Exam ID: [redacted]
Course: Terrorism and the Law
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Exam Date: Friday, December 15, 2006

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TERRORISM AND THE LAW FINAL

Question One

Part 1 - US v. James Torqada

The US can hold James Torqada ("T") liable under several sections of US law. First, there are general anti-terrorism statutes under which T would be liable, if his actions can be defined as: a) to intimidate or coerce a civilian population; b) to influenc the policy of a government by intimidation or coercion; or c) to affect the conduct of a government by mass destruction. 18 USC 2331. Even though T is an alien, the US has invoked universal jurisdiction under several anti-terrorism-related statutes (e.g. Hostage Taking Act, Antihijacking Act, Destruction of Aircraft Act, Providing Material Support to Terrorists). Therefore, even though the acts of T took place outside of the US (Iraq), courts have found where there is a sufficient connection between the location and the US and a clear intent to invoke universal jurisdiction, due process will still exist in the extention of jurisdiction. US v. Yousef.

The US can also find T to be an illegal immigrant, and find his presence in the US to be a violation of the Immigration and Nationality Act. Under 8 USC 1182(a)(3)(B), suspected terrorists can be denied entry to the US; such immigrants may be detained for further questioning and information gathering.

The US may also find T liable under any number of criminal statutes, since T has engaged in acts such as homicide, conspiracy, etc. Mal Comm/Ct?

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Part 2 - James Torqada's Defenses

James Torqada ("T") has been deemed an "enemy combatant" ("EC") by a military tribunal of the US. All detainees in connection with any terrorist action have some (albeit limited) rights to challenge their detention on the grounds that they deserve their status to be reviewed by a competent tribunal.

First, it seems clear that the US was correct in not deeming T to be a POW, as he does not seem to meet any of the guidelines for POW classification (was not wearing insignia, was not carrying arms, etc). However, the Geneva Conventions stress that detainees should be treated as "presumptive POW's" until further status can be attained. The 1971 protocol that called for this presumption was never signed by the US, and the US has basically detained all non-POW's as EC's for the purposes of the war on terror.

T's main defense would be that he is not part of any kind of "armed conflict," as international generarlly requires. The US would assert that he is part of: a) the war in Iraq; or b) the ongoing war on terror. Courts have generally not held that the war on terror can be the basis for ongoing detention, but it seems that T's public disclosure that he is responsible for killing US Marines in the war on Iraq would give the US ample justification for holding him. The US could also use immigration law as a means to

justify further detention even past armed conflicts. Additionally, since T would be liable for potential criminal charges, they can claim this as an act of rendition, if Iraq forces had the means of capturing T, and did not cooperate with any measures taken by the US to extradite T to US jurisdiction.

T is an alien, and therefore would not have the rights of full due process that US citizens enjoy under the Constitution. In Quirin, a unanimous Supreme Court opinion, gives further credence to the claim that the US has the right to be denied access to the courts, as military tribunals should suffice. However, the Court in Rasul ruled that in places where the US has territorial control, the Constitutional rights of habeas corpus should extend; and furthermore, in Hamdan, found that military tribunals violated the UCMJ, due process, and the geneva conventions. Congress passed the Military Commissions Act of 2006, which explicitly denied rights of habeas, and statutorily affirmed military tribunals as valid tribunals to determine the status of alien enemy detainees; and until this law has been examined by the courts, it seems that T will most likely lose on his challenge to be heard by a court, rather than tribunal.

T would have a definite claim of protection from torture, as Article 93 of the UCMJ and relevant provisions of the MCA explicitly forbid "cruelty towards, oppression or maltreatment" and the use of torture as a means of interrogation. This protection is repeated in several international treaties (i.e. Geneva Convnetions, UN Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment). If he is victim to

torture in an attempt to coerce statements, he can seek vindication through court martial punishment of the officers who were responsible; but would still be held responsible for his acts in connection with the war in Iraq, since EC's do not have combatant immunity.

very good 9

Part 3 - Asam Torqada

Asam could be liable under domestic criminal law for aiding and abetting terrorism for his act of attempting to hide his brother, who was connected with terrorist activities. But the most relevant charge he would face would be giving material support to a Foreign Terrorist Organization ("FTO"). Under 19 USC 2339(B), any individual giving material support is subject to imprisonment or a fine, and if death results (as it has here with the Marines in Iraq), Asam could face imprisonment for life.

Because Asam is a US citizen, he may bring a challenge of constitutionality to this statute; but as shown in cases such as US v.Hammoud, any claims that 2339(B) infringes on the freedom of association, overbreadth, or vagueness would most likely fail in the US courts. Asam would then challenge that he did not have knowledge that his brother's group (PTV) was an FTO; and because he solicits and and collects funds for various groups in connection with his mosque, he did not "knowingly" support any FTO under the statute. Depending on the circuit, courts have mostly found that "knowingly" does not require an intent to further the criminal activities of a group; but rather, that "knowingly" simply means he "intentionally" gave support to the PTV, and not necessarily an intent to further the illegal goals of the FTO. (see Paracha, Marzook, Assi) From the facts here,

Asam seems to have raised money for the PTV with knowledge that such money would go to this group, and therefore would be guilty under the statute.

Asam may also face charges under 18 USC 2384, for seditious conspiracy, or "conspiracy to overthrow the government." Again, any constitutional challenge by Asam will most likely fail, as the court in US v. Rahman affirmed that the government has the right to limit "conspirational" speech and activities without violating a citizen's constitutional rights of association.

very good 9

Part 4 - Bekka Jones

Depending on the status of the two prisoners, Bekka may have a claim. If the two prisoners are agents of a foreign entity, the terrorism exception in the FSIA, or the AEDPA provide jurisdiciton to bring tort claims of action in a state court. Additionally, the Anti-Terrorism Act (18 USC 2333) provides the survivors of those killed by terrorism relief in an appropriate district court of the US to recover threefold the damages and attorneys' fees. Cases such as Linde and Assi involve the use of the Anti-Terrorism statute, and have succeeded in imputing secondary liability to those who provide material support and resources to an FTO. Here, it is unclear whether the two men were directly responsible, or part of the FTO that killed her brother, but it would seem that their connection to the death would be sufficient to impute liability.

Bekka may also want to sue the company Harlan was contracted through for not providing security for her brother who was working as an independent contractor at the

time. A NY court held in 532 Madison Ave. that claimants may sue private parties if there is a reasonable foreseeability that such death could occur. It would be difficult to ascertain the level of care that the co. maintained, and to what extent "reasonable foreseeability" would apply in a case where an independent contractor must go to a war zone, but it seems that Bekka may have a claim that the co. had a duty to protect Harlan; and if they negligently failed to protect his safety, they would be liable.

Bekka may also want to sue the government, since presumably he was independently contracted by the US government for work in Iraq. Though the FTCA does waive sovereign immunity, it is likely that without a showing of gross negligence, the discretionary function would protect the US from liability. Most cases that have challenged the US's provision of security have failed before the courts (see Macharia, Bichage). Furthermore, the court may even dismiss as a political question to not interfere with executive military discretion in how to employ independent contractors.

excellent 10

Question Two

Part 1 - Rumsfeld in Federal Court

Rumsfeld would be appearing before a federal court as an officer of the Executive Branch. Generally, it would be a violation of separation of powers if the Courts were to interfere with the Executive Branch's determinations related to providing for the national security. In the case of El-Shifa, the court looked to the seminal case of Baker v. Carr in

determining that holding the Executive liable for a violation of the Takings clause would constitute a political question. The power of the Courts in Article III section 1 never foresaw encompassing judicial supervision over the President's judgment in regards to national security issues.

Baker set out six tests for the presence of a nonjusiticable political question. Here, the fact that this is a military decision that has already been made; and that the military usually does not have to get court approval in taking most of its actions, it would seem that in the spirit of Baker, Rumsfeld, as an officer of the Executive branch, could not stand before a federal court to answer to constitutional violations due to a nonjustiicable question. It is likely that a federal court would dismiss this case as a non-justiciable political question.

Rumsfeld could probably be tried under a court martial, since he was the officer that officially ordered the actions that resulted in the torture. ... substantive/more 7

Part 2 - Rumsfeld in International Court

Rumsfeld would undoubtedly be guilty of multiple international law violations in connection with the treatment of the Yemeni prisoners. First, his directives have violated Article 2 of the UN charter, which states that international disputes should be settled by peaceful means. Rumsfeld would assert that under Articles 42 and 51, he has the right to use "necessary force" to maintain or restore international peace. It's not clear from the

facts what these Yemeni prisoners actually did; but without the threat of an imminent harm in connection with the prisoners, it's unlikely that an ICJ would find Rumsfeld's argument persuasive. There is some question whether or not the use of pre-emptive force is appropriate, as the Bush administration has been promoting as necessary for the public safety. In this case, the use of torture on these prisoners could be justified as "interrogation aids" to finding out information of imminent threats to the US by the prisoners' co-conspirators. But in most international cases such as Nicaragua v. US, Iran v. US, and Congo v. Uganda, the ICJ has held that pre-emptive force is generally not allowed. Without more information on the threat of imminent harm to the US in connection with the Yemeni prisoners, on the facts alone any argument regarding the pre-emptive use of force would probably fail.

Rumsfeld would also be guilty for a violation of the Geneva Conventions. Depending on the status of the prisoners (assuming they are EC's, not POW's), Rumsfeld would argue that the Geneva Conventions don't apply to non-POW's. But most countries have signed on to the 1977 protocol (assuming that Germany has), stating that unlawful belligerents may qualify as POWs, and though they may not have the full rights of POW's, are undoubtedly protected from such torturous activity. Furthermore, it would seem that EC's still have some right to minimal protections under Geneva Convention IV, regarding the treatment of any person in connection with an armed conflict.

Rumsfeld would aslo be guilty of violating the European convention on Human Rights, the UN Convention Against Torture, and the ICCPR, and any other applicable German statute that finds the use of torture to be a violation of European law.

Applic. to ussec Def?

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Part 3 - Families of the prisoners

Ordinarily, the US government has sovereign immunity from civil liability of US citizens. Congress passed the Federal Torts Claim Act ("FTCA") that waives sovereign immunity for civil torts brought by US citizens, but kept in an exception for discretionary functions of government law enforcement.

Under the Gaubert standard, if there is any kind of federal policy to follow, or if not, if the challenged conduct involved an element of judgment, the FTCA will not waive sovereign immunity. Here, though the actions at Guantanamo Bay were extreme by any standard, this may be protected by the discretionary function exception; because this involved a level of discretion as set by commanding officers, courts are prone to letting the military have full control over what extent is necessary to preserve national security. Additionally, under similar claims (i.e. Takings clause, provision of security), the court generally defers to the government especially in regards to military actions, and has specifically exempted military in certain statutes from being sued for private claims during time of war. 28 USC 2680(j).

Therefore, it is unlikely that a civil claim by the two families would even reach a trial before the court dismisses them.

Question Three

What did the MCA do?

The MCA reversed the Supreme Court's ruling in Hamdan on several levels. Hamdan was a case to assert the validity of using military tribunals to determine the status of alien enemy combtants. In his majority opinion, Justice Stevens wrote that the Executive: a) had no statutory authority to create these tribunals, as the AUMF was too broad and made no specific mention of tribunals; b) that the Geneva Conventions required that all prisoners are entitled to review before a competent tribunal; and c) that UCMJ did not satisfy the minimum protections required for the tribunal to be "competent."

When Congress passed the MCA, it first gave a statutory basis for the President to act. Though Stevens never spoke directly on whether the President had the inherent constitutional power to create such tribunals for the necessity of national security, it is largely uncontested that the President may act through his war powers to take rather significant measures to provide for the national security when he is given congressional authorization. The MCA provided this for the President, and legislatively created the validity of the military tribunal.

Second, the MCA specifically states that the Geneva Convention was not a source of rights for alien detainees. The administration had long argued that the Geneva Conventions never intended to enforce a unitary means of detainee adjudication, but rather gave broad guidelines which individual governments may shift according to the necessity for public safety. This, in line with the US's refusal to sign on the 1977 Protocol to the Geneva Conventions, showed that so long as alien combatants did not bear obvioius indicia of POW status, they would fall outside the Geneva Convention protection through the duration of their detention.

Third, though still giving EC's very limited rights, the MCA clarified specific procedural due process rights to fall in line with the minimum requirements for justice that the UCMJ lacked. Specifically, it forbade the use of evidence obtained by torture, and gave detainees rights of disclosure regarding exculpatory evidence, prevented double jeopardy conviction, and gave some direct judicial review in the DC Circuit and the Supreme Court.

What will the Court rule?

The Court is faced with a challenge at the crossroads of enemy combatant precedent, and must make a choice between furthering the trend it had set since the days of Hamdi, or whether it will turn in a different direction and support the President in further denying rights to alien EC's.

Hamdi was the first major case regarding enemy detainees, and though the court affirmed that citizens could be held as EC's, it affirmed that the rights of citizens required review by a legitimate court to satisfy due process. Rasul extended this ruling to non-citizens, stating that where the US had territorial control, the federal courts still had jurisdiction to hear cases pending the review of combatant status through statuory habeas corpus. Though Padilla and its subsequent remand Hanft never fully gave us an answer, the Court refused to outright dismiss the case, allowing Padilla to refile his habeas claim in the right district. This line of cases showed the court further wanting to err on the side of allowing those with claims to come before a court, culminating in the final denunciation in Hamdan.

The most troubling issue is the Court's continual ducking on the full scope of Presidential powers. Though the court seems to want to err on the side of "final" review by courts, it seems comfortable allowing the President to act and then finding wrong after the fact, if such wrong does indeed exist. And while in the past, the Court has affirmed the denial of certain constitutional rights during times of global war (see Quirin re: WWII), the Court has in past cases such as Hamdi, regarded the nebulous "war on terror" as something less than the level of a World War.

It's even more curious that Stevens in Hamdan placed significance on the Geneva Conventions in a Supreme Court that has often been skeptical and reluctant to incorporate international law into substantive US precedent. There seems to be a tendency of the

Court to acknowledge that issues such as Human Rights and the prevention of torture have a global significance, while issues of procedure and due process can be limited to US interpretation. It is on this dichotomy that I believe the Supreme Court will rule on cases in the future.

I believe when the appropriate case comes before the Court, which utilizes the framework of the MCA to accomplish significant human rights violations (e.g. Abu Ghiraib), the Court will demand that the President further tighten and clarify the bounds that the Executive Branch will utilize in dealing with prisoners. But in cases where procedural issues arise (evidentiary concerns, burden of plaintiff, access to counsel), the Court will affirm the MCA's boundaries and hold that any interference in that area would constitute a non-justiciable politcal question.

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