Terrorism Outline – Shanor Fall 2006

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I. INTRO TO MODERN TERRORISM AND RESPONSES TO TERRORISM

- New Terrorism: Broader vision, better communication, no longer nation-state based. Roots:
  - Al Qaeda gained audience in South Asia because people there had no money, weren’t modernizing
  - The U.S. helped arm Afghans, who learned they had power when they successfully drove out the Soviets
  - Unsustainable social programs that bred resentment
  - Islamo-fascism
- Old Terrorism: Used criminal law tools

9/11 Report
- did not include broad policy directives
- Shanor pointed out report called for increased use of diplomacy
- Oil?
  - Money from oil may fund terrorism
  - But was not mentioned in the report

Report Card
- In all fairness, could reflect state of where we are, not where we are going.

IIA. CRIMINAL LAW AND CRIMINAL JURISDICTION

1-1. Introduction
- Terrorism is difficult, if not impossible to define.
- U.S. v. Yousef nicely summarizes some of the focuses of attempted definitions.
- Notes p. 4.
  - Note 1: U.S. Code definition of terrorism: “premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents.” 22 USC 2656f(d)(2).
  - Note 2, arguable whether Unabomber was political. A “lone wolf” terrorism provision was set up to catch guys like the Unabomber
  - Note 3, DC snipers. Didn’t seem to have a political motivation.
  - Note 4, U.S.S. Cole Bombing.

1-2. Ordinary Criminal Laws Applied to Terrorists

- 22 U.S.C. 2656f(d)(2) is underutilized because there is a lot of wiggle room. Often times traditional criminal statutes are better.
- Kasi argues there was reversible error because the jurors thought he was a terrorist even though he was not accused of terrorism. Court rejects this argument because of the policy of protecting jury deliberations
1-3. **Laws Aimed Specifically at Terrorism**

- One law that is a bit different is regarding the provision of funds/materials to terrorist organization. There is a process for designating an organization as a terrorist group. 18 USC 2339B.
- 8 USC 1189(a)(4) Criteria to designate a group as a foreign terrorist organization:
  - Org is a foreign org
  - Org engages in terrorist activity (as defined in § 1182(a)(3)(B) or terrorism as defined in § 2656f(d)(2) or retains the capability and intent to engage in terrorist activity or terrorism, and
  - The terrorist activity or terrorism of the org threatens the security of the U.S. or U.S. nationals.


- Hammoud challenged the accusations in four ways:
  - Freedom of association
    - Court applies the *O'Brien* test and finds that the statute satisfies all four prongs of the test:
      - It is within the constitutional power of the Gov't
      - It furthers an important or substantial government interest
      - The governmental interest is unrelated to the suppression of free expression; and
      - The incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.
  - Overbreadth
    - "As here, a statute is addressed to conduct rather than speech, an overbreadth challenge is less likely to succeed"
  - Vagueness
    - Material support is defined in the statute
  - Designation of an FTO
    - Even if he isn’t giving money per se, providing resources that can be traded off for weapons or other terrorist uses, he is still supporting crime

*Notes p. 18*

1. If the courts define these terms, there is less notice and more squishiness for defendants to argue. Also, really isn’t the courts’ role to engage in defining entities as terrorist organizations.
2. If you can cut off the money, you can perhaps cut off the acts.

**UK Terrorism Act 2006**

- Goes a lot further than U.S.:
  - It is an offense to publish statements that induce or encourage acts of terrorism
  - Glorify the commission or preparation of terrorist acts
  - Punishment is up to 7 years in prison or a fine or both
• There is no 1st Amendment in the UK
• UK Terrorism Act in action: Souad article
  • Al-Massari claims he is running a passive website, not encouraging terrorism himself

1-3. Treason and Sedition
• Shanor didn’t want to spend much time on this
• Argument is that constitutional requirements of treason clause were not met
• Court says that seditious conspiracy is not treason and the constitutional argument fails
• P. 27, U.S. prohibits only use of force, physical obstruction or threats of force
• Jury trial ran 9 months – these prosecutions are expensive

IIB. EXTRA- TERRITORIAL CRIMINAL JURISDICTION

2-1. Federal Legislation
• Crime must have occurred overseas
• Not extraterritorial jurisdiction if an American commits a crime against another American overseas
• U.S. Attorney’s Manual p. 32 – lists statutes where extraterritorial jurisdiction is valid
• Policy for Extraterritorial Jurisdiction
  o Want to have reach into countries that could harbor terrorists
  o Don’t want to share intelligence
  o Protect Americans overseas
  o Other country may not have the capability to carry out a trial
  o Different sentences
  o May be more reasons . . .

• Note, there is a difference between universal and extraterritorial jurisdiction
• **Universal jurisdiction:** is a controversial principle in international law whereby states claim criminal jurisdiction over persons whose alleged crimes were committed outside the boundaries of the prosecuting state, regardless of nationality, country of residence, or any other relation with the prosecuting country. The state backs its claim on the grounds that the crime committed is considered a crime against all, which any state is authorized to punish.
• **Extraterritorial jurisdiction:** is the legal ability of a government to exercise authority beyond its normal boundaries.

2-2. Limits on Extra-Territorial Jurisdiction
U.S. v. Yousef (2d Cir. 2003) p. 34.
• Yousef committed crimes outside of the U.S. Question is whether U.S. has the right to exert extraterritorial jurisdiction.
• Yousef planned to commit an attack against a U.S. plan overseas
• Is there extraterritorial jurisdiction under customary international law?
 Doesn't matter, because CIL "cannot alter or constrain the making of law by the political branches of the government as ordained by the Constitution"

- Treaties may be a source to determine if extraterritorial jurisdiction applies
- **Held:** In *Yousef*, universal jurisdiction was not proper under customary international law because terrorism does not provide a basis for universal jurisdiction. However, jurisdiction was proper under U.S. statutes, treaty obligations, and other principles of CIL other than the universality principle.
- **Due process:** 9th Cir. has held that in order to apply extraterritorially a federal criminal statute to a Δ, there must be a sufficient nexus between the Δ and the U.S., so that such application would not be arbitrary or fundamentally unfair.
- See p. 11 of supplement – 3 cases said that international terrorism is subject to universal jurisdiction:
  - *Peterson v. Islamic Rep. of Iran* (D.D.C. 2003). Int'l terrorism is subject to universal jurisdiction, Δs had adequate notice that their actions were wrongful and susceptible to adjudication in the U.S.

### III. TERRORISM PROSECUTION PROBLEMS - WITHHOLDING EVIDENCE AND WITNESSES

#### 1. Material Witnesses

- Material witnesses to matters relating to national security may be held as long as there is probable cause that he or she has material evidence regarding a criminal offense.
  - This is neither criminal arrest nor military capture.
  - Authority vested by Bail Reform Act of 1984, 18 USC 3144.
- Material witnesses run two substantial risks:
  - May be a path to being a coconspirator Δ. Ex. Terry Nichols.
  - If you don't cooperate, may be later prosecuted for perjury or obstruction of justice.

#### 2. Extradition

- Extradition occurs when a person suspected of criminal activity in one country who is found in another country is surrendered through diplomatic channels for trial and punishment.
  - If there is a treaty, then extradition follows. See list in 18 USC 3181.
- Noteworthy components of extradition treaties:
  - Reciprocity: extraditable offense must be a criminal offense in both countries
  - Some countries refuse to extradite their own citizens
  - Some countries refuse to extradite fugitives who could receive the death penalty
- Political offense exception: sometimes frustrates U.S. when individuals argue their crimes were political
- Doctrine of Specialty: as part of CIL demands that extradited person be tried only on the charges set forth in the documentation provided in support of the extradition. Note: can be waived by host country.

3. Rendition

- Rendition = self-help that occurs in the absence of a treaty
- Techniques include:
  - informal surrender by host nation
  - luring the suspect by subterfuge or deception
  - forcible kidnapping
  - military rendition
- *Ker-Frisbee* doctrine says that legality of the abduction was not a defense to federal court jurisdiction.

*The Agent*, New Yorker article

- Problems with the investigation
  - CIA/FBI did not communicate with each other
  - Yemeni resistance
  - Cultural awareness
  - Interrogation could have been a disaster, but investigator turned it around
  - Security of the investigators
  - Political context - eventually investigators got thrown out of Yemen by the U.S. Ambassador
  - Physical evidence
  - Terrorists have particular training designed to make them resistant to interrogation

3-1. The Accused's Rights

- Bases for rights:
  - Fed. R. Crim. P. 16(a)(1)(E) gives criminal Δs broad right to obtain physical evidence in the government’s possession.
  - Jencks Act, 18 USC 3500(b) – prosecution must disclose to the defense any statement of any witness in the possession of the govt if the statement relates to the witness’s testimony.
  - In *Brady v. Maryland*, SCOTUS held that suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment.
    - Milligan points out that *Brady* has been modified by subsequent case law
- *Shanor* wants to focus on **Classified Information Procedures Act** ("CIPA") that allows government to substitute a summary or statement for actual evidence
  - Reason behind CIPA statute is to establish a balance between national security interest and criminal defense rights
  - Courts have upheld CIPA as being constitutional as a general matter
- Courts get to look at the original documents to see if the summary is complete
- CIPA leads to exclusion of demeanor evidence since it only allows production of documents

3-2. The Prosecution’s Dilemma

U.S. v. Moussaoui (4th Cir. 2004) p. 51

- Applies CIPA to people. Government would not produce Al Qaeda operatives for the defense to interview witnesses. Policy behind this is that Government is worried that defense counsel would leak info or interrupt flow of interrogation.
- What does the defense lose in this process?
  - Demeanor evidence is excluded
  - Defense can’t depose its own witness
  - Won’t get entire answers, just selected parts
- 4th Cir has no statute, it is trying to create a common law criminal procedure. CIPA is a statute.
  - Could argue it was necessary for 4th cir to do so
  - Could argue that 4th cir shouldn’t be creating law
- P. 62, if there is a jury, it must be provided with certain information regarding the substitutions. At a minimum:
  - That substitutions are what the witnesses would say if called to testify
  - Subs are derived from statements obtained under conditions that provide circumstantial guarantees of reliability
  - Substitutions contain statements obtained over the course of weeks or months
  - Members of the prosecution team have contributed to [redacted] the witnesses
- Held: Moussaoui had a 6th amendment right to certain testimony that government previously refused to produce. Government could produce substitutions, but jury must be made aware of certain information regarding the substitutions.

Mosaic/web of information theory: little pieces of information may enable terrorists to map a web of what the government is researching. In the book, they call this a web of information.

People v. Mounir El Motassadeq (Germany) (Mar. 4, 2004) p. 65

- How does the German court approach this differently? Similarities?
  - Foreign courts may be harder on U.S. government than U.S. courts
  - German court didn’t dismiss the case, but says that a judgment must be made by a particularly careful weighing of the available evidence and when necessary giving the benefit of the doubt to the accused.
    - This seems different than U.S. treatment where accused does not seem to get benefit of the doubt, at least in terrorism cases.
- Remand – Motassadeq was acquitted even though U.S. likely had information that he was involved in the 9/11 attacks
  - He was convicted of being a member of a terrorist organization under German law
• U.S. refused to produce information sufficient for his conviction. Germany
government sealed interrogation statements. (Germany doesn’t have a CIPA-
equivalent statute.)

• Case dismissed because the government failed to produce information that was
found to violate the Δ’s rights.
  o Gov’t acknowledged that it committed serious error. Court commended
them for fessing up that they were wrong.

IV. PRACTICAL PROBLEMS IN CRIMINAL
PROSECUTION

4-1. Lacking sufficient evidence

9/11 Commission Report Excerpt (discussing FISA)
• Government overcomes this by going after people for non-terrorist charges, such
  as immigration
• There are special tools, biggest of which is the FISA statute
• Title III – need probable cause to believe a crime has or will be committed, go to
  judge to get warrant, then go to premises for search and seizure
• Under FISA, no probable cause for crime needed, just need reasonable belief
  that person is a member of a terrorist organization or an agent of foreign
  government
• What if a warrant is issued under FISA, then they find out a crime actually was
  committed? No unreasonable search and seizure.
• FISA trial court decided the wall of separation was not to be bridged, then appeal
  court said no, the wall is not mandated and government policy had been in error
• No, there are more FISA warrants than Title III warrants
• FISA was designed to deal with intelligence functions not prosecution functions
  even though sometimes it does provide prosecution information

4-2. Difficulty Capturing Suspected Terrorists
• Still haven’t captured Bin Laden
• Tried to indict him in absentia in U.S. v. Bin Laden

NSA Surveillance
ACLU v. NSA (Aug. 17, 2006)
• First decision in the U.S. to deal with whether Bush’s surveillance program is or
  is not constitutional
• Program allows monitoring of telephone calls where one party is a non-U.S.
  person overseas and government has reasonable basis to conclude that one party
to the communication is a member of al Qaeda, affiliated with al Qaeda, or a
member of an organization affiliated with al Qaeda, or working in support of al Qaeda.

- **Standing:** Surveilled individuals can't say there is an injury in fact just on the basis of being overheard, they just claim that their ties overseas are now tarnished. Court says that substantial burdens upon a II’s professional activities are an injury sufficient to support standing.

- **State Secrets Privilege:** gov’t argues that state secrets privilege bars II’s claims b/c II's cannot establish standing or a prima facie case for any of their claims without the use of state secrets.
  - First line of cases is more a rule of non-justiciability b/c it deprives courts of their ability to hear suits against the gov't based on covert espionage agreements
  - Second line of cases deals with exclusion of evidence because of the state secrets privilege.
  - Decision tree for Totten/Tenet rule:
    i. Is there a secret espionage relationship between the II and the gov’t?
    ii. Does the information for which the privilege is claimed qualify as a state secret?

- Court says all these were violated via wiretapping program:
  - Fourth amendment
    i. Doesn’t always require warrants, reasonableness of search is key
    ii. Look at extract from Military Law handout U.S. Dist. Court case says foreign intelligence surveillance for 4th Amendment can be either reasonable or have an exception for a warrant
  - First amendment
    i. There seems to be an interest in monitoring speech, question is whether government listening in is an infringement by itself
    ii. There seems to be an associational rights issue here, too, because the gov’t may not have known which group, if any, the speakers belonged to until after surveillance was conducted

- Separation of powers
- AUMF doesn’t grant authority either, although Shanor says best argument here is a statutory argument that FISA was designed to protect against unauthorized surveillance. Judge Taylor’s basic argument is that you can’t read the AUMF alone, but read it in light of FISA

- The cartoonist is all wet
  - Rebuttal to cartoon – AUMF was passed after FISA, so arguably it overrides FISA for those parties directly linked to the 9/11 attacks
  - Electronic communication has changed significantly since the 70s when FISA was passed
  - President appealed this opinion. There is legislation pending that seems to be agreed upon between the Whitehouse and the republican senators that would provide some authorization for NSA surveillance without warrants

• NSLs allow gov’t to get information from third parties
  o Banks
  o Phone companies
  o Libraries
  o ISP
• No one who is served with a National Security Letter is permitted to speak about it. 18 USC 2709.
• This litigation began because there was no challenge procedure for third parties to challenge NSLs

FISA Processes
• Foreign Intelligence Surveillance Act of 197: regulates collection of “foreign intelligence” info within the U.S. whether or not there has been a probably violation of any law.
• Foreign intelligence information “relates to” protection against possible hostile acts, sabotage or terrorism, or clandestine intelligence activities by a “foreign power” or its “agents.”
• For U.S. citizens and permanent residents: person must be about to violate U.S. law, cannot be targeted solely on the basis of activities that are protected speech under the 1st Amendment, and the info must be “necessary to” U.S. national security, national defense, or foreign affairs.

4-3. Security For Trials
• Δ objected to empanelling an anonymous jury on grounds that it impacts the presumption of innocence and due process rights by giving the jurors the notion that they are bad or dangerous people.
• Held: court approved use of anonymous jury because of publicity surrounding 9/11 → raises public policy questions of whether there should be different standards for terrorism cases to protect security of jurors.

4-4. Determining the Appropriate Punishment
U.S. v. McVeigh (10th Cir. 1998) p. 94
• Waco Evidence
• Victim impact testimony
  o The test for whether the testimony is “part and parcel of the circumstances” of the crime properly presented to the jury at the penalty phase of the trial
  o District Court said that only objective evidence was allowed and no gruesome photos would be allowed. Judge also instructed the jury to not be swayed by the emotional outpourings.

U.S. v. Meskini (2d. Cir. 2003) p. 110
Meskini complained that because his crime was considered terrorism, he got extra punishment. His prison sentence was doubled b/c of federal statute enacted after 9/11.

**Note:** After *Booker* (2005), sentencing guidelines are no longer mandatory. Shanor says that even if the guidelines weren’t mandatory on Chief Judge Walker, he could under his discretion add punishment based on past criminal efforts.

### V. CIVIL RESPONSES TO TERRORISM

#### 5-1. Exclusion of Suspected Terrorists

- Shanor doesn’t think the book does the best job in treating immigration law with relation to terrorism
- 18 USC 1182(a)(3)(B) excludes any aliens who:
  - Have engaged in a terrorist activity
  - The gov’t has reasonable belief that he is or is likely to be involved in terrorist activity after entry
    - seems like the State Dept is better positioned to decide who is a terrorist organization then Congress.
  - Represents a foreign terrorist organization or a group that undermines U.S. efforts to reduce or prevent terrorist activities
  - The definition of terrorism included is extremely broad
- This possibility of errors is significant as evidenced by fact that INS issued visas to two of the suspected 9/11 hijackers months after their death → err on side of exclusion?
  - But, immigration restrictions have affected whether students and teachers can come into the country

*Adams v. Baker* (1st Cir. 1990) p. 117

- Because Adams (member of Sinn Fein) is outside of the U.S. he doesn’t really have a first amendment right, but rather a statutory right that just mirrors first amendment considerations
- Standard of review for governments decision to exclude an alien is clear error
  - Actions can be, even if speech cannot be, reason for exclusion from the country
  - State Dept. has a lot of discretion
- McGovern amendment presents an exception to the immigration bar saying that sheer membership is not a reason to be barred
  - burden of establishing eligibility is on the alien
- but, as note points out, Adams was eventually let in after he made conciliatory statements about ending violence

#### 5-2. Immigration Sweeps

- Immigration Sweeps post-9/11
  - A lot of people were rounded up
  - Concerns were expressed about racial targeting
- We don’t really have the resources to treat all immigration violators separately
- How does the rubber hit the road? Removal, Exclusion, or Deportation
- Call in Program. Was actually quite successful, led to 13,000 men being placed in a deportation program.
- Government’s discretion in dealing with immigrants has some limits. Mandatory detention of suspected terrorists under the Patriot Act. AG is supposed to commence removal proceedings or bring criminal charges within 7 days.

Report of the Inspector General
- gov’t was sweeping up people and not treating them equally as far as detention
- there is a pattern of racial profiling

5-3. Public Information

- Freedom of Information Act challenge:
  - 1st amendment argument failed because it gives you a right to speak, but not necessarily to receive information
- Giving info out to the public about who is being detained is likely to disrupt law enforcement proceedings, so it doesn’t need to be given out
- Note after case addresses issue of deportation cases being maintained strictly on a confidential basis.
- In times of war, public access to information decreases and invasions of personal privacy go up

Schneiderman v. U.S. (1943) p. 37
- Schneiderman was a naturalized citizen, but then because of his involvement in the Communist party, the U.S. wants to throw him out
- Statute says you must “be attached to the principles of the Constitution”
  - Gov’t argues that Schneiderman is part of groups that want to overthrow the U.S. government and replace its structures with Communist models
- Should free speech principles protect what Schneiderman says?
  - When Schneiderman came into the country, he had no free speech rights, but then now he does. This is problematic, but seems to be true.
- Court finds for Schneiderman because he hasn’t broken from the basic tenets of the Constitution.
- Problem for prosecution is that they don’t have much, if any, specific things that he said
- There seems to be a difference in the majority and the other judges
  - Frankfurt says certain components are set in stone
  - Other judges say that amendment process allows alteration of the Constitution
  - Majority says all of this stuff can be changed by amendment
  - The irreducible minimum is peaceful amendment, there was nothing here to say Schneiderman insisted on a violent overthrow
• Aliens and naturalized citizens seem to have fewer rights than naturally born citizens

5-4. Deportation and Human Rights

Bellout v. Ashcroft (9th Cir. 2004) p. 139

• Statute is highly discretionary and there is no judicial review.
• Bellout argues that you can’t send him back to Algeria because of the Convention Against Torture
• Alien has burden of proof to show he is more likely than not to be tortured in his home country if deported
  o But, you can send someone to a different country

6-1. Unilateral Economic Sanctions.


• Shaham likes this case because it exposes us to this world of economic sanctions
• It puts in place a great scheme to avoid the US’ sanctions against Iran by going through China
• Defense says this is against US law, the court affirms because the agreement upon which it’s claim is based is illegal and against public policy

6-2. Multilateral Economic Sanctions


• Whizzed through

VII. USING MILITARY FORCE IN FOREIGN COUNTRIES

7-1. Military Force as a Response to Terrorism

• 7th wonder of the world example
  o Country could attack in self-defense if reasonably necessary and proportional force
• What does the White House argue in their national security strategy?
  o Pre-emption is necessary
• White House position differs from ICJ position in requiring self-defense, ICJ wants clear evidence of armed attack or threat of attack
• International agreements, treaties and conventions concern military responses to terrorism:
  o U.N. Charter
  o Geneva Convention relative to the Treatment of Prisoners of War (GC III)
  o Geneva Convention relative to the Protection of Civilian Persons in Time of War (GC IV)
  o U.N. Int’l Covenant on Civil and Political Rights (ICCPR)
  o European Convention on Human Rights
  o U.N. Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
7-2. Military Force and the U.N. Charter

- Article 2(4) says that “All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the U.N.”
- Two basic situations where nations may use force:
  - **Article 42**: Security Council may authorize use of force as may be necessary to maintain or restore int’l peace and security.
  - **Article 51**: inherent right of individual or collective self-defense if an armed attack occurs against a member of the U.N., until the Security Council has taken measures necessary to maintain international peace and security.
    - Must report measures taken immediately to the security council.

NATO—Article 5 of the Washington Treaty

- States that an armed attack on one or more of the Allies in Europe or North America shall be considered an attack against them all
- Invoked after September 11, 2001

The Bush Doctrine

- U.S. maintains the option of preemptive actions to counter a sufficient threat to national security. Used to justify:
  - 2003 invasion of Iraq
  - Israeli actions in 2006
    - U.N. condemned Israel’s response to Hezbollah as excessive and disproportionate even though it was self-defense

Definition of Armed Attack and Question of Necessity and Proportionality


- An armed attack can include “the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to an actual armed attacked conducted by regular forces, or its substantial involvement therein.”
- Providing arms to the opposition is not an armed attack.
- Court says response was not proportional


- U.S. did not sustain burden of showing that Iran was responsible and hence target (oil platforms) was not legitimate military target upon which self-defense attack was appropriate.

Congo v. Uganda (2005 ICJ)
• Majority did not consider the attack to be armed and could not attribute the attacks to the DRC (a rebel group)
• Judge Simma said that you must allow for some recourse
• High Command document was not in line with Article 51

**Israeli Separation Border case**

• Israel started constructing a wall to block off part of the West Bank
• Also instituted new administrative regime requiring ID cards
• Article 2(4) says members should refrain from threat or use of force
  - FCN treaty says “no territorial acquisition resulting from the threat or use of force shall be recognized as legal
• GC IV Article 2(1) applies when two conditions are fulfilled:
  - Armed conflict
  - Conflict has arisen between two contracting parties
• Held: construction of barrier is inconsistent with Article 51 (no self-defense), the wall was not necessary, and is contrary to international law.
• Dissent: didn’t think the ICJ should have even heard the case b/c it did not have j/d to render the advisory opinion. Says some portions of the wall may meet the test and be okay and, the U.N. Charter doesn’t limit right of self-defense to responses to state actors, hence, the general threat of terrorism may suffice.

**Pros and Cons of Using Force to Invade Iraq and Israel**

✓

• Hezbollah did exactly what the UN said is a justifiable action to respond to by using force
• Iraq – alleged bio-weapons trailers
• Difficult to determine at which point force is justified
• Necessity – in Iraq, if there was an imminent attack, would necessity justify attack?
• Potential for cooperation between Al Qaeda and Iraq

**Starving the Terrorists of Funding**

• Changes since 9/11
  - Focused on charities, specifically Muslim charities
  - Hawalas are more closely tracked
  - Increased bank “Spying”
  - Tax-exempt status can be stripped away if org engages in terrorist activity
  - Expanded definition of “U.S.”
  - International
  - Technical assistance – helping banks in less sophisticated countries to monitor money laundering and terrorist activities
  - Treasury working to freeze assets overseas based on five criteria
    - Executive Order
  - How effective have these changes been?
    - Probably made terrorist financing a little more difficult
    - Has not edged it out completely
• Author compares dealing with terrorists to the money-laundering activities the Treasury has dealt with. The problem with terrorism is that it takes clean money and uses it for “dirty” purposes instead of the other way around. It is really hard to prevent the use of clean money for terrorism.

_Europe Panel Faults Sifting of Bank Data_

• Is this the same as NSA?  
  
<table>
<thead>
<tr>
<th>NSA</th>
<th>Swift</th>
</tr>
</thead>
<tbody>
<tr>
<td>Greater privacy interest</td>
<td>Lesser privacy interest</td>
</tr>
<tr>
<td>Lesser search</td>
<td>Always regulated</td>
</tr>
<tr>
<td></td>
<td>Greater search</td>
</tr>
</tbody>
</table>

• The originally proposed Patriot Act actually had more intelligence mining aspects, but that was killed by Congress

8-1. **Military Assistance to Law Enforcement Domestically**

• Internationally, the UN charter restricts use of force, but within a country, the UN charter does not apply

  _Posse comitatus_ says that US can’t use its military against its own people.


• Padilla’s detention in order to interrogate him about the unlawful organization with which he is said to be affiliated and with which the military is in active combat, and to prevent him from becoming reaffiliated with that organization does not violate the Posse Comitatus Act.

_Attorney-General for Northern Ireland’s Reference (1977)_ p. 182

• What kind of standards are troops held to if they use force within the country

  • Answer here is that “reasonable” force may be used

    • Is reasonable the same to a police officer as it is to a member of the military?

VI. **TARGETED KILLING AND GROUP PUNISHMENT**

**When is killing okay in international law?**

• Self-defense/defense of others

• Prevent escape

• Enemy combatants in war

  • Difference between killing/assassination v. killing enemy combatants.

• To quell a riot or insurrection

• _Cf._ ordered execution

9-1. **Civilian and Military Rules**

• Lieber Code of 1863 § 15 (adopted by U.S. Dept. of War):

  • Military forces may kill enemy combatants, nothing in the law of armed conflict requires military forces to afford enemy combatants the opportunity to surrender before attacking them
• **But**, assassination of enemy leaders is not necessarily sanctioned
  
  • Hague Convention also may prohibit targeted killing
    o U.S. Army interprets as prohibiting assassination, bounty, etc., but does not preclude attacks on individual soldiers or officers whether in the zone of hostilities, occupied territory, or elsewhere
  
  • **Human rights principles:**
    o 5th Amendment says no deprivation of life without due process
    o Int’l treaties similar – right to life
    o **Exceptions:**
      - Self-defense / defense of others
      - To effect lawful arrest
      - Prevent escape of a person lawfully detained
      - To quell a riot or insurrection
      - To derogate in respect of deaths resulting from lawful acts of war
  
  • Dershowitz makes analogy that “The vice of targeted assassination is that those who authorize the hit are the prosecutor, judge, and jury—and there is no appeal . . . . The virtue of targeted assassination, if the targets are picked carefully and conservatively, is precisely that it is targeted and tends to avoid collateral damages and collective punishment.
    o Shanan says that there may not be a better alternative

*Report of the Special Rapporteur p. 191*
  
  • Special Rapporteur really has no true authority, so why publish this report?
    o Helps shape international law
  
  • Technology has made targeted killing more feasible
  
  • Where a citizen is on U.S. soil and can be arrested rather than killed, it seems that arresting is the only lawful option
  
  • Laurie says that U.S. is trying to claim that a faceless conflict is ongoing around the world leads to problems
    o Some combatants don’t get rights but U.S. gets to try to kill people
    o Can target head of state that is head of armed forces
    o CIA is not and never has been a military entity

*McCann v. UK (1996) p. 197*
  
  • Points out some of the problems with categorizing enemy combatants
  
  • Soldiers shot McCann and Farrell fearing they were going to detonate a bomb
  
  • Question is whether these killings violated Article 2 of the Convention
    o Court says it was a violation because the circumstances didn’t make the killing “**absolutely necessary**”
    o Because you didn’t have to kill them, there were other options, it was a violation
    o Dissent disagrees
  
  • Could argue that when we’re dealing with special forces, they aren’t in the business of arresting they are trying to remove the target
    o But, they are trained to take people alive
10-1. Demolition of Homes
Almarin v. IDF Commander in Gaza Strip (1992)
- Israeli military rules expand bounds of retaliation beyond purely individualized punishment
- Court says it depends on circumstances. See p. 210 for list of factors:
  - Seriousness of acts attributed to people living in the building? Evidence they actually committed the acts?
  - Were other residents aware of the suspect’s activity?
  - Can the residential unit be separated from the other parts of the building?
  - Possible to destroy the suspect’s unit without harming the rest of the building? If not, can you seal the unit?
  - What is severity of the result arising from the planned destruction?
- Side issue: in Israel or outside of Israel – Almarin argues that he was in Israel proper, not in Gaza when the crime occurred, so he was not subject to the rule, but the court rejects his argument.
  - Court says he took the knives out of his home out of the Gaza Strip, also could extend order that applies on its face to the Gaza Strip to somewhat broader circumstances
- Held: attack was justified.
- Israel is trying to create a deterrent to terrorism

Note 2. p. 214
Points out that Geneva Convention Article 33 says that “no protected person may be punished for an offence he or she has not personally committed.”
⇒ Israel argues that Geneva Convention doesn’t apply because it is a domestic issue

10-2. Deportation of Suspected Terrorists
Association for Civil Rights in Israel v. Minister of Defence (1992)
- Narrow holding is that when deportation happens without a hearing, then a hearing can be granted afterwards. No requirement for a hearing on the front end.
- International law worries about deportation from one country to another, not relocation within a country.

VII. COMPENSATING VICTIMS OF TERRORISM AND COUNTERTERRORISM

20-1. Claims Against Terrorists and Their Sponsors
- Boim’s widow does not succeed because QLI did not know that the money would be used for terrorist acts, a certain level of knowledge is required per 18 USC 2331(1) on p. 102
- Unlawful to provide material support to an organization on the Sec of State’s shitlist.
• Aiding and abetting doesn’t require that you intend for them to do terrorist things with your money, you just have to have helped them.
• 2/3 of plaintiff’s theories of liability survive summary judgment
• Final claim by QLI of Constitutional violation doesn’t fly, court finds no violation of first amendment rights

20-2. Claims Against the Government For Not Providing Security

Macharia v. US (D.C. Cir. 2003) p. 478
• FTCA has some exceptions that bar recovery:
  o Discretionary function
  o Foreign country, and
  o Independent contractor
• Discretionary function exception bars claims “based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.”
• Foreign Country and Independent Contractor Exceptions. A contractor’s negligence may only be imputed to the U.S. if the contractor’s “day-to-day operations are supervised by the Federal Government.”

• This raises pretty straightforward tort issues, proximate cause, existence of a duty, reasonable foreseeability, etc.

20-3. Claims Against Private Parties For Not Providing Security

• Targets for litigation:
  o Boeing – negligent design of aircraft
  o Building Manager/Owner – failure to establish a proper emergency response and evacuation plan
  o Airlines – failure to provide adequate security preventing hijackers
• Suggestion that juries may be less likely to grant awards when there is another source of compensation from the government
• Victim Compensation Fund was a way of limiting the damage Al Qaeda did to the US economy


• Question of whether two crashes into the towers were one occurrence or two occurrences
• Jury gets to decide if there are two occurrences or one
• Here, jury found there were two occurrences
"No Concessions" With No Teeth: How K&R Insurers and Insureds Are Undermining US Counter-Terrorism Policy

- Discussed pros and cons
- Alternative to voluntary no-pay policy is to legislate no ransoms by private companies

Compensation for Victims of Terrorism Outline

- Does a good shop covering state sponsors of terrorism
- Lockerbie finally settled
- Terrorism Risk Insurance Act of 2002
  - Government agreed to pick up the tab above a certain threshold

21-1. **Claims Against The Government (Counter-Terrorism Liability)**


- Courts are the wrong forum to decide whether the President was right to attack the facility, it is a political question.
- The destruction of property here was not a taking.


- I said Russia acted with too much force when the villagers were guaranteed safe passage
- After *El-Shifa*, shouldn’t it be in the discretion of the commander (i.e. isn’t it a political question)?
  - Here, court says that Russia is subject to a different legal regime
  - Don’t trick ‘em and bomb ‘em, unlike *El-Shifa* where there was no trickery involved

*Farrell v. Secretary of State for Defence (House of Lords 1979) p. 549*

- Use of force must be reasonable under the circumstances in prevent of crime, assisting the lawful arrest of others.

*Hatfill aka NY Times*

- Hatfill sued NY Times for libel, appellate court said that as a matter of state law, the case could survive a motion to dismiss
- SCOTUS denied cert
- If libel suits from terrorists were allowed to go forward, it might have a chilling effect on terrorist prosecutions
- Article’s author was criticizing the FBI for failing to investigate the anthrax attack in a timely, efficient manner
- Hatfill was not a public figure, so the case could go forward
- There is great public interest in the suit, but it does affect national security
- If there is libel compensation from the NY Times, it may have a deterrent effect on newspapers pursuing information about the war on terror which may have two ramifications:
- Improving efficiency of government investigations
- Could undermine efforts and tactics in the war on terror
- May also prevent the public from learning how the U.S. is pursuing the war on terror
- Look at Laurie’s outline of materials regarding Civil Liability

**VIII. BIOTERRORISM AND PADILLA**

**Richard Goodman & Paula Coker**
- Connections between public health, epidemiology, criminal law
- Epidemiology = stuffy of the distribution and determinants of health-related states or events in specified populations, and the application of this study to control of health problems.
- Forensic epidemiology = the use of epidemiologic methods as part of an ongoing investigation of a health problem for which there is suspicion or evidence regarding possible intentional acts or criminal behavior as factors contributing to the health problem.
- Public Health Surveillance laws require that health care providers in all 50 states report certain conditions
- Even a single case of anthrax can be considered an epidemic because that form of infection is so rare.
- Legal Basis for Epidemiologic Field Investigation
  - under police power, state and local laws and implementing regulations, debate about whether there is a federal police power though
  - public health service act

**David Nahmias, U.S. Attorney**
- for Al Qaeda, prosecution was not going to be very effective
- problems with 9/11 investigating included resistance by law enforcement agencies to share information
- legal cultural issues – criminal law v. law of war
  - law of war used to be that you held prisoners of war until the end of the conflict
  - soldiers are not cops
- question about whether cases decided after WWII are still good law, because things have changed a lot
- “The Hardest Case” – Jose Padilla
  - U.S. was capturing senior Al Qaeda officials
    - Through CIA interrogation, U.S. learned that Jose Padilla wanted to do something radiation oriented as an attack in the U.S.
    - Problem is that you can’t really use this information
  - How do we catch him?
    - No outstanding warrants
    - No immigration charges, he was a U.S. citizen
- Military combatant, based on his membership in the military of a foreign country – this is what they used
- Material witness warrant – if individual is a flight risk and possesses info relevant to a grand jury hearing

IX. CLASSIFICATION OF DETAINEEs

12-1. Possible Classifications

Five classifications:
1. POWs
2. Presumptive POWs
3. Unlawful combatants
4. Ordinary criminal suspects
5. Non-combatants/non-terrorists

1. POWs
- Military forces must classify a captured belligerent as a POW if two requirements are met:
  - Military forces must have captured the belligerent in a conflict falling within scope of Art. 2 → declared war or armed conflict
  - Belligerent must meet the definition of POW in Article 4
- Can be held for duration of armed conflict
- Rights during captivity:
  - Restrictions on coercive interrogation
  - May grant “combatant immunity” (can’t be punished for fighting in an armed conflict in accordance with law of war)
- Article 2 of Geneva Convention III p. 587:
  - Convention applies to all cases of declared war or of any other armed conflict, even if a state of war is not recognized by one of them
  - Applies to all cases of partial or total occupation of a territory, even if there is no armed resistance
- Article 4 of Geneva Convention III p. 588:
  - POWs are persons belonging to one of the following categories, who have fallen into the power of the enemy:
    - Members of the armed forces of a Party to the conflict (including militias or volunteer corps)
    - Members of other militias and members of other volunteer corps including organized resistance movements provided that:
      - Being commanded by a person responsible for his subordinates
      - Having a fixed distinctive sign recognizable at a distance
      - That of carrying arms openly
      - Conducting operations in accordance with the laws of war
    - Members of regular armed forces who profess allegiance to a gov’t or authority not recognized by the Detaining Power
- **Civilian members** who accompany the armed forces (need ID card)
- **Crewmembers of civil aircraft** of Parties to the conflict
- **Inhabitants of non-occupied territory** who take up arms to resist invading forces (must carry arms openly and respect the laws and customs of war)
  - Also treated as POWs:
    - Current or former members of the armed forces
    - Persons that fit into an above category who have been received by neutral or non-belligerent powers on their territory and those powers are required to intern under int’l law
- Provisions on p. 590-598 because it matters a lot for interrogation:
  - Art. 13 – must treat humanely
  - Art. 15 – entitled to respect for their persons and their honor, women to be treated equally with men
  - Art. 17 – only need provide certain info to captors, must give ID card, no torture or coercion, incapacitated POWs must be handed over to medical service, questioning in understood language
  - Art. 25 – must be kept in same conditions as own forces, women kept separately
  - Art. 26 – adequate food and water to be provided
  - Art. 27 – climate-suitable clothing to be provided
  - Art. 28 – canteens to be set up at all camps, profits to be used for benefit of the prisoners
  - Art. 29 – camps to be sanitary and POWs should be able to maintain hygiene
  - Art. 30 – infirmaries to be set up, cost of treatment to be paid by detaining forces
  - Art. 34 – religious freedom
  - Art. 38 – intellectual and physical pursuits
  - Art. 70 – cards to family and Central Prisoners of War Agency must be forwarded
  - Art. 71 – send and receive letters and cards
  - Art. 72 – can receive packages
  - Art. 82 – POWs subject to laws of armed forces
  - Art. 85 – POWs prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the Convention
  - Art. 86 – no double jeopardy
  - Art. 87 – collective punishment and any form or torture or cruelty are forbidden
  - Art. 88 – POWs must be treated equally regardless of rank or sex
  - Art. 99 – can’t be tried or sentenced for acts not forbidden by law of Detaining Power or by int’l law
  - Art. 105 – right to counsel or assistance, counsel can visit facilities to prepare for defense, can confer with witnesses (incl. POWs), accusations shall be communicated in a language he understands
  - Art. 118 – POWs shall be released without delay after cessation of active hostilities
  - Art. 123 – creation of Central Prisoners of War Info Agency
2. Presumptive POWs

- Problem with presumptive POWs is what the process is for deciding who is and who isn’t
  - GCIII Article 5 says that some people are presumed POWs until proved otherwise by a competent tribunal

3. Unlawful Combatants

- **Definition:** fighters who do not meet requirements for status of POW under GC
  - May be held through duration of conflict, but may not receive combat immunity
  - May be tried by a military commission instead of civilian courts
  - May qualify as “protected persons” under GC IV
  - Others that don’t qualify as “protected persons” may still qualify for humanitarian protections under Common Article 3.

- **Army Reg. 190-8** sets forth process for determination
  - There is no mention of the notion of an “unlawful combatant” in Art. 4 or 5, yet in *Quirin*. There is an oblique reference in Art. 85, but this may just refer to a person that is a POW, but is then found to have committed war crimes before capture
  - A competent tribunal requires:
    - Composed of three commissioned officers
    - A written record
    - Proceedings shall be open (with exceptions)
    - Person whose status is to be determined shall be advised of their rights at the beginning of their hearings
    - Allowed to attend all open sessions
    - Allowed to call witnesses if reasonably available
    - And to question those witnesses called by the Tribunal
    - To have a right to testify
    - Burden is *preponderance of evidence*

- **GCIII Article 85:** POWs prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the GC.

- *Quirin* (saboteurs and spies):
  - “capture, detention, and triable of unlawful combatants, by universal agreement and practice are important incidents of war”
  - There is no bar to the U.S. holding one of its own citizens as an enemy combatant.

4. Ordinary Criminal Suspects

- Probable cause, charge, bail, speedy trial
5. Non-combatants/non-terrorists

- Geneva Conventions say they must be treated humanely - get rights of “protected persons”
- GCIV, Article 3 (“Common Article 3”) p. 600:
  - In cases of armed conflict not of an international character occurring in the
territory of one of the High Contracting Parties, each party must, at
minimum:
  - Treat people not active in hostilities humanely
  - Following acts prohibited:
    - Violence to life and person, murder, mutilation, cruel
treatment and torture
    - Take of hostages
    - Humiliating and degrading treatment
    - Executions without previous judgment pronounced by a
regularly constituted courts with judicial guarantees of
civilized peoples
  - Care for wounded and sick
    - Int’l Red Cross may offer services
    - Endeavor to bring the GC into force

Process for Classifying

1. International Law Requirements:
   a. Art. 5 doesn’t tell you what a “competent tribunal” might be
2. Constitutional law requirements
   a. Hamdi
3. Service Regulations
   a. 190-8 talks about process for classifying
4. Military orders of 7/7/04


- Facts: Hamdi was born in the U.S. and is a citizen. Gov’t classifies him as an
enemy combatant and say they can hold him indefinitely without formal charges
or proceedings.
- SCOTUS seems to be saying that even Taliban are not POWs
- Held: on these facts, due process demands that a citizen held in the U.S. as an
enemy combatant be given a meaningful opportunity to contest the factual basis
for that detention before a neutral decisionmaker. Hamdi’s detention was
necessary and appropriate.
  - The constitution would not be offended by a presumption in favor of the
Government’s evidence, so long as that presumption remained a rebuttable
one and fair opportunity for rebuttal were provided. See burden shifting p.
250-251.
- Authority to detain enemy combatants:
  - Government argues that no trial is required, this can be dealt with as a
normal military detention
- **18 USC § 4001(a)** says that “no *citizen* shall be imprisoned or otherwise detained by the U.S. except pursuant to an Act of Congress.”

- **AUMF**: President may “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks” or “harbored such organizations or persons, in order to prevent any future acts of international terrorism against the U.S. by such nations, organizations or persons”
  - Court says Congress authorized Hamdi’s detention via AUMF and it is viewed as sufficient authority to be an Act of Congress allowing detention pursuant to 4001(a)

- **Limits to detention:**
  - Citizens? *Quirin* does not preclude detention of citizens. Policy reason for detention is the same—to prevent combatants from returning to the battle field.
    - In *Quirin* was subject to trial and punishment by a military tribunal for spying, his citizenship did not change that case.
  - Indefinite duration is not allowed under the AUMF, but Hamdi can be held at least as long as there are active hostilities.
    - Court says Taliban combatants can be held as long as active combat exists in Afghanistan
  - *Milligan (1842)* (citizen in U.S., not combatant, courts open)
    - Court says Milligan could probably have been detained under military authority for the duration of the conflict, regardless of his citizenship.

- **Process for determining status**, what is Hamdi entitled to?:
  - P. 250 says he is entitled to notice and a fair opportunity to rebut the Government’s factual assertion before a neutral decisionmaker
  - Court applies *Matthews*: must weight the “private interest that will be affected by the official action” against the Government’s asserted interest, “including the function involved” and the burdens the Gov’t would face in providing greater process.
    - Milligan notes that rights here seem much more significant than the security benefits in *Matthews*.
    - Shanor said they were really surprised that *Matthews* was applied here
  - He gets to keep his lawyer, but it is not clear if future citizen-detainees get to be appointed a lawyer
  - Does the process have to exclude hearsay? Not necessarily

- **Souter/Ginsburg concurrence**
  - Doesn’t think his detention is authorized by an Act of Congress as required by 4001(a) AUMF.
  - Questions whether 4001(a) even applies during wartime since it was inserted into Title 18 which collects federal criminal law.
  - They would apply GCIII, give Hamdi POW rights, including presumption of protection until determination by a competent tribunal
  - See p. 256 and 257
USA PATRIOT Act of 2001 authorized detention of alien terrorists for no more than seven days before charging or deporting

- **Scalia/Stevens dissent**
  - does not believe the AUMF invokes the Suspension Clause

- **Thomas dissent**
  - says good faith determination is enough

**Padilla v. Hanft (4th Cir. 2005)**

- **Facts:** Padilla is an American citizen that was captured on American soil.
- **Issue:** does the President have authority to detain militarily a citizen who is closely associated with al Qaeda who is at war with the U.S.?
- **Held:** the AUMF authorizes Padilla’s detention. He is an enemy combatant as defined in *Hamdi*. His detention was *necessary and appropriate*.
  - *The availability of criminal prosecution did not render detention unnecessary within the meaning of the AUMF.* If it did, Hamdi’s detention would have been unnecessary and unauthorized, too.
  - *Availability of criminal process cannot be determinative of the power to detain.*
  - *Milligan* does not extend to enemy combatants.

- One thing *Padilla v. Hanft* says is that it doesn’t matter, this is an enemy combatant, he had a connection with Afg, fact he was seized on American soil and that AUMF is not a clear statement, and that criminal process is available doesn’t matter, fact civilian courts are available under Milligan, doesn’t matter

**Military Commissions Act of 2006**

- **§ 948a Definitions**
  - **Unlawful enemy combatant** means a person who has engaged in hostilities who is not a lawful enemy combatant, OR has been determined to be an unlawful enemy combatant by a CSRT or another competent tribunal
  - **Lawful enemy combatant** means
    - A member of the regular forces engaged in hostilities against the U.S.
    - Member of militia, organized resistance, which are under responsible command, wear a fixed distinctive sign, carry arms openly, and abide by law of war, OR
    - Member of armed forces of gov’t not recognized by the U.S.

- **§ 948b Military commissions**
  - Commissions afford all necessary judicial guarantees under common Article 3
  - No alien unlawful enemy combatant subject to trial by military commission gets rights under the GC

- **§ 948d Jurisdiction of military commissions**
  - (b) no j/d over lawful enemy combatants
  - (c) says classification is dispositive
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Among resident enemies there are many of “friendly disposition”

- Jackson also alludes to fact that affording habeas rights to those like the petitioners might be a drain on resources

Black dissent
- Guantanamo would fall under Black’s writ
- There is still a concern over resources
  - But, habeas doesn’t literally require bringing the person before the court
- If Black had prevailed, we probably wouldn’t see prisons in Guantanamo Bay, they would be in Afghanistan or in other conflict zones
  - Laurie notes that under Int’l Law, POWs can be held anywhere, but civilians and non-POWs are not supposed to be taken from the area where they reside or are found because that is involuntary deportation


- The analysis the court applies here is a statutory analysis, the majority’s interpretation triggered a battle with congress about how far the statutory writ should extend
- Rasul is an alien prisoner at Guantanamo
- Stevens distinguishes *Eisenhower* by saying the petitioners are not nationals, they have never been charged, they seem to be indefinitely detained, etc.
- Stevens comes down on the status of Guantanamo Bay saying that U.S. exercises complete jurisdiction and control
  - Scalia says sovereignty
- *Shanor* says one last thing about the statute is that if you look at p. 10 “Whatever traction . . . “ He bets the Bush administration will argue that now that there is now a statute, the presumption of extraterritoriality for Constitution turns on sovereignty and extraterritoriality for statute turns on jurisdiction and control.
- Stevens approach is “complete control”
  - Where does that leave the green zone? Isn’t truly under complete control since U.S. doesn’t have administrative control.
- *Held*: alien detainees held at Gtmo have a statutory right to habeas corpus. Federal courts have j/d to determine legality of the Executive’s potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing.
  - But, DTA 2005 legislated this away

**Kennedy Concurrence**

- Justice Kennedy’s concurrence is important – he does not think the statute extends to Guantanamo Bay, but he thinks the writ extends to Rasul
  - He wants a “pre-habeas” habeas
    - Is the territory a U.S. territory in every “practical respect”
    - Detainees held indefinitely without benefit of any legal proceeding
  - Would a pre-habeas present the same concerns about resources?
    - Scalia thinks so

**Scalia dissent**
• Says Kennedy's approach is not straightforward, says to look at the statutory language
• Since detainees are not located within the j/d of any U.S. court, the habeas statute does not apply. Since Guantánamo is extra-territorial there would be a presumption against applying the writ
• Scalia says the whole notion of Eisentrager is to take a broad interpretation to incorporate the Constitutional right

**Habeas Corpus for Noncitizens After Rasul**

1. **Detainee Treatment Act of 2005**
   - § 1005(e): “no court, justice, or judge shall have jurisdiction to hear or consider a writ filed by an alien detained by the Dept. of Defense at Guantánamo”
     - This is discussing the statutory writ, not the constitutional writ
   - Question is whether the DTA applies to pending cases
     - *Hamdan* (2006) rules that DTA does not apply to cases ‘pending’ as of the passage of the DTA
     - Then MCA overrules Hamdan clarifying that pending cases are included

   - Court says DTA does not apply to pending cases based on statutory construction.

3. **Military Commissions Act of 2006 § 7**
   - Expands DTA to include aliens anywhere, not just in Guantánamo:
     - “no court, justice, or judge shall have jurisdiction to hear or consider a writ filed by an alien detained by the U.S. who has been determined by the U.S. to have been properly detained as an enemy combatant or is awaiting such determination.
   - Changes effective date to include all pending cases
   - Luke thinks that if someone is picked up in the U.S. and can’t get a habeas petition, then SC would say that is a violation of the writ.
   - Shanor’s problem with the MCA is that under this statute, the gov’t could accuse a resident alien of being an enemy combatant then the alien gets put into a CSRT system from which there is no habeas relief. But, maybe he is wrong.

   **X. Aspects of Detention and Interrogation**

13-1. **Duration**
   - Starting point is really the law on p. 277.
     - POWs: GCIII says must be released without delay after cessation of active hostilities
     - Unlawful combatants are not addressed by GC.
       - SC says duration of armed conflict. *Hamdi*.
     - Criminal suspects – have right to speedy trial, may be released on bail.
       May be held as material witnesses.
Immigration laws may provide alternative basis for detention

- U.S. says you can't detain *citizens* unless there is an Act of Congress
  - European Convention on Human Rights is similar


- Lawless was suspected of being involved in IRA activities and was held for five or six months, then he sued
  - *Held:* Detention here was lawful even though his rights were violated as far as Art 5 and 6 were concerned
    - Court found there were certain exigent circumstances allowing the country to do so
  - "ticking time bomb" – if there are detainees or suspects that have info about a highly probable upcoming attack, then generally, there may be more leeway given to the methods used to extract information
- Art 5 grants everyone right to liberty and security of person
- Article 15 allows derogation from certain Convention obligations in time of war or public emergency threatening life, but it requires notice to the Secretary-General of the Council of Europe
  - Art 5 and 6 can be derogated from, but the anti-torture rule cannot be derogated from
  - Regarding the Art 15(3) notice, on p. 292, the court says that "the Convention does not contain any special provision to the effect that the Contracting State concerned must promulgate in its territory the notice of derogation addressed to the Secretary-General of the Council of Europe.

- Having the rule of "liberty and security" is helpful even if some cases of derogation occurred


- She was arrested for a couple of hours and was questioned about her brothers' activities related to the IRA. She was never charged with anything.
- She says there was no "reasonable suspicion" to have arrested her
- She was arrested under § 14 of the Northern Ireland Act, which only requires "suspicion," not reasonable suspicion
- Article 8 is in the appendix and in the case at 301, court says there is no violation
- On one hand, it was only two hours, on the other hand, setting precedent that people can be taken out of there homes without being charged and for not much reason
  - Shanor thinks the court should have talked more about this issue
- There is a tension here between individual rights and concern for public safety
  - 2 hours is a huge deal to the chick
  - 2 hours is not a big deal at all if that is what it takes to protect numerous other people from harm

13-2. **Conditions of Detention**

Reid is pissed that he can’t get his entire Time magazines, he has trouble with the special administrative measures (SAMs)

- The court dismissed the case as moot because the SAMs had already expired, but there is a discussion of whether Reid’s first amendment rights were violated
- Different prisons have different SAMs
- Shanor is skeptical about the mootness decision

**14-1. Domestic and International Limitations on Interrogation of Detainees**

- Look at sources of law on p. 313
  - Geneva Convention Common Article 3
  - Convention on treatment of POWs
- Geneva Convention on prisoners of War says “no physical or moral coercion shall be exercised against protected persons”
  - This is broad to avoid exceptions and because of reciprocity
  - A bright line rule was needed
- Why no rewards?
  - Don’t want your own POWs in foreign countries to have incentives to give up information
- See handout where during Korean war, the Convention was not abided by

*Republic of Ireland v. UK (1979-1980)* p. 314

- Five techniques in combination were inhuman and degrading
- Dissent says that he doesn’t think the treatment was inhuman

*Public Committee Against Torture in Israel (1999)* p. 321

- The court discusses the tension between the need to discover the truth and the public interest in exposing crime on p. 326

*Ocalan v. Turkey* handout

- Only talked about briefly

*Kenal Mehinovic v. Nikola Vuckovic*

- There was jurisdiction because of the ATCA
- The court convicted the persecutor in absentia
- Had to show three things:
  - People were subjected to torture
  - Intent to torture
  - Torturer was acting in official capacity
- Standard for cruel inhuman or degrading treatment
  - U.S. courts look to 8th amendment

*Human Rights Watch*

- 330 cases of assault, beatings etc.
- 460 detainees subjected to abuse
• Iraq and Afgh ahead of those at Gtmo
• Most of those investigated were enlisted soldiers, 1/3 faced some disciplinary action
  o 70% were confinement <1 year, avg sentence 4 months
• What are the right punishments for those engaged in torture?
• Is the fact these are soldiers, not officers, relevant?
• Further factor is ambiguity? There seemed to be a lack of clarity in the military rules of what was and wasn’t accepted.

Military Guide – DoD Regulations
• Interesting that it repeated Geneva convention rules
• Failure to report is a punishable offense
• Everybody, even those not POWs have to be treated humanely
• Most importantly, specific list of prohibited actions
• What do these things tell the terrorists?
  o That we are a humane society?
  o Provide useful information about how to resist interrogation
• Two questions to ask yourself if you are engaged in interrogation?
  o If it were used against you?
  o Would it violate the law?
  o If yes to either, then don’t do it
• Caution paragraph: Other forms of impermissible interrogation may be more subtle. Look at this.
• There is supposed to be training and should refuse to obey an unlawful order, but don’t take your actions objecting to interrogation techniques in front of the detainee
• DOD rules do not apply to the CIA, but do they apply to subcontractors?

Military Commission Act of 2006
• Van De Vyver says this Act is two faced and applies different standards to military personnel who are court martialed and to aliens
• Could back into the topic by asking what a violation of Common Article 3 is? What is a grave violation?
• Could back into it by talking about liability for acts of terrorism.
  o Is there a double standard?
• Doesn’t seem to be a punishment of any CIA personnel
• If death results, under the Act, it is punishable by death
• Ordinary breaches of GC are defined in the code, then “grave breaches” are defined separately
• Is there any purpose to dissimilarity of treatment?
  o Is there a legitimacy to that distinction?
• There is another section saying something about cruel and unusual punishment. § 6(a)(2). Implementation of Treaty Obligations. Last sentence says must use U.S. law.
• § 950(b) or § 11 or 12 deals with double-standard
Hamdan

- Several things are addressed in the military commissions act

Section 1

- Issue 1: neither congressional Act nor the common law of war supports trial by military commission for the crime of conspiracy (which Hamdan says is not a violation of law of war).
- Issue 2: procedures President have adopted to try him violate basic tenets of military and international law.
- Held: the military commission convened to try Hamdan lacks power to proceed because its structure and procedures violate both the UCMJ and the Geneva Conventions.
- Laws passed:
  - AUMF
  - November 13 Order covers any noncitizen for whom the President determines there is reason to believe that he or she:
    - Is or was a member of al Qaeda, or
    - Has engaged or participated in terrorist activities aimed at or harmful to the U.S.
    - If he meets the qualifications, he shall be tried by military commission for any and all offenses triable by military commission
      - Gov’t didn’t charge him for a year
- Held: DTA did not bar suits that were pending at the time of enactment, this is a textual interpretation

Section 2

- Court says neither the AUMF or the DTA expand the President’s authority to convene military commissions.
  - Assume the AUMF activated the President’s war powers and those powers include authority to convene military commissions in appropriate circumstance, there was nothing in AUMF saying Congress intended to expand or alter Article 21 of UCMJ. Hence, AUMF did not authorize this commission.
  - DTA didn’t authorize the commission either.
- At most the UCMJ, AUMF, and DTA acknowledge a general Presidential authority to convene military commissions in circumstances where justified under the “Constitution and laws,” including the law of war.

Section 3

- The type of military commission here’s jurisdiction is limited to offenses cognizable during time of war, but its role is primarily a factfinding one—to determine, typically on the battlefield itself, whether the Δ has violated the law of war. Quirin.
  - Quirin represents the high-water mark of military power to try enemy combatants for war crimes
- Four preconditions for exercise of jurisdiction for Hamdan-type commission:
o Only has j/d for offenses committed within the field of command ("theatre of war") of the convening commander
o Offense charged must have been committed during the war
o Commission not established pursuant to martial law or an occupation may try only:
  ▪ individuals of the enemy's army who have been guilty of illegitimate warfare or other offenses in violation of the laws of war
  ▪ members of one's own army who, during the war, become chargeable with crimes or offenses not cognizable or triable by the criminal courts or under the Articles of war
o law-of-war commission has j/d to try only two kinds of offenses:
  ▪ violations of laws of war triable by military tribunals only, and
  ▪ breaches of military orders or regulations for which offenders are not legally triable by court-martial under the Articles of war

→ Hamdan's commission lacks j/d to try him unless the charge "properly sets forth, not only the details of the act charged, but the circumstances conferring jurisdiction.
  o None of the acts Hamdan is accused of violate the law of war
  o "Conspiracy" is not a war crime
    ▪ This doesn't mean isn't necessarily triable by military commission. Quirin. But, when neither the elements of the offense nor the range of permissible punishments is defined by statute or treaty, the precedent must be plain and unambiguous.
      ▪ Quirin seemed to limit violations of the law of war to those that were actually committed or attempted.
      ▪ Note: MCA includes conspiracy as an offense triable by military commission.
  • At a minimum, the Gov't must make a substantial showing that the crime for which it seeks to try a Δ by military commission is acknowledged to be an offense against the law of war.
    o Executive failed to show military necessity.
  • Held: the commission lacks authority to try Hamdan.

Section 4
• Procedures gov't has decreed will govern Hamdan's trial violate the American common law of war, UCMJ, law of nations, and GC.
• Rights granted on supp. p. 83 are subject to condition that certain evidence may be kept from the accused and his attorney if the gov't decides to close it.
• Also, commission permits admission of any evidence that would have probative value to a reasonable person.
  o → coerced testimony, hearsay, and unwarned statements thus admissible
• UCMJ Article 36 places two restrictions on President's power to promulgate rules of procedure for courts-martial and military commissions:
  o No procedural rule he adopts may be contrary or inconsistent with the UCMJ, however practical it may seem
o Rules adopted must be uniform insofar as practicable (must be same as those for courts-martial so far as practicable)
  ▪ President has made a determination that it is impracticable to apply the rules that govern the trial of criminal cases in the U.S. district courts to Hamdan's commission
  ▪ \( \rightarrow \) President has not made an official determination that it is impracticable to apply the rules for court martial
• \( \rightarrow \) especially since basic right of presence is denied and Article 36 has not been complied with, the rules specified for Hamdan's trial are illegal
  o Also violates GC because even though not clear that war with al Qaeda is a true armed conflict, Common Article 3 still applies:
    ▪ Hamdan must be tried by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples
• Breyer concurrence: Congress has not issued the Executive a “blank check.” But, nothing prevents President from returning to Congress to seek the authority he believes necessary (come MCA).

Section 5 – Kennedy concurrence:
• Proper framework for assessing authorization for Executive actions is Jackson's three-part scheme from Youngstown:
  o When the Pres acts pursuant to 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.
  o When Pres acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain.
  o When Pres takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb.
• This situation fits into the third category because UCMJ was Congress speaking explicitly to this issue.

Section 6 – Kennedy concurrence (cont’d)
• Thinks military evidence rules and procedures should be followed, there is no practical reason for the President to deviate.
• Military commission is unauthorized under the UCMJ.

Section 7 – Thomas dissent
• Court lacks jurisdiction to entertain Hamdan’s claims
• President is the Commander in Chief and his decision to try Hamdan before a military commission is entitled to heavy deference
• Military commissions are authorized by AUMF. Hamdi.
• Article 21 alone supports use of commissions

Section 8 – Thomas dissent (cont’d)
• Common law of war establishes that Hamdan is charged with war crimes chargeable before a military commission.
• Membership in an organization can be grounds for military tribunal

Section 9 – Thomas dissent (cont’d)
- Procedure of military commissions has not been prescribed by statute, but has been adapted in each instance to the need that called it forth.
- Says UCMJ does not limit President’s power

XI. REPRESENTATION OF DETAINES

John Chandler
- Bawazir was born in 1980 in Yemen, which for 2000 years has been dominated by other countries
- Bawazir was in Mozar Sharrif when the U.S. started bombing Afgh
- Bawazir was captured in Afgh by people looking for bounty
- He eventually confessed under duress
- Many people advised against creating a place like Gtmo.
- U.S. government refused to say who was at Gtmo until a year ago
- Lawyers for detainees received death threats for choosing to represent the prisoners
- When challenged, court said that writ of habeas corpus applied to Gtmo, after that, other attorneys began filing habeas petitions
- Petitions for habeas corpus kind of turn Rule 11 on its ear because they file suit without knowing they are there for sure. You find out if they are in Gtmo by whether the gov’t files an answer or not.
- Bawazir had a CSRT proceeding, lawyers challenged them, but no luck
- What Rasul meant, was that detainees were allowed to file a petition for habeas, cases went to DC Circuit, and are pending today. No Dist. Ct. judge will schedule a habeas hearing until the issue is decided.
- Any time anyone has gotten close to a hearing, to gov’t has released the detainees. Rasul and Hicks were released.
- Congress has now passed a law that men in Gtmo are not entitled to challenge their detention through habeas
- Issue here is that gov’t should not be able to pick you up and hold you indefinitely

XII. MILITARY TRIAL OF SUSPECTED TERRORISTS

- Think about how much of Hamdan remains, how the Supreme Court would likely deal with the offenses, evidence, and procedure aspects of the MCA, and whether you think the special procedures of the MCA are warranted in light of your readings throughout this course. Note that the answers to some of these questions may be contingent on what the Secretary of Defense submits to Congress (see p. 32) and what happens in actual trials.
- In addition, think about the advantages and disadvantages of military commissions, military courts-martial, domestic criminal trials, the International Criminal Court (for those of you who have studied this topic in other international law courses), and special war crimes international tribunals (like Nuremberg) as possible settings for trying terrorists.
1. Authorization to Convene Military Commissions

Hamdi
- Court says that AUMF authorized military commissions.
- We have used military commissions in the past – what is different about Gitmo situation? Ex: Quirin case.
  - It is not in the theater of war, but in a detention facility way removed from combat areas.
  - It does not fit into paradigm of military commissions run by a country that is an occupying power.
  - These are really different from the military tribunals at Nuremberg – not everyone tried was a soldier, b/c lots of German industrialists were tried as well, but in general Germans were tried in Germany & Japanese were tried in Japan. This is different – although the whole world is different. Does it change the analysis that people have been displaced & relocated? Also, the statute casts a wide net – lots of people could fall under the definitions included in the statute.

Hamdan (2006)
- Was limited by Military Commissions Act of 2006 (MCA).
- Court said AUMF has no bearing on President’s ability to convene military commissions in the Gitmo context.
- Hamdan is grounded in REINFORCING DEMOCRACY.
- Mentions Geneva Conventions (although does not ground its opinion in the GC) – this mention gets picked up in MCA (§ 948b(d)(2)).
- Before Hamdan, people thought Milligan was dead letter & Quirin took its place – citizens could be subject to military commission.
  - BUT neither Hamdan NOR MCA 2006 purports to apply to U.S. citizens! So, this is still an open question.
  - Why didn’t John Walker Lindh get tried by military commission? Perhaps fear of political backlash – aliens don’t vote & citizens do. LEGAL ARG – maybe there is a constitutional reason, supplied in Milligan.

Uniform Code of Military Justice
- Congress did not preclude the Military Commissions through its wording of the UCMJ.
- Many people had read part of the UCMJ to AUTHORIZE military commissions – but the proper reading is that Congress had reserved whatever power needed to authorize military commissions in the way it drafted the UCMJ. This power was then exercised in MCA 2006.

MCA
- authorizes President to convene military commissions (p. 1 of statute)
- Is Milligan still good law? See Quirin – some of the saboteurs at trial are U.S. citizens – but court allowed military commissions to proceed.
How does Geneva Convention apply?

- Congress essentially trumped the GC with its sections on “Status of Commissions Under Common Article III” and “Geneva Conventions Not Establishing Source of Rights.” (p. 3)
  - The question is: does anything else trump the statute? i.e. CIL?
  - What about privileges extended to detainees within the U.S.? Laurie thinks it would be pretty easy to argue for certain treatment based on U.S. law, not bothering with GC.
  - The problem with Constitutional provision arguments: divergence in district courts over whether substantive U.S. constitutional rights attach to aliens at Gitmo (or other areas of the world) just b/c they are held by Americans.
  - This is a situation of a right with no remedy—Congress says you have the rights under GC, BUT they are not enforceable through litigation.
  - One way in which these GC rights ARE enforced is through UCMJ (see rules put out by DOD to interrogators).
  - ALSO: GC only applies during armed conflict! So could argue that it doesn’t apply here...although the justification for detention is that there is a conflict going on (war on terror). Even though the statute seems to say GC applies, maybe it really doesn’t.
- SO—treaty rights might be trumped by legislation, and
  - Constitutional rights – we don’t have solid precedent assuring all persons held by U.S. people certain constitutional rights.
- What do the statutory provisions mean?
  - (f) Congress says military commissions are OK under GC Art. III
  - (g) two ways to read this:
    - Congress isn’t saying much new – GC is a treaty btw states & has never afforded a private right of action
    - Congress could be saying a detainee cannot even refer to GC as standard for fundamental rights assured internationally.

2. Offenses Triable by Military Commissions

Hamdan

- Court found that Hamdan’s offense was not a crime. He was charged w/conspiracy, but he had been Osama’s driver & may or may not have known much of anything (let alone conspired in 9-11).
- Usually it’s enough for conspiracy to be part of the organization & supporting the orgs efforts.
- Would the govt have won if it had said, H. is guilty of conspiring to fly planes into WTC?
  - According to the Court, the answer turns on whether flying planes into WTC violates laws of war.
- Why be skeptical of conspiracy in military context (i.e. war crime)? B/c just being a member of the armed services should not be enough to call person a conspirator &
make that a crime (there are other crimes, like being accessory to specific violation of law of war).
  o We know that genocide, slaughter of civilians, starting war of aggression are all violations of law of war. So why not conspiracy to do those things? Court does not say where it will draw the line—what kind of conspiracy = violation of law of war.

**MCA—List of Offenses (S.3930-27)**

- Does the section on conspiracy answer the question in *Hamdan* (p. 31)? Congress says conspiracy to do any of the other things on the list IS PUNISHABLE.
  o In essence, they have **by statute made conspiracy a law of war violation.**
  Can they do this? Yes. So, *Hamdan* is overruled on this point
- Murder is not treated as a crime unless victim is **protected person**
  o not all killing in wartime is murder
  o what if person kills an armed soldier in cold blood? Probably not triable by military commission
- rape, sexual offenses are not limited to victims that are “protected persons.”
  o If person rapes a soldier, in contrast to murder provision above, that is always triable by military commission.
- if you have other offenses at issue, **court-martial** may be appropriate.
  o Ex: detainee at Gitmo steals property while detained. Theft might be punishable through court-martial, but cannot use military commission for that.
  o U.S. citizen who commits murder of a protected person (consider John Walker Lindh example), might court-martial him instead.

3. **Procedures – Trial & Appellate**

- *Hamdan* was concerned with ultimate fairness of process meeting GC min standard of civilized proceedings.
  o Does this statute violate any of those standards?
- 2. 950(w) IS VERY IMPT! Says that procedures must be promulgated by SecDef within 90 days of the MCA’s being signed into law.

**Evidence Admissibility**

- Hearsay OK if there is a fair opp’y for Δ to meet the hearsay evidence. Seems to be Congress’ way of getting around the *Hamdan* problem of hearsay evidence w/ no controls on it.
- No torture evidence, but evidence based on lack of search warrant or other authorization is OK. Who is gathering the evidence? Soldiers. The idea is the soldiers are fighting & the context is completely different from police officer on a search.
- Δ can review redacted or summarized evidence instead of actual evidence. This is very different from U.S. criminal proceedings, BUT this is similar to courts-martial provisions. In a crim trial, if Δ can’t see the evidence then case is dismissed. Military commissions balance nat’l security interests against Δ’s interest & says redaction, summarization OK.

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• Many opportunities for death penalty, which makes the evidentiary concerns more disturbing.

Review Route
• direct appeal to D.C. Cir, then to Supreme Court. You still get a hearing on Constitutional issues, it just isn’t through the standard route.

XIII. TERRORISM: BACK TO THE BIG PICTURE

Is There Still a Terrorist Threat?
• Is security actually better? Shanor isn’t convinced.
• Mueller argues Afghanistan and our operations there obstructed Al Qaeda
• Iraq has kept them busy
• Muslims in the U.S. are well integrated, so that is why we haven’t had attacks
  o Maybe since there is no incentive here like in other countries
• Al Qaeda is simply biding its time
  o Chance of injury is same as getting hit by a comet
  o Newt’s worst case is nuclear, Mueller seems to ignore this

Declaring Victory, James Fallows
• Cost benefit analysis - $1B per anthrax victim
• Fallows describes himself as an optimist
• More difficult to join Al Qaeda because you can’t find them
• Public scrutiny of anyone who looks Muslim
• Deescalate, change spending
  o Robust emergency response systems
  o Transform the military to a new model
• Rhetorical change is real change

Lessons from the First Five Years of the War, Newt Gingrich
• Newt seems to misuse the word appeasement
• Do any of his solutions carry over the Marshall plan?
• Border security – pretty much impossible to control our borders
• One War model – new war budget

Islam and the West, Bruce Hoffman
• Hoffman characterized:
  o Al Qaeda central
  o Al Qaeda Affiliates and associates
  o Al Qaeda locals
  o Al Qaeda Network
• Marginalized individuals creates a problem
• Two aspects of modern global terrorists:
  o Deep commitment to faith
  o Shared sense of alienation
• Does say contrary to Mueller and Fallows that there are “real threats”
- But, is this because he works for Rand?
  - Follow on Rand report says we should be hitting the ideology, which we haven't been doing so far

Does big picture change?

- Criminal law framework?
  - One potential ramification is to bring criminal law and procedure utilized with respect to terrorists more inline with punishments for other crimes
  - Maybe get rid of all anti-terrorism laws and just make acts unlawful
  - Maybe have sentencing enhancements

- Civil framework?
  - Compensation? If we de-mythologize 9/11 and say it was an incident of 3,000 murders, then we don't need a special compensation fund

- Military strategy?