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-->Question -1-

(a)

For the four of the "Alexandria Five" that are American citizens, their use of a Habeas Corpus petition will depend on whether the principles of Boumediene extend to the United States' owned facility in Waziristan. The statutory habeas corpus claims will follow the principles illustrated in Munaf. Under Munaf, the American citizens had a statutory habeas right because they were in custody under the "authority" of the United States. Here, the four American detainees are being held under the authority of the United States because the house is owned by the U.S. This principle was extended to the constitutional habeas claim in Boumediene, so Sec. 7 of the MCA would not be a barrier to the 4 here. There are certain sovereignty and practical concerns illustrated in Boumediene about whether allowing them to have habeas will undercut the ability of Pakistan to defend itself here. These terrorists were targeting Pakistan as much as they were targeting the U.S. However, the Supreme Court cases in this area generally have presumed a habeas claim for American citizens, even if in American custody abroad.


For the one who is not an American citizens, the Boumediene multi-factored test will likely determine whether that case's holding on Gitmo will be extended here. Whether the facts are closer to Boumediene or Eisentrager likely will control the result. It seems like the facts here are probably closer to Boumediene: the non-American is not a citizen of a country at war with the United States (like Germany was), he is being held under the "de facto" control of the United States (in addition to Pakistan), and the

presence of the United States is more long-term here. Therefore, under those principles, the non-American citizen probably should have a habeas corpus claim.

Pakistan may object to the transfer of these men to the United States if they file their habeas corpus petition, but the law of the United States will probably overcome that concern. While the AUMF arguably gives the President the authority to hold these men under House Arrest, they will still probably have the ability to file habeas corpus petitions with proper district court jurisdiction. Since a federal court will have jurisdiction over the officials who oversee this American House, it will have jurisdiction over these men too by extension.

The Alexandria Five's lawyers might also challenge their detention if they are tried by military commission, which will depend on the CSRT's determination of unlawful enemy combatant status. The lawyers also might decide to challenge their detention by arguing that these men have not committed any crime against the United States. However, their ties to a group tied to Al-Qaeda will probably harm that claim.

If the U.S. decides to try the men as unlawful enemy combatants before a military commission, they will be returned to the U.S. (extradited under the treaty between the U.S. and Pakistan) in order to be detained for that trial.

very good 10 

(b)

The President most likely will be able to classify these men as unlawful enemy combatants and try them before a military commission. Unlike in Al Marri, all five men were captured on the battlefield in Waziristan. Their

status as a citizen will not help them (for the four that are citizens), for Padilla also is a citizen captured on the battlefield, and he has been classified as an unlawful Enemy Combatant. The AUMF grants the President relatively broad authority to detain, in conjunction with the DTA and the MCA (despite Sec. 7 being overruled by *Boumediene*). The five may argue that unlike in *Quirin*, they did not even enter the United States. However, the United States has a presence internationally, and they can still be taking up hostilities or arms against the U.S. without coming to the country. The U.S. can probably (successfully) argue that detention of these men is necessary to prevent them from returning to the battlefield. See Hamdi.

However, the detainees will have some arguments in their favor. First, they could argue that Common Article III of the Geneva conventions applies, and that the unlawful enemy combatant status is not available, or is inappropriate here. They also could argue that they never took up arms with an enemy nation, since *Jaish-e-Muhammad* is not a "nation" under Article III. However, the Geneva Conventions paradigm was created when conflicts were mostly between nation-states; the terrorism problem of sub-national groups presents something entirely outside of that framework. Therefore, the Common Article III argument, despite its acceptance by the U.S., probably cannot overcome the President's power to detain under Supreme Court precedent and under the AUMF. The easiest argument for detention will be for the alien (non-citizen); for the American citizens, Quirin did say that detention of citizens as Enemy Combatants is justified if they take up arms against the U.S.

Since the Defense Department's definition of Enemy Combatant has not been challenged (not decided by the D.C. circuit), that definition will apply

here. These men are engaged in hostilities against the U.S.'s coalition partner (Pakistan) and are supporting the Taliban. This probably will lead to a CSRT determination of unlawful (since they are not in uniform) enemy combatant status.

If detained, under Al Marri, there will have to be adequate safeguards in place for the Alexandria Five to challenge their status as an Enemy Combatant both at the CSRT hearing and afterward on appeal. See Al Marri, Hamdan. The U.S. probably will be able to present hearsay evidence, subject to their right not to self-incriminate.

The best case to help the detainees here may be Parhat. They may argue that like in that case, they are not enemies of the U.S. but of Pakistan (like China to the Uighurs). However, the five's connection to Al Qaeda does not seem as attenuated here as in Parhat. In addition, that case was a rare decision overturning a CSRT determination, and may not be of much help.

very good 10

(c)

There are two material support statutes that the imam could be prosecuted under: 2339A (for material support to terrorists) and 2339B (for material support to a Foreign Terrorist Organization). It is most likely that 2339A would be used here, because there is no evidence that the imam helped Jaish outside of the Alexandria five. The facts indicate that the U.S. might not be successful in charging the imam here. There is not much argument that he provided training here; religious advice is not training, and he only gave them information about a website. The "training" prong also has been successfully attacked as unconstitutionally vague in the 9th Circuit. The best argument for the U.S. is expert advice or assistance. It might be a

stretch to argue that mentioning a site is advice or assistance; it also might be hard to argue that the mention was derived from any kind of scientific or technical expertise. Since the website was incidental and was mentioned to everyone at the mosque, the imam might be able to survive that prong as well. The imam has probably provided personnel to Jaish in a very attenuated way, and he did not intend to do this either (based on his calling the site "blasphemous"). The imam himself did not provide transportation like in Taleb Jedi; that kind of charge could be brought against the Saifullah itself.

The lack of knowledge on the part of the imam also will be fatal to the U.S.'s material support claim. There is a lack of knowledge by the Imam, and a lack of intent as determined in Al-Arian. He mentioned the site in a negative light in order to make a point in his talk with many members at his mosque, and he likely had no knowledge that this would be used the opposite way by some men in his mosque sympathetic to the views of the web site. Because of the use of the word "blasphemous," there is no intent on the part of the imam either to help the men in this way or to help Jaish. Based on the above analysis, the U.S. does not have a very strong material support claim against the imam. Considering his views on the blasphemy of this site, they would be wise to use him as a resource or informant to catch other potential recruits in his mosque, rather than charging him and isolating him.

very good 10

(d)

Because there is evidence here (assumably) of the Five being watched under FISA, they will have standing under ACLU v NSA. FISA, as amended in 2008, allows the U.S., in general, to conduct electronic surveillance of

foreign agents or powers without a warrant if the "significant purpose" of the surveillance is to collect foreign intelligence. So the failure of the U.S. to get a warrant will probably not help the cause of the Alexandria Five. One district court in Mayfield has indicated that this shift from "primary purpose" to significant purpose is unconstitutional, but that goes against the general trend of deferring to the government under FISA. See Sealed Case. The Sealed Case court reversed the FISC's rejection of these procedures, and said that the executive branch should be deferred to in this type of case. The Terrorist Surveillance Program has been argued to be supported by both FISA and the AUMF. Because of the statutory authority, the President is arguably in the First Category of the Jackson Three-Part test. The best argument for the Five here is that by using the evidence in the prosecution, rather than for intelligence gathering, the U.S. is violating the requirements of FISA. However, the AUMF and later reforms were aimed at breaking down the "wall" between intelligence and law enforcement, and Sealed Case represents the Courts' general deference to that goal by the executive under AUMF. The Five's challenge of the surveillance under TSP and FISA will probably not be successful.

The Five also may make arguments under the Katz test, because the surveillance here is akin to data mining. Since the internet is arguably a public forum, and ISPs always have knowledge of what websites a person is using and what their IP address is, there might not be a reasonable objective expectation of privacy that "society is prepared to accept" under this test. Smith v Maryland There is no evidence either way that the Five had a subjective intent of privacy, but that would make sense considering what they were looking at and what they probably were planning to do. They would also

probably argue for subjective expectation of privacy after the fact as well. The site of where they were looking at the internet (if at home) will not matter because of the public nature of the internet and the ISPS' tracking of their info anyway. A Katz test challenge by the Five will thus likely not be successful.

*excellent 12*

(e)

The State Secrets privilege, if successfully invoked, allows the U.S. to block the Five from using evidence that may compromise national security in some fashion. The AG or other formal head will have to invoke the claim under Reynolds. Then, the Court can conduct an in camera review to determine independently whether the evidence might expose military matters or endanger national security. There seems to be a good argument that this evidence will do just that. The surveillance presumably collected the identities of other people who visited the site, and revealing that will hamper the U.S.'s (or Pakistan's) efforts to go after those people if they need to. Al Haramain revealed that courts will often be deferential to the U.S.'s claims here, despite their own independent in camera review. The surveillance info might also reveal classified information about informants, methods, or other material that would harm the U.S.'s counterterrorism efforts a la the "mosaic method." The judge could then choose to exclude the evidence, redact some portions if possible, or the U.S. could dismiss the case to prevent the info from getting out.

The U.S.'s best argument, under Al Haramain, is that the surveillance is the very "subject matter" of the trial. If the court agrees, the case (if

brought by the Five as plaintiffs) would be dismissed. The Five could argue that the U.S. affirmatively agreed to engage in public discourse, or the TSP is publicly known after the NY Times article, etc. However, under El-Masri, the general public knowledge of the overall system does not prevent the use of State Secrets doctrine here. The Five may also argue that FISA preempts the common law state secrets doctrine; this is an open question that the Ninth Circuit has remanded on. On balance, the state secrets claim by the U.S. will probably prevail. If the Defendants want to testify, they cannot do so in a way that "releases" the information that they obtained.

CIPA allows for procedures in criminal cases to balance the interests of the U.S. in protecting classified information with the defendants' interest in full and fair trials. Under CIPA, the Five will have to file notice of the classified information that it wants to disclose. See U.S. v. Lee. The U.S. will probably request an in camera hearing to determine how to handle the evidence. If the judge decides the evidence is admissible, the government can argue for substitution or summary instead of full disclosure. The prosecution will have to turn over helpful info to the defendants under Brady. The U.S.'s invocation of CIPA probably will not be challenged constitutionally because prior challenges have failed. See. U.S. v Lee. Under Moussaoui, the Court will probably defer to the U.S. here because they are rightfully exercising their national security prerogative, rather than trying to hide embarrassing information. The balancing of national security interests will be similar to the analysis in the state secrets doctrine above. If any information may be preserved that will not harm national security, it may be given to the Five in redacted form or in summary.

very good 10



Question 1 Word Count = 2310

Character Count = 13897

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-->Question -2-

The challenges that the U.S. will face in trying KSM in federal court rather than in military commission are substantial. First, there are significant differences between the rules of evidence in civilian courts versus military courts. In New York, the U.S. will have to follow the hearsay rules of the Federal Rules of Evidence, whereas hearsay evidence that is probative may be allowed in commissions. Since the cases against terrorists are often based largely (if not solely) on hearsay evidence, the U.S. will have a much harder case to make in civilian court. In addition, the trial in civilian court will be before a jury of 12 civilians rather than of a handful of military members.

The U.S. will have to prove their case beyond a reasonable doubt, rather

than the lower burden of proof in military commissions. The use of the jury cuts both ways in this case. Since KSM undoubtedly (like Moussaoui did) use the opportunity for theatrics and attempts to influence the jury, the jury may be swayed strongly one way or the other emotionally. But since the jurors in a commission (military) might be less likely to be biased for KSM, and equally likely to be biased against him, a commission might be better based on that factor as well. A civilian trial, as a criminal trial, will be subject to the rules of CIPA, whereas this does not apply to military commissions. The U.S. might have to present certain evidence to KSM's lawyers, even in redacted form, that they would not have to present in military commission. Considering KSM's nature, the U.S. might be afraid that he might use the opportunity to disclose classified information that he was not supposed to or attempt to send coded signals to Al-Qaeda compatriots. At a military commission, the cameras would not be there and KSM would be more constrained in his propaganda efforts. KSM will have the right to a speedy trial in civilian court, a right he would not have in military commission.

There are other factors that make the use of a civilian trial more difficult for the U.S. here. It will be much more expensive to try him in NY than in Gitmo. However, there are some advantages as well. Trying KSM civilly enhances the U.S.'s reputation as a nation subject to the "rule of law," which helps the U.S.'s counterterrorism efforts from a message standpoint. In addition, to the extent that the death penalty would be the wrong result because it would give KSM what he wants (martyrdom), a trial in civil court may be better. A civil jury can decide to sentence him to life to prevent him from getting what he wants, whereas he would automatically be executed at a

military commission in all likelihood. In addition, there may be more availability of civilian witnesses who can testify emotionally (a la the McVeigh case) to the horrors of 9/11. This can impact the jury in the U.S.'s favor (although the conviction of KSM is pretty much a foregone conclusion). In balance, despite these benefits, the U.S. will have a much harder time trying KSM in civilian court. The Obama Administration most likely is aware of these challenges but has chosen this course to enhance the perception of the U.S. in the eyes of the world community.

**Question 2 Word Count = 554**

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-->Question -3-

First Amendment

Al Bahlul's First Amendment claim should be rejected by this Court. A material support statute similar to the one used here, 2339B, was expressly upheld in Humanitarian Law Project v. Mukasey. While the court in that case did strike down certain provisions of the statute for overbreadth, it upheld the law overall. Al Bahlul provided expert assistance to Al Qaeda in Afghanistan via his knowledge of speeches, his knowledge of video production, and his skill with wills. The "expert advice or assistance" prong of the material support statute was upheld by the HLP court, and overcomes the First Amendment claim here. Al Bahlul's actions here go beyond simple speech under the First Amendment. He undertook direct actions that were expressly intended to help harm the United States and the other "enemies" of Al Qaeda. Taleb

Jedi. Much like shouting "fire" in a crowded theater has always been understood as outside the First Amendment's protection, the First Amendment could not have been intended to protect speech that is used towards incitement or encouragement of violence. The restriction here should be analyzed under rational basis because of the deference due to be accorded to the Executive Branch in times of war. If strict scrutiny is applied, this statute is narrowly tailored to an important government interest: halting those actions that are knowledgeably or intentionally undertaken to help terrorists and their organizations. Al Qaeda was one of the main impetuses for the reforms since 9/11, and Al Bahlul should not be allowed to hide behind our own constitution to avoid the justice he deserves under the material support statute.

#### Ex Post Facto

The AUMF authorizes the President to use "all necessary and appropriate force" against those who "aided" the 9/11 attacks. This statute has been interpreted as broad authority for the Executive in this time of war. See Al Marri. Al Bahlul's ex post facto argument is without merit because his actions in 1999 in aiding Al Qaeda aided the 9/11 attacks, an action expressly covered by the AUMF. Even if this Court decides that Al Bahlul did not aid the 9/11 attacks, he aided Al Qaeda in general, which is covered by the AUMF. The AUMF does not contain any time limitation on when actions in aid of Al Qaeda become unlawful. The Department of Defense has declared anyone who

takes up arms against the U.S. or who associates with Al Qaeda (beyond mere membership) is an unlawful enemy combatant. This definition has not been challenged, and no court has declared that enemy combatants who committed acts before 9/11 cannot be tried as such. The president has valid power to create commissions after passing the MCA after Hamdan. In the charge of these crimes in commissions, the President is given broad latitude, and that includes charging those who committed acts before 9/11 that eventually aided acts that occurred on and after 9/11.

#### Material Support as a War Crime

Military commissions are not limited to trying crimes based on the consensus of other nations. Congress itself has the power to define crimes under the Law of Nations under Article 1, Section 8. Congress has done exactly that under the Military Commissions Act of 2006, which defines Material Support (among other crimes) as a violation of the law of nations. It is true that Military Commissions may try only crimes against the laws of war, but material support is one of those crimes. Whether material support was a crime before the MCA of 2006 or not is irrelevant; the MCA of 2006 is largely intact (even after Sec. 7's overrule in *Boumediene*), and these definitions are still intact. They are valid statutory law, created by the people of this country through their legislature. Based on the Constitutional authority given to Congress here, Al Bahlul may be tried for material support before a military commission. In addition, it is questionable that material

support has not been generally accepted by other nations. Almog v Arab Bank involved a material support claim under the law of nations, and the Court there held that material support was valid under the law of nations based on international conventions.

#### The MCA of 2009

Even if material support is not a crime listed in the 2009 version of the MCA, there is ample common law support for his being tried for this crime under the law of nations. The Geneva Conventions prohibit terror against a civilian population, and Al Bahlul has contributed to that terror by his actions on behalf of Al Qaeda. As a treaty, the Geneva Conventions are a part of the "law of nations." Various U.S. cases also indicate that material support is part of the law of nations. See Almog. Other treaties between the U.S. and its allies indicate that material support is against the law. These authorities support the trial of Al Bahlul before military commission, even in the absence of support in the MCA of 2009. If Al Bahlul is wrong, and material support is listed in the 2009 version, than his argument is wholly without merit based on the analysis in the above paragraph. Al Bahlul aided Al Qaeda materially with his videos, wills, and speech drafting, and he can be tried under the common law as violating the law of nations.

Question 3 Word Count = 880

Character Count = 5262

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Good 14

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Total Word Count = 3744

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