrets privilege, although not as broadly as was done by the Bush administration. Immunity doctrines continue to be invoked to shield the officials responsible for torture, rendition, and illegal wiretapping. Aggressive defenses are asserted in almost all of the habeas corpus cases involving the Guantanamo detainees, and appeals are taken when the district judge finds that the detainee is entitled to release. Since almost all of these matters involve positions inherited from the Bush administration, it is difficult to say in some circumstances what the policies of the Obama administration are. It would be inefficient and perhaps even irresponsible for a new executive to attempt to rework every issue in every pending case as if it could write on a blank slate. There are many particular instances of which I am aware—involving state secrets claims, immunity, and Freedom of Information Act issues, for example—where I profoundly disagree with what the new administration has done. However, I believe that responsible officials are thoughtfully formulating positions intended to protect the national security of the United States while complying with the law.

My preliminary assessment is that the national security policies of the Obama administration are markedly better than those of the Bush administration, especially in light of the many difficult matters that were inherited.

#### 6. SHOULD KHALID SHEIKH MOHAMMED EVER BE BROUGHT TO TRIAL?

Khalid Sheikh Mohammed (KSM) may present an insoluble problem in this regard. While the full details of his involvement in the 9/11 attacks and other attacks on the United States are not publicly available, based on the report of the 9/11 Commission it appears indisputable that he has committed heinous acts that merit the most severe punishment. It also seems clear that he was tortured by the CIA in an effort to prevent future attacks like those of 9/11. Perhaps a fair trial could be conducted in federal court, although there have been substantial obstacles put in the way of that course,<sup>16</sup> and it would be very difficult to reconcile any acceptable notion of procedural fairness with the history of torture

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16. See, e.g., Jane Mayer, *The Trial: Eric Holder and the Battle over Khalid Sheikh Mohammed*, THE NEW YORKER, Feb. 15, 2010, [http://www.newyorker.com/reporting/2010/02/15/100215fa\\_fact\\_mayer](http://www.newyorker.com/reporting/2010/02/15/100215fa_fact_mayer).

in his case.<sup>17</sup>

At least so long as the conflict between the United States and al Qaeda continues, the best (and perhaps the only acceptable) course seems to be to hold KSM as a captured enemy fighter who must be kept from returning to the field against the United States. Allowing him to go free is unacceptable.

7. IS THE THREAT POSED BY A NUCLEAR-ARMED IRAN AS SERIOUS AS THE P5+1 (UNITED STATES, UNITED KINGDOM, RUSSIA, CHINA, FRANCE, AND GERMANY) REPRESENT IT TO BE?

In light of the dramatic recent events in Tunisia, Egypt, and Libya, among other states in the Middle East, this question is even more difficult to answer than it was when framed by the editors of the *Journal of the National Security Forum* several months ago. Moreover, there are some indications that Iran's nuclear program has suffered serious reversals that may delay it for a substantial period, perhaps years.<sup>18</sup> Plainly, Iran's influence on its region and the world does not depend exclusively on its possible future acquisition of nuclear weapons and delivery systems for them, nor is Iran itself immune from the changes underway in so many other states.

As to the magnitude of the threat raised by Iran's effort to acquire a nuclear capability, I do not feel that I have anything to add to the immense speculation that has been published already, some of it quite informed. However, I do think it is important to note that quantifying the threat is not that significant under the terms of the question—that is, on the assumption that the permanent members of the UN Security Council (plus Germany) are more or less in agreement. If there were to be such agreement, it seems highly likely that the UN Security Council would invoke its Chapter VII powers to assure that Iran never completes the project. This is in effect the scenario from the First Gulf War, when in the honeymoon period following the collapse of the former Soviet

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17. On April 4, 2011, Attorney General Eric Holder announced that Khalid Sheikh Mohammed will be referred to a military commission to stand trial. Peter Finn, *Khalid Sheik Mohammed to be Tried by Military Commission*, WASH. POST, Apr. 4, 2010, [http://www.washingtonpost.com/world/khalid-sheik-mohammed-to-be-tried-by-military-commission-officials-say/2011/04/04/AFH1S8cC\\_story.html](http://www.washingtonpost.com/world/khalid-sheik-mohammed-to-be-tried-by-military-commission-officials-say/2011/04/04/AFH1S8cC_story.html).

18. See William J. Broad, John Markoff & David E. Sanger, *Israeli Test on Worm Called Crucial in Iran Nuclear Delay*, N.Y. TIMES, Jan. 15, 2011, [http://www.nytimes.com/2011/01/16/world/middleeast/16stuxnet.html?\\_r=2](http://www.nytimes.com/2011/01/16/world/middleeast/16stuxnet.html?_r=2).

Union and prior to the development by the People's Republic of China of the influence it now wields, it was possible for all members of the UN Security Council to join in authorizing the invasion of Iraq in order to liberate Kuwait.

Much more troubling would be a situation in which some permanent members of the UN Security Council (probably led by the United States) considered Iran's attainment of a nuclear capability to be an imminent and an urgent threat to the peace, while at least one other permanent member was of a different view. This is the scenario that led to the invasion of Iraq in 2003 without the authorization of the UN Security Council. The UN Security Council did recently authorize military action in Libya, but past experience demonstrates how difficult it can be to get UN Security Council approval for even the most urgently needed actions.

9. DOES THE U.S. HAVE ADEQUATE SAFEGUARDS TO PROTECT CLASSIFIED INFORMATION USED IN DOMESTIC COURTS TO PROSECUTE TERRORISTS?

Yes. The recent successful prosecution of Ahmed Khalfan Ghailani in the Southern District of New York demonstrates that existing safeguards are adequate.<sup>19</sup>

10. WHAT IS THE MOST IMPORTANT ISSUE TO AMERICAN NATIONAL SECURITY?

I do not know what the most important issue is, given the broad sweep of the programs, doctrines, and problems that are relevant. Within the narrower realm of national security *law*, the persistent issue that I believe still urgently needs attention is the state secrets doctrine.<sup>20</sup> The way the state secrets privilege has been expanded in recent years constitutes a serious threat to the rule of law.<sup>21</sup> There are already a multitude of principles and precedents

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19. See Clyde Haberman, *A Verdict Replies to Terrorists, and to Critics*, N.Y. TIMES, Jan. 28, 2011, [http://www.nytimes.com/2011/01/28/nyregion/28nyc.html?\\_r=2](http://www.nytimes.com/2011/01/28/nyregion/28nyc.html?_r=2); Benjamin Weiser, *Ex-Detainee Gets Life Sentence in Embassy Blasts*, N.Y. TIMES, Jan. 26, 2011, <http://www.nytimes.com/2011/01/26/nyregion/26ghailani.html>.

20. See *Ten Questions: Responses of John Cary Sims*, 33 WM. MITCHELL L. REV. 1593, 1604 (2007) (identifying the state secrets doctrine as the most important question in national security law today).

21. See, e.g., *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1077-93

that prevent full accountability for violations committed by government officials. There is a sweeping system of classification, and all information properly classified is exempt from release under the Freedom of Information Act, so much wrongdoing never comes to light. When individuals who have been injured by misconduct touching upon national security sue for damages, courts are reluctant to even recognize a *Bivens* cause of action,<sup>22</sup> and even if they do acknowledge a *Bivens* cause of action the doctrines of absolute and qualified immunity raise additional and daunting obstacles.<sup>23</sup> An injured party that discovers wrongdoing as to which an official is not immune may still be barred from recovering if Congress passes a statute immunizing the wrongful conduct. These obstacles are substantial, and few claimants ever successfully run the gauntlet necessary to recover. There is no justification for adding an elastic state secrets doctrine to these defenses.

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(9th Cir. 2010) (en banc) (affirming, on state secret grounds, dismissal of claims brought by victims of the extraordinary rendition program).

22. *See, e.g.,* Arar v. Ashcroft, 585 F.3d 559, 565 (2d Cir. 2009) (en banc) (“[affirming dismissal of a claim arising from rendition because] Congress has not prohibited the practice, imposed limits on its use, or created a cause of action for those who allege they have suffered constitutional injury as a consequence”), *cert. denied*, 130 S. Ct. 3409 (2010).

23. *See, e.g.,* Lebron v. Rumsfeld, 2011 U.S. Dist. LEXIS 16192, at \*37 (D.S.C. Feb. 17, 2011) (dismissing constitutional tort claims based on alleged mistreatment of Jose Padilla, on the basis that no *Bivens* claim may properly be asserted, and that in any event defendants’ alleged acts did not violate “clearly established” law and therefore were entitled to qualified immunity).