

FINAL EXAM
COUNTERTERRORISM LAW

December 13, 2011

Professor Shanor

You have **three hours to write this exam, which is designed to be done in two and one-half hour**. Please use your extra time to read carefully and document your answers rather than writing verbiage. It is my hope that no part of the first two parts of the exam will require more than a page, and some parts can be answered very briefly.

The five-page exam contains **3 parts**. **Part I consists of one factual scenario with five questions; part II provides five provisions of a proposed statute for you to analyze; and Part III contains one question**. You should spend about one hour each on Parts I and II, and about 30 minutes on Part III.

Your **exam number** should appear on **each exam page** and **each answer page**. This exam is covered by the **honor code**; by placing your exam number on this copy of the exam and your answers, you are pledging to abide by the code.

This exam is **open book** (including casebook, notes, written study aids). Computer research, downloading, electronic cutting and pasting, etc. are **forbidden**, as is assistance from any other person. This exam is being administered at different times. **Do not discuss the exam** – some classmates may not have taken it.

Answer concisely; verbose answers do not help, will interfere with your analysis, and will cause you unnecessary time pressure. If you think you need **additional information** to analyze any question, state what you believe is needed and why it makes a difference.

All exam questions must be returned at the end of the exam, whether you write or type your answers!

Read, think, and organize before you write!

GOOD LUCK AND HAVE A HAPPY HOLIDAY!

I.
(one hour)

The receding successes of the Seal Team Six raid on Osama bin Laden's compound and the targeted killing of Anwar al-Aulaqi, the American-born editor of *Inspire*, the glossy English-language jihadist magazine, made the Obama administration eager for another terrorism victory before the 2012 elections. Fortunately, another target appeared -- Ayman al-Zawahiri, the Egyptian physician named al Qaeda leader after bin Laden's demise.

The first inkling of al-Zawahiri's whereabouts came through an intercept of a text message between two American converts to the al Qaeda cause inspired by al-Aulaqi. This lead, with other triangulated information, including deliveries of a costly Hepatitis C medication Zawahiri had been taking, led the DoD, CIA, and Director of National Intelligence to conclude that their target was hiding in Sari, an Iranian Caspian Sea port with a population of 250,000 near Iran's border with Turkmenistan.

Drone overflights seeking confirmation of Zawahiri's location produced little tangible data and the loss of one drone, about which Iran gloated to the global media. Eventually, CIA assets in Turkmenistan identified a refrigerated truck carrying Hepatitis C medicine intended for Iran. The CIA assets then hijacked the truck and replaced its occupants with CIA operatives. In the Turkmen desert, CIA agents unloaded and put the medicine in special syringes having a compact sensor that could read the recipient's DNA and broadcast it to a CIA satellite. The CIA agents then transported the medicine to its Iranian destination.

Within two weeks, the CIA picked up a DNA signal similar to those of a Zawahiri relative who had donated blood to the Red Crescent (the Muslim counterpart to the Red Cross). The house pinpointed was very close to the waterfront. Unfortunately, it was inside a walled compound, surrounded by many other homes, and a scant fifty yards from a hospital, making a drone strike out of the question. Moreover, the Administration wanted to make sure it had the correct target, for nothing more could go wrong in Iran. The best approach would be via the Caspian Sea—in by sub and out by sub. A job for the Navy Seals.

The Seals, dressed in Iranian Revolutionary Guards garb, entered Sari on the stormy, moonless night of June 7, 2012. They quickly made their way to the compound, scaled the walls, and entered. Meeting no resistance, they quickly packed up computers, a cell phone, and notebooks found amid copies of *Inspire*. A video camera and a backdrop identical to one in the latest Zawahiri video led them to believe they had the right home.

When they went upstairs, they found three people sleeping, a man who looked like Zawahiri, a teenage boy who had an eerie resemblance to al-Aulaqi, and a third man of swarthy complexion. They sedated and hooded all three (using the chloroform-soaked cloths technique) and rolled them to the dock in wheelbarrows. Nobody seemed to notice the CIA movements and, if they had, they would have thought it another Revolutionary Guards operation to avoid like the plague. Without a hitch, the Seals returned with their quarry to the sub and soon boarded a Jeppesen Dataplan flight from a Turkmenistan airfield directly to Guantanamo.

One month later, Seymour Harsh wrote a blockbuster exposé for the *NEW YORKER* exposing the CIA operation to track Zawahiri through a medicine shipment from Turkmenistan. The article quickly spread globally, and led to protests in which several people died. Harsh's article did not mention the exact medicine used, but it did name the CIA station chief in Turkmenistan's capital as "Rebecca Jones" and claimed that she signed off on the operation. After the story broke, Ms. Jones was expelled from Turkmenistan. Two

weeks later, an antiwar activist photographed Ms. Jones at a Virginia supermarket and posted the photo to his website.

Three months later, IRNA, Iran's national press agency, reported that a rash of deaths among Hepatitis C patients in Sari had been traced to a shipment of spoiled medicine that entered the country through Turkmenistan. Among the victims in Sari was a prominent lawyer and human rights activist, Hussein Jabbar, whose son, Afshin, is a professor of robotics at Carnegie Mellon University in Pittsburgh and an American citizen.

1. Assume that the teenager was al Aulahi's son, an American citizen who had taken over editorship of *Inspire* following his father's death. The son had not participated in the 9/11 attacks, had never received military training, had never corresponded directly with individuals who have been involved in attacks on America, and had never been in Afghanistan or Iraq. What charges could the government file against him? What hurdles would the government face in prosecuting him?
2. The second man, turned out not to be Zawahiri, but an Egyptian accountant named Tariq. After two weeks of sleep deprivation, stress positions, walling, and three instances of waterboarding on the boat ride to Guantanamo Bay, Tariq confessed to being a member of al-Qaeda and described two transactions with German chemical companies for reagents to make chemical weapons. The CIA also has a classified dossier from Egyptian intelligence alleging that Tariq managed the finances of a group tied to pogroms against Coptic Christians in Egypt. The United States decides not to try him, but to return him to Egypt. Tariq, however, sues to prevent his release and his lawyer released a statement that Tariq would rather "spend the rest of his life praying in an American cell than be subjected to the rack in an Egyptian torture cell." Discuss the legal and evidentiary issues in Tariq's suit.
3. The swarthy man, it is discovered, is also American. He is Dr. Strangelove, a prominent member of Doctors Without Limits who had brought medicine for Zawahiri. The doctor was sleeping, awaiting Zawahiri's return, so he could administer the medicine. Assume Dr. Strangelove is brought to the United States for trial in federal court for "material support of terrorism." Has he provided "material support" under federal law?
4. Professor Jabbar files suit in the Western District of Pennsylvania against CIA Director General Petraeus and Rebecca Jones, alleging that they caused the wrongful death of his father by supplying tainted vaccine to Iran. The government moves for summary judgment. Discuss the legal basis for Prof. Jabbar's suit, any government defenses, and the factors the court will use to determine the result of the government's motion.
5. What protections would the Seals have under international law had they been captured before completing their mission?

II.
(one hour)

Different versions of the National Defense Authorization Act (NDAA) recently passed by the House and Senate are in the process of reconciliation. Several renumbered provisions from the various versions are set forth below. **For each provision, analyze what changes the bill makes to current law, using examples where appropriate.**

§1. Military force, as authorized by the AUMF, may be used against:

(a) A person who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored those responsible for those attacks.

(b) A person who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces.

§2. The Armed Forces of the United States shall detain a person who is captured in hostilities authorized by the AUMF in military custody pending disposition under the law of war unless the Secretary of Defense, in consultation with the Secretary of State and the Director of National Intelligence, certifies to Congress that waiving this provision is in the national security interests of the United States.

§3. The Administration shall develop a national security protocol for each detainee containing a description of the authority of the individual to have access to counsel and any limits on access to that counsel, what items are forbidden and allowed to that individual, what sort of information the individual is not allowed to discuss with outside parties, the nature and controls on the outside communications allowed to the individual, and the nature of any monitoring of legal materials to which the individual may have access.

§4. No funds appropriated shall be used to (a) create sites in the United States to house current detainees or those detained under §2; (b) transfer or release any non-citizen detained outside the United States into the United States, or; (c) transfer detainees to any foreign country when any prior transferee to such country has, subsequent to return, engaged in terrorism against the United States.

§5. No federal court shall have jurisdiction to try any foreign national accused of a terrorism offense and who is subject to trial for that offense by a military commission.

III.
(30 Minutes)

Here is a conclusion to a fictitious law review article. Please comment on the accuracy of this conclusion in light of the materials you have read in this course.

The Supreme Court has pursued a blatantly political agenda in dealing with civil liability for terrorism and counterterrorism. It has imposed liability for terrorism on individuals, organizations and countries that would not, under traditional legal doctrines, face civil liability. Conversely, the Court has exonerated from liability those who have, in opposing terrorism, acted both negligently and even intentionally in violating all precepts of human dignity. Neutral principles of civil liability, in a phrase of the Court's, have had no place in its world, a universe in which the "[national] interest in combating terrorism is an urgent objective of the highest order." Urgent or not, that objective has trumped the rule of law.