OUTLINE
TERRORISM & THE LAW

PART I—(CHAPTERS 1-4)—Criminal Prosecution of Suspected Terrorist

Chapter 1—Terrorism and the Criminal Law

1-1 Introduction
1) Terrorism is defined variously by the perpetrator's motives, methods, targets, and victims.
   i) Many definitions based on motives, methods, targets, and victims all suffer from confusion e.g. motive-based suffers confusion b/c of the attempt to carve out a legitimate armed struggle for self-determination
   ii) In the US, no single definition of "terrorism" or "terrorist act" prevails. There are numerous statutes defining terrorism (page 2).
   iii) Terrorists generally seek to achieve some kind of political end. By inflicting pain and by threatening future harm, terrorists hope to influence others to do w/e it is that they want.
   iv) Terrorism concerns the law in several ways:
      (a) The law prohibits terrorist acts of various kinds, like murder, hijacking, and destruction of property
      (b) The law limits and regulates governmental responses to terrorism e.g. requirement of fair trials, prohibit certain forms of military response etc.
      (c) The law may impose civil liability on parties that support terrorism, fail to provide protection against terrorists, and others.

1) One provision of the US Code defines terrorism simply as "premeditated, politically, motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents."
   (a) Israel actions, under this statute, would not be considered terrorist acts
   (b) Kaczynski (unibomber) would not be a terrorist b/c of the "subnational group" or "clandestine agent" element of the statute.
   (c) D.C. area snipers could be argued are terrorist
   (d) USS Cole would be considered a terrorist attack, but it's arguable that the military was "noncombatant."
   (e) Remember of the collateral damage defense: if the target was combatant and a civilian was killed in the attack on the target, you could argue collateral damage.

1-2 Ordinary Criminal Law Applied to Terrorist
1) Kast v. Virginia
   i) Shooting spree outside of the CIA headquarter entrance w/ an AK-47.
   ii) ▲ charged w/ a capital offense and in VA b/c the death penalty exists.
   iii) ▲ moved to set aside the verdict b/c (1) juror misconduct on basis of the article found in a newspaper about a juror's belief of the ▲ (following the trial) (2) ▲ contends that the death sentence was imposed under the influence
of passion, prejudice, or other arbitrary factor, and the death penalty was excessive or disproportionate to the penalty imposed in similar cases.

iv) The ▲ also says that b/c his crimes were “political” he somehow is entitled to First Amendment protection. ▲ is worried that the court did not take his political motivations into account as a mitigating factor.

1-3 Laws Aimed Specifically at Terrorism

1) Although ordinary criminal laws of general application already prohibit many kinds of acts that terrorist commit, Congress has enacted criminal legislation specifically aimed at terrorist.

2) 18 USC §2331-2339, US v. Hammoud interprets the statute and addresses its constitutionality

3) US v. Hammoud
   i) ▲ challenges the constitutionality of US terrorism law: arguing FREEDOM OF ASSOCIATION, OVERBREADTH, VAGUENESS, and DESIGNATION OF AN FTO
   ii) ▲ was living in NC and operating an illegal cigarette smuggling ring.
   iii) ▲ was charged w/ providing material support to an FTO §2339 (see page 571 for a new definition)
   iv) ▲ argues 1st Amendment right to Associate; overbreadth and vagueness of §2339.

1. ▲’s 1st Amendment Right fails when the ct says that this “argument fails b/c §2339 does not prohibit mere association; it prohibits the Conduct of providing material support to a designated FTO.” Therefore, cases regarding mere association with an organization do not control. Rather, the governing standard is found in US v. O’Brien, which applies when a facially neutral statute restricts some expressive conduct. Such a statute is valid if it meets the four factors (page 14). The Ct says that the O’Brien’s four factors were satisfied page 14-15.

2. ▲ argues 2 overbreadth points and one argument lead to the rewriting of §2339 (bottom of page 571). A statute is overbroad only if it “punishes a substantial amount of protected free speech, judged in relation to the statute’s plainly legitimate sweep.” The ct, however, argues that were conduct and not speech is challenging the constitutionality, it is likely not to succeed.
   i. Religious materials and medicine are not considered material support according to the new provisions of the statute.
   ii) Hizballah’s designation as an FTO: the FTO has to show up in court to challenge its classification as a FTO—not going to happen.
   iii) Pre-2004 provisions to §2339 a lawyer may be charged w/ giving expert advice to a terrorist on what he/she could send to e.g. Hezbollah. The DOJ was concerned about the lack of definition and vagueness, so now §2339 says “expert advice or assistance…or other specialized knowledge.”
(a) Specialized knowledge = us lawyers
(b) The ninth circuit pre-amendment case said that legal advice was ok. It is likely that a post-amendment case would also hold the same.
iv) Congress wants to avoid making the courts decide who is a “terrorist” or what is “terrorism” b/c the cts wouldn’t be timely; and there is no notice if not clear in statute.
v) Funding: Anti-terrorism vs. Counterterrorism
    (a) Chris Wray presentation: the DOJ has focused its attention to preventive measures and methods.
    (b) Prevention—Post 9/11 financial breakdown is an e.g. of an anti-terrorism initiative—prevention is easier to get them for tax evasion, immigration violations etc.

1-4 Treason and Sedition
1) Do the acts of American citizens or permanent residents who have participated in terrorist acts against the people or the gov’t of the US constitute either treason or some form of sedition?
2) US v. Rahman
   i) LEXIS: Ten defendants were convicted and sentenced in connection with the 1993 World Trade Center bombing, a rabbi’s 1990 murder, and related charges and conspiracies to "levy war against" the United States as an enemy of Islam, in a wide-ranging campaign of urban terrorism. They appealed their convictions for numerous constitutional, pre-trial and trial errors, and challenged their sentences. The court affirmed all convictions and all but one sentence. The court rejected defendants' constitutional Treason Clause challenge, since they were not charged with treason, punishable by death, but with sedition, carrying a 20-year maximum. The sentencing guideline for treason was properly analogous to defendants' conduct and thus authorized by the U.S. Sentencing Guidelines Manual (Guidelines), which does not include seditious conspiracy. The sentencing court, following the recommendation of the pre-sentence reports, applied the Guidelines' grouping rules to determine the offense level for convictions on multiple counts and properly imposed consecutive prison terms for total punishment exceeding the 20-year maximum.
   ii) There is a loyalty requirement in Treason and not sedition offense. The treason statute has an allegiance requirement (requiring witnesses).
      (i) “In both it's common law and constitutional definitions the term 'treason' imports a breach of allegiance.”
      (ii) Treason "imports a betraying"
   iii) ▲ was charged w/ the lesser of the crimes, sedition.
   iv) Ct says that the gov’t does not have to wait until a bomb has gone off to punish a conspirator→conspiracy laws are in place to prevent the perpetration of a criminal act.
Chapter 2 Extra-territorial Criminal Jurisdiction

2-1 Federal Legislation
1) Terrorist acts affecting the US or its citizens often occur beyond the national boundaries. The US for this reason claims the power to exercise jurisdiction to prosecute the perpetrators of these acts.

2) Why would the US want to exercise jurisdiction over an offense occurring in another country instead of simply allowing the government of the other country to prosecute the offense?
   i) We don’t want govt of other countries to punish terrorist b/c there is no universal form of justice.
      (a) Other countries e.g. Mexico and European countries don’t believe in death.
   ii) It is more retributive to extradite back to US.

2-2 Limits on Extra-territorial Jurisdiction
1) Criminal A’s charged w/ committing offenses outside the US typically make three legal arguments against jd: (1) is that the test of the particular statute at issues does not permit its extra-territorial application; (2) is that international law or treaties bar the US from asserting such jd; and (3) is that asserting extra-territorial jd would violate the constitution.

2) United States v. Yousef
   i) LEXIS: The court held that the district court had jurisdiction over defendants’ extraterritorial conduct under federal law, even though the district court erred in partly basing its finding of jurisdiction over one defendant on the universality principle of customary international law because it improperly relied on the unsupported statements of commentators instead of the practice and customs of States in determining what crimes may be subject to prosecution. However, the absence of jurisdiction over "terrorist" acts under the universality principle did not preclude prosecution under United States laws implementing the United States’ obligations under the Montreal Convention.
   ii) A argues that the US does not have jurisdiction over him.
   iii) Congress has the authority “to enforce its laws beyond the territorial boundaries of the United States. Although there is a presumption that Congress does not intend a statute to apply to conduct outside the territorial jd of the US, that presumption can be overcome when Congress clearly expresses its intent to do so. As long as Congress has indicated its intent to reach such conduct, a US ct is bound to follow the congressional direction unless this would violate the due process clause of the 5th Amendment.
      (i) “The text of the applicable federal statute makes it clear that Congress intended that it apply extraterritorially.”
   iv) Footnote 24 page 40 notes customary international law regarding extra-territorial jurisdiction which recognizes five bases on which a state may exercise criminal jd over a citizen or non-citizen for acts committed outside of the prosecuting state:
a. **Objective territorial principle**—which provides for jurisdiction over conduct committed outside of a state’s border that has, or is intended to have, a substantial effect within its territory;

b. **Nationality principle**—which provides for jurisdiction over extraterritorial acts committed by a state’s own citizen;

c. **Protective principle**—provides jurisdiction over acts committed outside of the state that harm a state’s interest.

d. **Passive personality principle**—provides jurisdiction over acts committed outside of the state that harm a state’s citizens abroad;

e. **Universality principle**—provides jurisdiction over extraterritorial acts by a citizen or a non-citizen that are so heinous as to be universally condemned by all civilized nations.

   i. Terrorism is not a crime giving universal jurisdiction b/c countries can’t agree on a definition of terrorism and there is no treaty giving countries universal jurisdiction for terrorism. (According to the Int’l law expert, there are acts that have been designated as giving universal jurisdiction.)

   ii. The court says that the district court did not correctly find universal jurisdiction, but that the Montreal Convention does.

   iii. Also, typically there is local jurisdiction b/c terrorism takes place on land in a geographic local.

ii) ▲ says that he was not “found in” the US, but instead was “brought into” the US.

   1. The court says no, only after he was in the US awaiting trial for the WTC charges did a grand jury indict him on separate charges relating to the airline bombing plane.

   iii) The court says that US law would supersede international customary law where there was a conflict. Some scholars, however, would argue that international customary law would supersede local, provincial law. There is a debate.

2) **US v. Richard Reid (Shoe Bomber)**

   i) Plead guilty to attempted use of a WMD; homicide in violation of US law; placing an explosive device on an aircraft; etc.

   ii) Before receiving a life sentence he said, “I am at war w/ your country, and my allegiance is to Sheik Osama bin Laden”

   iii) Did this case involve extra-territorial application of US criminal law? Look at the statute and see if Congress intended that the statute apply extraterritorially.
Chapter 3 Withholding Evidence and Witnesses

3-1 The Accused’s Rights

1) The US Constitution requires fairness in a criminal trial. A ▲ should have the ability to present witnesses and evidence (6th Amendment). FRCP further gives criminal ▲’s a broad right to obtain physical evidence in the gov’t’s possession. Also, Congress and the Sup Ct require that the government turn over any information that might help the ▲. Jencks Act.

2) In most cases, the prosecution will give up such evidence, but cases arise where the gov’t does not want to give up information b/c of fear in disclosing evidence of national security.

3) Congress recognized this problem and enacted the CIPA (classified information procedures act) that allows the gov’t to withhold classified information, so long as it provides a substituted summary of the information that will suffice to provide a fair trial.
   i) Classified information means information or material that has been determined by executive order, statute, or regulation to require protection against unauthorized disclosure for reasons of national security.

3-2 The Prosecutors Dilemma

1) US v. Moussaoui
   i) LEXIS: Defendant was accused of being involved in conspiracies surrounding the September 11, 2001 terrorist attacks. The district court concluded that the testimony of the witnesses was material to defendant's defense and sanctioned the Government for refusing to produce the enemy combatant witnesses for depositions by dismissing the death notice and excluding specific items of evidence. Inter alia, the appellate court agreed that the testimony was material and, because the witnesses were within the process power of the court, defendant had a Sixth Amendment right to their testimony. Moreover, the Government's particular proposals for substitution were inadequate. However, contrary to the district court's ruling, it was possible to craft adequate substitutions. To protect defendant's fair trial rights, the jury had to be made aware of certain information about the substitutions. Moreover, the rule of completeness was not to be used by the Government to gain the admission of inculpatory statements that neither explained nor clarified the statements designated by defendant as the substitutions were a remedy imposed because the Government would not allow contact with the witnesses.
   (a) The orders for production were affirmed, as was the rejection of the Government's proposed substitutions by the district court. The order imposing sanctions on the Government was vacated, and the case was remanded for the compiling of substitutions for the deposition testimony of the enemy combatant witnesses.

   ii) Terrorist are arrested for immigration violations. This gives the US time to prepare its case for terrorism.

   iii) The ▲ wants access to gov’t witnesses as constitutionally required by the 6th amendment’s compulsory process right: “in all criminal prosecutions, the
accused shall enjoy the right...to have compulsory process for obtaining w’s in his favor.”

(a) The gov’t maintains that b/c the enemy combatants witnesses are foreign nationals outside the boundaries of the US, beyond the process power of the district court.

(b) However the ct says that the w’s are in US custody and the issue is more about the power to issue a writ of habeas corpus “testimonial writ” to the w’s custodian.

iv) CIPA doesn’t apply b/c in this case we are dealing with W’s and not documents.

v) CIPA is a federal statute. The 4th circuit’s analogy was completely judicially made up

vi) ▲ lost their leverage over the gov’t w’s, so there is no benefit in putting the ▲ in front of a jury.

2) People v. Mounir El Motassadeq

i) Federal Supreme Court of Germany

ii) El Motassadeq was charged and convicted for being accessories to more than 3000 counts of murder and being members of a terrorist organization. However, the conviction did not stand and was reversed.

iii) The reversal was related to the witness that the US gov’t allowed to be substituted in the Moussaoui case, and that Moussouci wanted to question.

3) US v. Koubriti

i) LEXIS: Defendants sought a new trial, alleging that the Government did not fully meet its Brady and Giglio obligations. The Government confessed error. The court was satisfied that a searching and comprehensive review was completed. The prosecution failed in its obligation to turn over to the defense, or to the court, many documents and other information, both classified and non-classified, which were clearly and materially exculpatory of the defendants as to the charges against them. These failures by the prosecution were not sporadic or isolated. Defendants' due process, confrontation, and fair trial rights were violated, and the jury's verdict was infected to the point that the court believed there was at least a reasonable probability that the jury's verdict would have been different had constitutional standards been met. The court found it unnecessary to provide further explication for its decision.

ii) The court granted the Government's motion to dismiss without prejudice count I of the third superseding indictment. The court granted in part defendants' motion for new trial. The court dismissed count I without prejudice and ordered a new trial

iii) “It is an axiom that a prosecution must maintain sufficient distance from his case such that he may pursue and weigh all of the evidence, no matter where it may lead, and then let the facts guide him. That simply did not happen here.”

iv) “[we shouldn’t] allow our constitution standards to be tailored to the moment”
Chapter 4 Practical Problems in Criminal Prosecution

4-1 Lacking Sufficient Evidence
1) The gov't uses immigration law to arrest person who might have involvement in terrorism even when sufficient proof of terrorist acts does not exists.
2) After the Sept 11th attacks the US lacked sufficient evidence to hold suspected terrorist and American citizen, Jose Padilla. Since he was an American citizen the US could not hold him on immigration law violation. The government's solution was to hold Padilla as an "enemy combatant."

4-2 Difficulty Capturing Suspected Terrorists
1) US v. Osama Bin Laden
   i) The US offered a $5M reward for Osama's head, but that has not produced results.
   ii) Also, the US indicted Osama. But what are the practicalities of the US's action?
       (a) It's a Public Relations stunt
2) In Oct of 2002, Al-Qaeda carried out the conspiracy charged in a US indictment. The USS Cole was attacked. The US knew of the conspiracy two yrs earlier when it indicted Osama bin Laden, but a Navy investigation subsequently concluded that "the commanding officer of the Cole did not have the specific intelligence, focused training, appropriate equipment or on-scene security support to effectively prevent or deter such a determined, preplanned, assault on his ship."

4-3 Providing Security for Trials
1) US v. Koubrity
   i) LEXIS: Defendants were arrested on September 17, 2001, i.e., within a week of the September 11 attacks on the World Trade Center and the Pentagon. Defendants were charged with, inter alia, conspiracy to provide material support or resources to terrorists. To protect potential jurors from undue harassment by the media, the court decided to empanel an anonymous jury. Defendants challenged the court's decision on due process grounds.
       (a) The court overruled defendants' objections to the empaneling of an anonymous jury
   ii) The ct says that picking an anonymous jury was not anything out of the ordinary, especially for other cases that are expected to receive lots of media attention.
   iii) Totality of the circumstances must be used to determine whether or not to use an anonymous jury.

1) What harm might come from using special procedures to try ordinary offenses?
   i) Consider: "if we fail to preserve the clear dichotomy b/t a 'regular' criminal offense and a 'terrorist offense,' a slipper slope problem may arise. In the absence of a clear dichotomy, unique measures applicable to terrorist offenses may enter the ordinary criminal procedure."
4-4 Determining the Appropriate Punishment

1) "Let the punishment fit the crime."

2) But what is the proper punishment for terrorism?

3) *US v. McVeigh*
   
   i) LEXIS: Defendant challenged his conviction and death sentence on numerous grounds. The court rejected each of defendant's contentions and held that: 1) adequate safeguards were taken to ensure that pretrial publicity did not manifest itself so as to corrupt due process; 2) the district court did not err in failing to hold a hearing on alleged juror misconduct, and the alleged misconduct did not violate defendant's right to a fair trial; 3) the probative value of evidence that someone else may have been guilty was substantially outweighed by the danger of confusion of the issues and thus properly excluded; 4) defendant was not entitled to a lesser included offense instruction under 18 U.S.C. § 2332a and 18 U.S.C. § 844(f); 5) defendant was given an adequate opportunity to "life-quality" the jury on voir dire; 6) there was no error in excluding mitigating evidence at sentencing that someone else may have been involved in the bombing; 7) **there was no error in excluding evidence showing the reasonableness of defendant's beliefs**; and, 8) the victim impact testimony admitted during the penalty phase did not produce a sentence based on emotion rather than reason.

   ii) The ▲ was arguing that the facts of Waco should be shown. The ct said that they were inappropriate.

   iii) The ct said that it was only appropriate to allow what the ▲ knew or believed and that the theories in the report issued after the incident by the DOJ was inappropriate. The ▲ was ahead of the curve...haha...don't think so.

   iv) *Payne v. Tennessee*, allows the use of emotional witness, but the ct did not allow the introduction of wedding pictures of home videos. The ct allowed "objective evidence describing the fact of the loss of people to an agency and the loss of a family member the empty chair, but not the emotional aspect of that, the grieving process, the mourning process." The gov't followed this instruction by the ct.

4) *US v. Meskini*
   
   i) The doubling of his prison sentencing b/c of a federal statute enacted after 9/11

   ii) ▲ argues that he's a one time terrorist

   iii) After *US v. Booker* (2005), the US sentencing guidelines are no longer mandatory.

5) "Criminals we capture, enemies we kill"
Chapter 5 Immigration Law and Terrorism

5-1 Exclusion of Suspected Terrorists

1) In the US, immigration laws prevent persons who have or may have engaged in “terrorist activity” or who may have other links to terrorism from entering into the country.”
   
i) One possible response to the possibility of error is to err on the side of exclusion. The statute requires exclusion of any person a consular officer “has reasonable grounds to believe... is engaged in or is likely to engage after entry in any terrorist activity.”

2) See pages 114-115 for US statutes that define terrorist activity

3) The statute’s effectiveness in excluding person connected w/ terrorism depends on the quality of the information about the persons and ability of immigration bureaucracy to assess that information.

4) §1182(a)(3)(b) singles out the PLO deeming its officers to be engaged in terrorist activity. In opposing a constitutional challenge, Alan Keyes explained that the US wanted the PLO to recognize Israel’s right to exist and accept certain UN Security Counsel resolutions. He then stated, “our policy is designed to withhold legitimization of the PLO until it has satisfied these conditions. Consistent w/ this policy, our diplomatic strategy has been aimed at discouraging other states from recognizing or otherwise according legitimacy to the PLO unless these conditions are met. If we were to allow PLO members to travel freely throughout the US furthering their political agenda and attempting to build their political base, we would undercut our policy of not lending legitimacy to that organization.”
   
i) Should congress by statute determine which organizations engage in terrorist activity instead of leaving that decision to the executive branch?

5) Adams v. Baker
   
i) Plaintiff alien, an Irish citizen and president of Sinn Fein, applied for a non-immigrant visa in order to conduct a speaking tour of the United States. Because U.S. consular officers determined that he had engaged in terrorist activity, his visa was denied pursuant to § 212(a)(28)(F) of the Immigration and Nationality Act, § U.S.C.S. § 1182(a)(28)(F). Plaintiffs sued challenging the denial, and the district court granted summary judgment to government officials. On appeal, the court held that the government had a sovereign right to regulate immigration, and plaintiff alien had no right to enter the U.S. The court found that the McGovern Amendment, 22 U.S.C.S. § 2691 which allowed visas to those who did nothing more than belong to a proscribed organization, did not apply, since the consular officers had a reasonable basis to believe that plaintiff alien actually participated in terrorism. Thus, plaintiff alien’s visa was properly denied, and the court affirmed the order of the district court granting summary judgment to government officials

ii) The US later changed its mind and decided to grant Gerry Adams a visa after Adams made “conciliatory comments” about ending violence.
5-2 Immigration Sweeps
1) Many times US authorities lack enough evidence to detain suspected terrorist. However, many foreign residents of the US have committed immigration infractions e.g. many overstay their visas.
2) Following Sept 11th the US conducted large-scale sweeps, attempting to use immigration infractions as a grounds for arresting anyone whom is suspected of possible involvement in terrorism.
3) See page 124 Report by the Inspector General regarding the detention of 750 aliens who had violated immigration laws and were arrested and detained in connection w/ the FBI's investigation into the attacks.
4) DOJ's “call-in program”—US required immigrant males from certain Muslim countries to register w/ the US IMM OFFICE resulting in the commencement of deportation for 13K immigrants. Many have attacked the program as a waste of time and resources.
5) The Patriot Act—requires the Attny General to detain anyone whom he has certified as a “terrorist alien” and to commence removal proceedings or bring criminal charges against the person w/in seven days.

5-3 Public Information
1) Persons held on immigration violations have the right of habeas corpus, right to counsel, etc. These rights effectively prevent the govt from secretly detaining immigration violators.
2) Through the cts or their attny's, persons held on immigration charges can make the facts of their arrest known.
3) But this does not mean that the public has full information about the govt's immigration practices.
   i) If detainees and their attneys choose not to publicize their arrest, and the govt does not reveal the details, the facts effectively may remain secret.
4) Why does the public may want to know how the govt is enforcing immigration laws as an anti-terrorism measure and why might the detainees and the govt want to resist complete disclosure?
5) Center for Nat'l Security Studies v. US DOJ
   i) Plaintiff public interest groups filed a Freedom of Information Act, 5 U.S.C.S. § 552, action seeking information being withheld by defendant U.S. Department of Justice (DOJ) concerning detainees caught up in the investigation following the September 11 terrorist attacks. The U.S. District Court for the District of Columbia ordered the release of the names of the detainees and their attomeys, but nothing else. The parties filed cross-appeals
   ii) The detainees fell into three categories: those who were detained for immigration law violations, those held on other federal criminal charges, and those who were material witnesses. The circuit court held that Exemption 7(A) of the FOIA, 5 U.S.C.S. § 552(b)(7)(A), was properly invoked to withhold the names of the detainees and their lawyers. The terrorism investigation was one of DOJ's law enforcement duties and its declarations, viewed in light of the appropriate deference to the executive on issues of
national security, satisfied its burden to show a rational link between
disclosure and the harms alleged. The circuit court held that disclosure of the
detainees' names could reasonably be expected to interfere with the ongoing
terrorism investigation. The detainees' attorneys' names were protected from
disclosure by the same exemption. The circuit court affirmed the district
court's holding that the DOJ properly withheld information about the dates
and locations of arrest, detention, and release for each detainee. Neither the
First Amendment nor common law, which was preempted by the FOIA,
provided a basis for compelling disclosure

iii) The judgment of the district court ordering the DOJ to disclose the names of
the detainees and their attorneys was reversed. The judgment of the district
court holding that the DOJ properly withheld information about the dates and
locations of arrest, detention, and release for each detainee was affirmed

5-4 Deportation and Human Rights

1) Suspected terrorist may be more unpopular in their own countries than in the US.
Can the US deport a suspected terrorist to a country that will mistreat him or her?
Most cases, NO b/c the US is a member of the UN Convention against Torture
and other Cruel, Inhuman, or Degrading treatment or punishment. Additionally, Congress
has passed a similar bill.

2) Bellout v. Ashcroft

i) The alien, a citizen of Algeria, tried to enter the United States using a
fraudulent passport. The Immigration and Naturalization Service initiated
removal proceedings, and the alien sought asylum, withholding of deportation,
and relief under CAT, stating that he would be tortured by terrorists or police
if he returned to Algeria. The immigration judge ("IJ") denied the requested
relief, and the Board affirmed the denial. On review, the court held that: (1)
under 8 U.S.C.S. § 1158(b)(2)(D), the court lacked jurisdiction to review the
determination that the alien was ineligble for asylum where the IJ found that
there were reasonable grounds to believe that the alien engaged in or was
likely to engage in terrorist activity; (2) substantial evidence supported the
conclusion that the alien engaged in or was likely to engage in terrorist
activity and was thus ineligible for withholding of removal where the alien
testified that he was a member of the Armed Islamic Group for three years;
and (3) substantial evidence supported the denial of deferral of removal under
CAT where the alien did not show it “was more likely than not” that he
would face torture if returned to Algeria.

ii) The court dismissed for lack of jurisdiction that part of the alien's petition
seeking review of the determination that the alien was ineligible for asylum—
b/c “there shall be no judicial review of a determination of the Attny
General's determination that the an alien is ineligible for asylum b/c the alien
is madmissible or removable b/c of terrorist activity (page 141).” The court
denied the remainder of the petition for review.

3) CAT = “substantial ground to believe the alien would be tortured” versus 8 C.F.R.
§1208 = “more likely than not to be tortured”
i) The ct in Bellout said that “to be eligible for deferral of removal under CAT, Bellout must establish that he “is more likely than not to be tortured” if he returns to Algeria.

Chapter 6 Economic Sanctions

6-1 Unilateral Sanctions

1) The US has responded to terrorism in part by unilaterally imposing economic sanctions e.g. freezing of assets and the prohibition of trade and assistance on terrorist organizations and the nations that support them i.e. Hamas will be denied US aid until they recognize Israel’s right to exist.

2) Some US businesses argue that unless export prohibitions and other measures apply to the whole world, they accomplish nothing more than harm to US businesses b/c other firms in other countries simply take over the business.

3) To address this concern the US has put pressure on foreign companies whose extra-territorial action they cannot regulate directly.

   (1) The govt banned US business in Libya and Iran and Congress gave the president authority to bar foreign firms that make significant investment in Iran and Libya from conducting certain kinds of transactions in the US or w/ US businesses.

4) The US enforces sanctions through civil and criminal penalties. In addition, the existence of sanctions may render contracts made in violation of them unenforceable.


   i) LEXIS: The contract provided for the American manufacturers to build a plant in Iran for assembling the Chinese manufacturers’ computer products to be sold in Iran and elsewhere. According to the complaint, the Chinese manufacturers decided not to proceed with the transaction. The trial court granted summary judgment to the Chinese manufacturers on the ground that the transaction was illegal. The court affirmed, observing that unlicensed transactions involving Iran violated Exec. Order Nos. 12959, 13059; the Iranian Transactions Regulations, 31 C.F.R. pt. 560; 50 U.S.C.S. § 1705; and 18 U.S.C.S. § 2332d. By entering into the contract, the American manufacturers approved and facilitated a prohibited transaction, acts barred by 31 C.F.R. § 560.206. Their activities, done in furtherance of the agreement to supply goods, technology, and services to Iran, were all prohibited, absent a specific license under 31 C.F.R. § 501.801(b). Hence, the contract was unenforceable under Cal. Civ. Code §§ 1550(3), 1596, 1598, 1667, 1668. The penalty was not disproportionate to the severity of the offense, and any forfeiture was not unfair.

   ii) The court affirmed the summary judgment

6) The Iran and Libya Sanctions Act gives significant discretion to the President. The Act says that the President’s “determination to impose sanctions under this Act shall not be reviewable in any court.”

6-2 Multilateral Sanctions
1) Multilateral sanctions are usually stronger than unilateral actions, so the US has on my occasions pressed the UN Security council to institute multilateral sanctions i.e. the UN has passed a resolution giving Iran 30 days to stop its nuclear ambitions.

Chapter 7 Using Military Force in Foreign Countries

7-1 Military Force as a response to terrorism
1) Traditionally, most nations have seen acts of terrorism as crimes. They arrest terrorist w/ law enforcement, charge them w/ crimes, and try them in courts. Terrorist are in prison for murder, kidnapping, etc.
2) A new trend as emerged and countries have seen acts of terrorism not merely as crimes, but as forms of armed aggression.
3) As such, nations are now using military force instead of law enforcement.
4) In US v. Yousef, the FBI in a joint operation w/ the NYPD brought Yousef to justice after leading an investigation that took them to Pakistan and parts of NY.
5) After Sept 11th attack, the US responded not only w/ federal agencies but w/ military force.
6) The US viewed the attacks not just as a crime, but an act of war.
7) In addition to domestic law, a variety of int’l agreements, treaties, and conventions concern military responses to terrorism.

7-2 Military Force and the U.N. Charter
1) Article 2(4)—“all members shall refrain in their int’l relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent w/ the purposes of the UN.”
2) Nations may use force in two basic situations:
   i) Article 42—the Security Counsel may authorize the use of “air, sea or land forces as may be necessary to maintain or restore international peace and security.”
   ii) Article 51—recognizes that “inherent right of individual or collective self-defense if an armed attack occurs against a member of the UN, until the Security Council has taken measures necessary to maintain int’l peace and security.”
3) NATO represents a military alliance b/t the US and 18 other nations (created by the Washington Treaty in 1949).
   i) Article 5 of the Washington Treaty says “an attack on a member state is an attack on all.”
   ii) On Sept 12th, NATO said that if the attacks are found to be from an outside party of the US, then it will be considered an attack on all members.
   iii) The US was giving the full support of NATO Allies.
4) Nicaragua v. US
   i) In this case, the ICJ ordered the US to pay compensation to Nicaragua, but the US refused to comply w/ the judgment. The UN General Assembly passed several resolutions urging the US to comply immediately.
   ii) As a result of this case, the US withdrew from the compulsory jurisdiction of the ICJ. The US believes that if US officials commit crimes, the US criminal justice system is best suited to try them for their crimes.
5) Scholars have argued that maybe the Sept 11th attacks were not an armed attack b/ the hijackers were only using box cutters. Page 171.

6) *Islamic Republic of Iran v. US*
   i) Legal standard of proof in the ICJ is clear and convincing, or very high standard.
   ii) The ICJ concluded that the US did not demonstrate by sufficient evidence that Iran had fired the missile that struck a ship or that Iran had shot at helicopters.
   iii) How realistic is it to expect countries to gather evidence on a terrorist attack perpetrated by a country.

7) Should Article 51 be amended to permit the use of force to respond to acts of terrorism even if those acts do not rise to the level of an armed attack?

8) *Pre-emptive uses of force are designed to prevent enemies from attacking by hitting them first, rather than simply reacting after they strike.*
   i) *Anticipatory self-defense* i.e. Israel attack on Egypt. Where do you draw the line? How about Article 51’s that gives permission to respond to acts of force?
   ii) Military technology is important in determining when a threat is imminent.

9) The US and UK justified the 2003 invasion of Iraq, not as a pre-emptive use of force under Article 51, but instead on grounds that Iraq had violated terms of the cease-fire agreement reached in 1991 at the conclusion of the Gulf War. *See Lord Goldsmith, Attorney General, Legal Basis for Use of Force Against Iraq (March 17, 2003) (UK Prim Minister’s Office website)*

10) Schneiderman case (get handout from week 4 *Loss of Citizenship*)—deals w/ whether or not citizenship can be revoked for a person who is a self-determined communist. He was a naturalized citizen and five yrs after the gov’t stripped him of his citizenship and deported him. The Sup Ct said the burden of proof rested w/ the gov’t and citizenship should not lightly be removed from any individual. It was not enough to show that schneiderman was a communist but that he was a fighting revolutionist who wanted to change the constitution. The implication for terrorism, if someone is accused of being a member of al-quaeda, citizenship cannot be stripped unless the person has taken action in support of al-quaeda—as long as they don’t take any action, it’s likely that the citizenship cannot be stripped.

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**Chapter 8 Domestic Use of Military Force**

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

1) A “Posse Comitatus” is a group of citizens who are called together to assist the Sheriff in keeping the peace.

2) The Posse Comitatus Act says, “*Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years or both.*”

3) The history of Posse comitatus: one court said, “the immediate objective of the legislation was to put an end to the use of federal troops to police state elections in the ex-confederate states where the civil power had been reestablished.”

4) Modern application of Posse Comitatus:
i) On Sept 11th, the USAF was authorized to shoot down civilian airliners
   (a) Does Dick Cheney authorizing the USAF to shoot down the
       commercial jets violate posse comitatus? Posse Comitatus requires an
       Act of Congress or expressly authorized by the Constitution.
   ii) What if a local P.D. found a nuclear bomb? The military would be better
       prepared to handle bomb.

5) *Padilla ex rel. Newman v. Bush*
   i) Padilla argues that his detention by the military was a violation of the Posse
       Comitatus Act codified in 18 USC §1385—making it unlawful to use the
       military “as a posse comitatus or otherwise to execute the law.”
   ii) The Act is to prevent the military from executing civilian law
   iii) The Court says that Padilla’s military detention was not in order to execute a
       civilian law or for violating a civilian law, notwithstanding that his alleged
       conduct may have violated a civilian law. He was detained for interrogation
       of his association w/ Al-Qaeda, an organization which the military is in active
       combat w/.
   iv) Therefore, Padilla’s detention by the military does not violate the Posse
       Comitatus Act.

6) If the military was used to detain Padilla and bring Padilla to trial on criminal charges
   in a civilian court, then it would likely have been a violation of the Posse Comitatus
   Act.

8-2 Applicability of General Laws
1) Employing military forces domestically to respond to terrorism also raises the
   question whether laws of general application can or should regulate military forces.

2) **Attorney-General for Northern Ireland’s Reference**
   i) British Soldier shot and killed what they believed were terrorist while on
      patrol of an area considered to be haven to IRA terrorist.
   ii) Should the British soldiers be tried for murder? “In the circumstances
       postulated, the soldier had no choice as to the degree of force to use. It was a
       case of all or nothing. He could either aim a bullet at the suspect w/ his rifle
       or use no force at all and let the suspect escape, whereas in ordinary cases of
       self-defense or of arrest there is some choice of methods involving varying
       degrees of force.”

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**Chapter 9 Targeted Killing or Assassination of Suspected Terrorist**

9-1 Civilian and Military Rules
1) Law enforcement generally arrest suspects of crimes and then try them in court of
   law. Military forces, however, often simply attempt to kill suspected terrorist leaders
   w/o endeavoring to arrest them. This practice is known as “targeted killing or
   assassination”

2) *Lieber Code of 1863 was the first formal statement of the law of armed conflict and*
   *gives military forces legitimacy in killing enemy combatants. Nothing in the law of*
   *armed conflict requires military forces to allow the enemy combatant to surrender*
before death. US may bomb barracks full of enemy combatants before giving them an opportunity to surrender.

3) The law of armed conflict does not sanction all assassinations of enemy leaders, however. §148 of the Lieber Code and Article 23 of the Hague Convention IV Respecting the laws and Customs of War on Land, prohibit targeted killing (Page 190)

4) In contrast to law of armed conflict, Human Rights principles generally require gov’ts to follow some kind of procedure before executing anyone.
   i) ICCPR (Int’l Covenant on Civil and Political Rights)—says that “every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”
      (a) US (and maybe other nations) hold the view that the ICCPR does not apply to military actions.
   ii) European Convention on Human Rights says, “no one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.”
      (a) But even human rights principles recognize special exceptions. In the European Convention, “Deprivation of life shall not be regarded as inflicted in contravention to this article when it results from the use of force which is no more than absolutely necessary...”

5) Report of the Special Rapporteur (page 191)
   i) US said the US was at War and their assassination was legitimate/legal under int’l humanitarian law.
   ii) Yemen’s involvement in the assassination could be justified by using the UN SC resolution.
   iii) Clear case of extrajudicial killing
   iv) Rapporteur’s duty is to report, and it is up to the UN general assembly to determine if it will condemn the US actions.

6) Could military forces have shot Jose Padilla as you got off the plane, but before he was in US custody? The Rules of Engagement would apply, and so, Padilla could have been shot; however, this is very unpractical. Do the rules of engagement require an armed force to capture an enemy who has not surrendered? NO.

7) The US, along w/ Israel have argued for the legality of targeted killing.
   i) A petition by a human rights group to the Israeli Supreme court argued that “launching of missiles at a suspected terrorist, at a time when he does not pose immediate danger to another person, is an execution w/o a trial” in violation of human rights principles embodied in Israeli and international law. The petition also asserted that “targeted killings trample over the human rights of the liquidation targets and of innocent passers who happen to be present at the location of the liquidation operation.”
   ii) Israeli Gov’t responded by saying that the laws of war allow the Israeli defense forces to attack legitimate targets and that “there is no argument but that a person who takes a direct part in the hostilities is a legitimate target, w/c his formal characterization (member of a conscription army, uniformed guerrilla fighter, civilian, etc.) may be.”
iii) The High Court of Israel declined to issue an interim order barring targeted killing. However, prior to a final decision in the case, the Israeli gov’t announced it would suspend targeted killing as an attempt to better the relations w/ their neighbor.

8) In 2004, the US vetoed a UN Security Counsel Resolution that would have condemned Israel’s practice of targeted killing.

9) McCann v. United Kingdom (European Court of Human Rights)
   i) The European ct decided that the UK did not breach its obligation under the European Convention of Human rights b/c the killing of the IRA suspects was “absolutely necessary” under the circumstances.
   ii) Soldiers who killed a couple IRA guys who were suspected of plotting a bomb in Gibraltar. A car full of explosives were later found.

10) Remember, that unlawful combatants also deserve, under international law, to have their lives spared; except when “absolutely necessary.” The crimes committed that would classify a combatant as unlawful would trigger a prosecution for those crimes. Justice would be served in court.

Chapter 10 Group Punishments

10-1 Demolition of Homes
1) Military forces have the capacity not only to attack terrorist, but to disrupt their lives and the communities that they live in.

2) For example, they can destroy terrorist homes, set curfews in areas of high terrorist activity, deport suspected terrorist, etc.
   i) Are these responses lawful?
   ii) If applied to persons who were not involved in any terrorism, do these responses amt to impermissible collective punishment?

3) Almarin v. IDF Commander in Gaza Strip (Supreme Court of Israel)
   i) ▲ stabbed and killed a little girl at a bus stop.
   ii) This was a case of murder
   iii) But Israel classified the act as terrorism, thus invoking Israeli authority to destroy the ▲’s domicile.
   iv) This authority to destroy one’s domicile, also extend to parts of the apartment or home that are owned or used by the members of the family of the suspect.
   v) Sad case but the court simply applied the facts to the Israeli law; our class discussion was simply one of politics.

4) Israel believes that destroying homes will provide a strong deterrent to prospective terrorist. “because of the impossibility to deter the terrorist themselves, it is important to deter the ones that send them, those who facilitate their actions, and those that influence them.”

5) Geneva Convention IV prohibits the various kinds of collective punishment. It says, “no protected person may be punished for an offense he or she has not personally committed. Collective penalties are likewise all measures of intimidation or of terrorism are prohibited....reprisals against protected persons and their property are prohibited.”
i) Israel has continuously and persistently argued that the convention does not regulate their conduct since the inception of the convention. As such, Israel has legally, under int'l law, declined to ratify and apply this article of the convention.

10-2 Deportation of Suspected Terrorists
1) Deportation of suspected terrorist and their associates is another means of deterring terrorism.
2) *Association for Civil Rights in Israel v. Minister of Defense* (Supreme Court of Israel)
   i) “The full panoply of natural justice does not have to be observed in a case where this would be contrary to national security.”
   ii) The UN Security Council condemned the deportation at issue in this case and demanded that Israel “ensure the safe and immediate return to the occupied territories of all those deported.”
3) The Geneva Convention IV, Article 49 says, “individual or mass forcible transfers and deportations...are prohibited, regardless of their motive.”
   i) Article 78 also speaks to this point and says, “...it may at the most, subject them to assigned residence or to interment.”

Chapter 11 Military Searches

11-1 Searching of Physical Spaces
1) The police face an important constitutional limitation when looking for evidence of criminal activity. The 4th Amendment requires a warrant after showing of probable cause to get a certain piece of thing to be seized at a particular location.
2) The question arises, whether the 4th Amendment should apply when military personnel are looking for terrorist.
3) *US v. Green*
   i) This case is good example of the military and civilian interface. Lady is pulled over at a random checkpoint at the military base. You wouldn’t know you were going through the base at some points—open base.
   ii) In a civilian ct the lady probably would have received 10 yrs.
4) Airport and border searches are not protected by the 4th Amendment. The *Green* case says that military bases are also not given 4th Amendment protection.

11-2 Searching Computer Databases
1) In 2002, the US DOD announced the Total Information Awareness Program now known as the Terrorism Information Awareness Program.
2) The objective of the act was to allow the gov’t to search databases to help prevent terrorist attacks by looking for behavior patterns e.g. using credit cards to purchase particular items, etc.
3) Practical reasons explain the failure of the Act; Chairman of the Committee said that in 7 clicks all 19 hijackers could have been identified, but the practicality of deciphering and collecting this information is unreasonable and unlikely successful.

Chapter 12 Classification of Detainees
12-1 Possible Classification

1) Thousands of suspected terrorist have been captured around the world. What rights do these detainees have? The answer depends on the proper classification of the prisoners' detention.

2) Geneva Convention III on Prisoners of War

**PRISONERS OF WAR**

i) Military forces must classify a belligerent as a Prisoner of War if two requirements are satisfied:

   (a) FIRST, the military forces must have captured the belligerent in a conflict falling within the scope of Article 2 of the Convention. Article 2 says, “the present convention shall apply to all cases of declared war or of any other armed conflict which may arise between or more of the high contracting parties…”

   (b) SECOND, the belligerent must meet the four requirements of Article 4 definition of a POW. Page 230

ii) The Convention allows the belligerent to be held throughout the duration of the conflict.

iii) As POWs, the detainees have many important rights e.g. no coercive interrogation is permitted; POWs get “combat immunity” if they have been lawful combatants. Detainees who are not POWs are not naturally afforded these rights.

**PRESumptive POW UNDER THE CONVENTION**

i) Military forces may have to classify some captured belligerents as presumptive POWs. Article 5 says, “if doubt arises” about the status of the detainee, then they “shall enjoy the protection of the present convention until such time as their status has been determined by a competent tribunal.”

ii) The US has not generally treated anyone captured in Afghanistan as a presumptive POW, although one lower ct has concluded that they deserve that classification

   (a) **Hamdan v. Rumsfeld** (2005)

      1. (distinguish this case from **Hamdi** where the court held that due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker.)

   (b) The Government alleged that appellee, who was being held in solitary confinement at the Guantanamo Bay Naval Base in Cuba, was Osama bin Laden's personal driver in Afghanistan. The charges further alleged that he served as bin Laden's personal bodyguard, delivered weapons to al Qaeda members, drove bin Laden to al Qaeda training camps and safe havens in Afghanistan, and trained at the al Qaeda-sponsored al Farouq camp. On appeal, the court found that through a joint resolution, Pub. L. No. 107-40, 115 Stat. 224, 224 (2001), and Unif. Code Mil. Justice art. 21 and 36, 10 U.S.C.S. §§ 821 and 836, Congress authorized the military commission that was to try appellee. Additionally, the 1949 Geneva Convention did not confer upon
appellee a right to enforce its provisions in court. Finally, to the extent there was ambiguity about the meaning of an article in the 1949 Geneva Convention as applied to al Qaeda and its members, (1) the President's view of the provision prevailed; (2) comity dictated that the court defer to the ongoing military proceedings; and (3) if the article covered appellee, he could contest his conviction in federal court after he exhausted his military remedies.

**UNLAWFUL COMBATANTS**

i) The US Supreme Court has determined that the military may classify captured belligerents who do not qualify as POWs as “unlawful combatants” or “unprivileged belligerents.” *Hamdi v. Rumsfeld*

ii) Unlawful combatants are person who are fighting but who do not meet the requirements for the status of “POW” under article 2 and 4 of Geneva Convention III.

iii) Unlawful combatants may be held throughout the duration of the conflict but may not receive combat immunity.

iv) Military commissions instead of civilian courts may try them for their offenses.

v) Although unlawful combatants do not have the rights of POWs some of them may qualify as “protected persons” under articles 2 and 4 of Geneva Convention IV. Page 599. They could have this status if they were fighting in an armed conflict b/t two nations that have signed the Geneva Convention and they fell into the hands of one of these nations. But even if unlawful combatants have the status of protected person, they still may have limited rights. Article 5 says that when “an individual protected person is definitely suspected of or engaged in activities hostile to the security of the state, such individual person shall not be entitled to claim the rights and privileges under this convention.”

(a) The US currently has treated detained irregular insurgent forces in Iraq as persons w/in this subcategory of unlawful combatants.

vi) Other unlawful combatants who are not “protected persons” still may qualify as persons entitled to the minimum humanitarian protections mandated by common article 3. Common article 3 applies “in cases of armed conflict not of an int’l character occurring in the territory of one of the high contracting parties.” It generally does not apply to unlawful combatants b/c it covers only “persons taking no active part in the hostilities.” But it could apply to persons who formerly had engaged in an armed conflict but who laid down their arms before their capture. Common Article 3 provides basic rights, such as the right not to be murdered or tortured, but does not supply all of the rights granted to protected persons.

vii) The US has classified persons whom it has captured in Afghanistan as unlawful combatants.

**ORDINARY CRIMINAL SUSPECTS**
i) The military may treat suspected terrorists whom it has captured just like the police would treat persons arrested on suspicion that they have committed a crime.

NON-COMBATANTS NON-TERRORIST
ii) Sometimes military forces mistakenly or purposefully detain persons who are neither a combatant nor terrorist. These persons generally have the rights of "protected persons."

2) The 1977 Protocol to Geneva Convention III has not been ratified by the US.
   i) The difference b/t this protocol and the original Geneva Convention is that now unlawful belligerents may qualify as POWs, and in the original Geneva Convention III unlawful combatants do not have the rights of POWs (but may only qualify as "protected persons")
   ii) Article 44—Combatants and POWs
      (a) See page 234
      (b) This protocol says that if combatant is unlawful, he may still qualify as a POW if:
         1. distinguishes himself from the civilian population (but the protocol recognizes exceptions that the nature of some conflict combatant cannot distinguish himself, but shall still be afforded POW protection if:
            i. he carries his arms openly
            ii. during each military engagement and
            iii. during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate
      (c) a combatant who fails to meet these requirements shall forfeit his right to be a POW, but shall be given protections equivalent in all respects to those accorded to a POW.

12-2 Process for Making Classifications
1) Article 5 of the Geneva Convention III contemplates that a "competent tribunal" will determine the status of detainees if "doubt arises" about whether they qualify as POWs.
2) The US has conducted hundreds of tribunals pursuant to this regulation during the conflict in Iraq, but have not always used in detaining suspected terrorists e.g. Guantanamo Bay, Cuba. Intelligence reports apparently identified these individuals as members of Al-Qaeda and the Taliban. The US relied on these intelligence reports rather than Article 5 tribunals to decide the propriety of the detention.
3) Al-Qaeda does not qualify as POWs b/c they are not members of the Geneva Convention.
4) The Taliban could have received POW status but they did not meet the requirements of POW status as expressed in the convention.
5) The US concluded that it did not have to offer Article 5 status tribunals b/c no “doubt arises” as to the status of Al-Qaeda and the Taliban. *Hamdan v. Rumsfeld* (see above).

6) *Hamdi v. Rumsfeld*
   
i) **LEXIS:** The citizen-detainee was born in the United States, detained in Afghanistan during the United States' military action against the Taliban regime, and transferred to the United States. Pursuant to a government official's declaration, the Government contended that the citizen-detainee was an enemy combatant. Aside from unspecified screening processes and military interrogations, the citizen-detainee received no due process. The Court determined that the Authorization for Use of Military Force (AUMF), 115 Stat. 224, authorized the detention of individuals in the citizen-detainee's circumstances and that the AUMF satisfied 18 U.S.C.S. § 4001(a)'s requirement that a detention be "pursuant to an Act of Congress." However, under the Mathews analysis, the Court determined that the citizen-detainee, seeking to challenge his classification as an enemy combatant, was entitled to receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker. The Court rejected the Government's assertion that separation of powers principles mandated a heavily circumscribed role for the courts in such circumstances.
   
   ii) **Held:** The judgment is vacated, and the case is remanded. Justice O'Connor, joined by The Chief Justice, Justice Kennedy, and Justice Breyer, concluded that although Congress authorized the detention of combatants in the narrow circumstances alleged in this case, *due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker*
   
   iii) If Congress attempted to limit presidential war powers and say that declaration of war does not give president authority to hold detainees indefinitely, the President would argue that Congress cannot limit it's inherent powers.
   
   iv) Burden of proof is on the detainee to prove that he/she was a student, aid worker, etc. Hearsay evidence is okay in this situation
   
   v) The Mobbs declaration was introduced by the gov't saying that Hamdi was a terrorist. So, on remand from the Sup ct giving Hamdi the chance to rebut the factual findings of Mobbs; but hasn’t this already been done...Hearsay is permissible, so not a fair process for Hamdi. On remand from the Sup Ct then, the finding will likely be the same. The burden has not shifted to the gov’t and remains w/ Hamdi. Again, and the gov’t gets to bring in hearsay.
   
   vi) Hamdi argues for criminal standards where gov’t has burden of proof beyond all reasonable doubt.
   
   vii) 8 justices say habeas available—this is the law going forward. On what kind of process is due; thomas plus 4 say burden on individuual (and gov’t hearsay permitted)=5 saying that Hamdi doesn’t get criminal like trial.

7) The *Hamdi* decision had consequences for all of the persons that the US was detaining as “unlawful combatants.” The US responded by establishing “Combatant
Status Review Tribunals.” By March 2005, the tribunals had determined that 465 detainees were combatants and that 22 were not. Remember that the burden still lies on the detainee.

   i) The Congress recently passed the Detainee Treatment Act of 2005 28 USC §2241, which contains provisions on the CSRT

   (a) The USCA (US Court of Appeal) for DC Circuit shall have exclusive
   jd to determine the validity of any final decision of a CSRT that an
   alien is properly detained as an enemy combatant.

   (b) The jd of the ct on any claims w/ respect to an alien shall be limited to
   the considerations of

   1. whether the status determination of the CSRT w/ regard to such
      alien was consistent /w the standards and procedures specified
      by the Sec of Defense for CSRT (including the requirement
      that the conclusion of the tribunal be supported by a
      preponderance of the evidence and allowing a rebuttable
      presumption in favor of the govt’s evidence.)

   2. to the extent the constitution and laws of the US arc applicable,
      whether the use of such standards and procedures to make the
      determination is consistent w/ the Constitution and law of the
      US

   3. see handout for specific language

8) The Five justices in Hamdi concluded that the US could hold a US citizen as an
   enemy combatant, but the ct did not determine whether a country may or must
   classify one of its own citizens as a POW. This status has both benefits and
   detriments for citizens as shown in the cases below.

9) The definition of “enemy combatant” for the purpose of the Guantanamo detainment
   has evolved over time. In January 2002, when the first detainees were sent from
   Pakistan and Afghanistan to Cuba they were termed, as were the detainees in Ex
   Parte Quirin, “unlawful belligerents.” (In Quirin, the ct held that 8 US born Germans
   could be tried in military court b/c the president designated them as “unlawful
   belligerents” through presidential authority. In Hamdi, the gov’t defined “enemy
   combatants” far more narrowly as someone who was “part of or supporting forces
   hostile to the US or coalition partners’ in Afghanistan and who engaged in an armed
   conflict against the US there.” Later, in response to Rasul v. Bush, the detainee were
   called “enemy combatants.”

12-3 Citizenship and POW Status
1) In Re Territo (9th Circuit 1946)
   i) A citizen can be a POW. He was born in the US, then brought back to the US
      from Italy after enlisting in the Italian army. Torrito argues that he was forced
      against his will into the Army. Ct said does not matter whether drafted or
      volunteer, a enemy of war is a POW. Does not want to be POW. Citizen

2) Public Prosecutor v. Oie Hee Koi (UK Privy Council)—pre-Geneva III and IV in
   Malaysia. Does want to be a POW. Is a citizen.
Chapter 13 Aspects of Detention

13-1 Duration

1) The permissible period for detaining suspected terrorists depends on the reason for their detention. For POW’s, they can be detained for the duration of the conflict.

2) The Geneva Convention III does not address the duration of detention for unlawful combatants, but in Hamdi five Justices concluded that unlawful combatants also could be held for the duration of armed conflict.

3) In the US, if suspected terrorists do not merit treatment either as POWs or unlawful combatants, but probable cause exists to believe that they have committed a crime, law enforcement official may jail them pending trial. However, a speedy trial is still required under the constitution. The US held Zacarias Moussaoui as a criminal suspect.

4) Even w/o probable cause to detain a suspected terrorist for a crime, law enforcement may still hold them as material witnesses to grand jury proceedings or to a trial. Jose Padilla was initially held as a material witness to a grand jury proceeding in NY.

5) Immigration laws also provide an alternative basis for detention.

6) Apart from these few different categories, govt’s cannot simply arrest persons on grounds that they may be terrorists. In the US, for example, a federal law says “no citizen shall be imprisoned or otherwise detained by the US except pursuant to an act of Congress” 18 USC §4000. Article 5 of the European Convention on Human Rights similarly provides “no one shall be deprived of his liberty save in the following cases and in accordance w/ a procedure prescribed by law…”

7) Hamdi court said that “enemy combatants” could be held for the duration of the conflict like POWs in the Geneva Convention. What about when suspects are detained on the larger global war on terror? The Court said “if the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel.”

8) The US DOD announced that it would conduct annual reviews of all the detainees. Each detainee is afforded an opportunity to explain to the review panel, consisting of 3 military officers, why he is no longer a threat to the US or allied forces. The detainee has assistance of a military officer in preparing his case; his family and home country may also provide information; then the review panel makes a recommendation to the DOD on whether to release the detainee.

9) Is there any risk in releasing detainees? US officials said that they have captured many of the detainees that were released before fighting against in Pakistan and Afghanistan.

10) Lawless v. Ireland (European Court of Human Rights)
   i) Page 292

11) Murray v. UK (European Court of Human Rights)
   i) Northern Ireland and the IRA. Sister of the an IRA member. Suing for false imprisonment.

   ii) Main argument is art 5.1 of Geneva Convention—“deprived of liberty…”
12) Supplemental Case

   1) Israeli case—you can keep people up to 18 days. Reason is that there is a lack of Israeli investigators and so they need time to get to ask good questions. The Israeli Sup Ct says no, you cannot do this. High Ct of Justice says, lack of investigators is no excuse...people's liberties are worth more than that. You have 6 mths to come into compliance w/ int'l and Israeli law. Hire more investigators and speed up the process. Professor thinks this is a much more demanding standard than the US etc have imposed.

13-2 Conditions of Detention

1) Geneva Convention III Article 70 allows POWs to write home, and Article 122 requires the detaining power to send information regarding POW to an information agency established in a neutral country.

2) The Law also regulates the conditions of confinement for captured terrorists who are held as ordinary criminal suspects.

3) *US v. Richard Reid*

   i) LEXIS: Defendant was held as a criminal ▲. ▲ pled guilty to eight terrorism-related offenses and was sentenced to life in prison. Defendant challenged the imposition of certain special administrative measures (SAMs) that restricted his access to news media while he was detained in Massachusetts. The United States District Court for the District of Massachusetts denied defendant access to the withheld material. Defendant appealed.

   ii) While at a Massachusetts correctional facility defendant was permitted to use funds from his prison account to purchase a subscription to a magazine. Under a set of SAMs imposed on defendant by the U.S. Marshals Service at the direction of the Attorney General, an FBI special agent removed the "letters to the editor" section from each issue of the magazine and clipped two articles about terrorism from the magazine. Defendant was transferred from the Massachusetts facility to a maximum security facility in Colorado. The court of appeals found that this appeal had been overtaken by changes in the factual and legal circumstances of defendant's confinement. Although there remained a substantial dispute between the parties concerning defendant's access to the magazine, the court nonetheless dismissed the appeal as moot. Based on his relocation to Colorado, defendant no longer asserted an injury that was likely to be redressed by a favorable judicial decision in the proceeding. Any opinion on the merits of defendant's appeal would be merely advisory. Accordingly, the court had no choice but to dismiss the case as moot.

4) The US takes the position that the detainees at GITMO are not entitled the privileges of POWs b/ they do not meet the definition of POWs. What standards govern the treatment of unlawful combatant? The Geneva Convention still requires that unlawful combatant be treated human and similar to a POW.

5) Would suspected unlawful combatants have fewer rights than aliens who have asserted that they are "at war" w/ the US and who have pleaded guilty to serious terrorist offenses?
6) Reciprocity. What incentive does the US have to follow the requirements of the Geneva Convention III? Is the incentive the possibility that the US’s compliance will induce its enemy to comply when Americans are captured? Have past enemies ever complied? Are future enemies likely to comply? Other reasons why the US may want to comply.
   i) The US is a world leader and as such must lead by example; global public relations are an incentive for the US to follow the Geneva Convention. If the enemy does not comply w/ the Geneva Convention then that state will face prosecution for violating international law. The US should not hinge American policy of detention of POWs on the enemy’s actions.

Chapter 14 Interrogation of Detainees

14-1 Domestic and International Limitations

1) Civilian and military authorities may wish to interrogate persons detained as suspected terrorists for intelligence and prosecutorial purposes.

2) Apart from interrogations, the US may not have any other means of obtaining important information that could lead to preventing terrorist attacks or capturing terrorists.

3) But interrogators have both domestic and international limitations on conduct during interrogations.
   i) The 5th Amendment creates the self-incrimination privilege.
   ii) The 6th Amendment creates the right to counsel.
   iii) Prosecutors may not admit into evidence any information induced through violation of the 5th or 6th Amendment.
   iv) A question not fully resolved is whether a coercive interrogation by itself may give rise to a cause of action for damages.
      (a) In Chavez v. Martinez, five Justices of the Sup Ct concluded that no 5th Amendment violation can occur absent use of compelled statements in a criminal case against the W, but the ct left open the possibility of recovering damages on grounds that a coercive interrogation violates substantive due process rights.

4) Military interrogations also face restrictions
   i) Article 93 of the UCMJ says, “any person subject to this chapter who is guilty of cruelty towards, or oppression or maltreatment of, any person subject to his orders shall be punished as a ct-martial may direct.”
      (a) Soldiers responsible for guarding the prisoners at Abu Ghraib prison in Iraq have been charged w/ violating this article.
   ii) Int’l Treaties and Conventions also restrict methods of interrogation.
      (a) Article 17 of the Geneva Convention III page 313
      (b) Article 111 of the Geneva Convention IV
      (c) UN Convention Against Torture and other Cruel, Inhuman, or Degrading Treatment (CATT)

5) Republic of Ireland v. the UK (European Court of Human Rights)
6) Public Committee Against Torture in Israel v. State of Israel
7) Putting aside the question of their legality, were the interrogation methods described in these cases effective? What is the cost of not using coercive interrogation methods
when dealing w/ suspected terrorists? Do the cts think the benefit of using the methods is a relevant consideration?

i) You’re likely to get false or inaccurate information during coercive interrogations.

ii) Very fact intensive inquiry. If a coercive interrogation could have prevented the 9/11 attacks, most people would agree on allowing the coercive interrogation.

iii) “shock the conscious” standard for civilian detention *Roshen v. CA*

8) In response to doubt about what interrogation techniques the govt was using and what legal standards regulated these techniques, Congress enacted the following provisions:

i) §1402 Uniform Standards for the Interrogation of Persons under the Detention of the DOD.

ii) §1403 Prohibition on Cruel, Inhuman, or degrading treatment or Punishment of Persons under Custody or Control of the US Govt.

iii) See handout for language of above statutes

Chapter 15 Access to the Courts

15-1 Federal Habeas Corpus Jurisdiction

1) Persons detained by military forces may wish to challenge in court the legality of their detention and the conditions of their confinement.

2) In the US, prisoners who believe that they are being held illegally have sought review of their detention by applying to a court for a “habeas corpus”

3) Remember in analyzing these cases of the distinctions b/t constitutional an statutory right to habeas.

4) When a court receives an application for a writ of habeas corpus from a person detained by the military, at least three questions may arise:

i) Does lack of JD or some other principle prevent consideration of the application?

ii) What are the merits of the applicant’s claim?

iii) What remedy, if any, might the court order?

5) *Johnson v. Eisentrager* (US Sup Ct 1950)

i) This case is about Germans whom a US military commission had convicted of violating the terms of Germany’s surrender.

ii) LEXIS: Petitioners have been convicted of violating laws of war, by engaging in, permitting or ordering continued military activity against the United States after surrender of Germany and before surrender of Japan. Petitioners were repatriated to Germany to serve their sentences. Their petition for habeas corpus alleged that their trial, conviction, and imprisonment violated U.S. Const. arts. I and III, and U.S. Const. amend. V. The court of appeals held that any person, including an enemy alien deprived of his liberty anywhere under any purported authority of the United States, was entitled to the writ if he could show that extension to his case of any constitutional rights or limitations would show his imprisonment illegal. The Court held that the Constitution did not confer a right of personal security or an immunity from military trial and
punishment upon an alien enemy engaged in the hostile service of a
government at war with the United States. The Court further found that the
petition failed to allege any fact showing lack of jurisdiction in the
respondents to accuse, try and condemn petitioners or that respondents acted
in excess of their lawful powers

iii) The Court reversed and held that the petition was properly dismissed because
petitioners had no constitutional right to personal security or immunity from
military trial and punishment

iv) Ingredients Overseas, Alien, and War. The ct does not say that if we drop the
‘war’ or any other ingredient, that constitutional rights would not be extended.

v) An enemy alien held in the US may get the constitutional right of habeas. We
don’t know. With thousands of enemy aliens held in the US during WWII,
none tried to get out of the US b/c they didn’t want to go back to the front
lines of Germany.

vi) The ct does not say that there are no situations that an alien does not have
habeas right overseas but in this case, w/ strong words, enemy alien held over
seas by US military has no constitutional habeas right

vii) For policy reasons the court held the way it did b/c a writ of habeas is almost
entirely unknown throughout the world in countries other than English
speaking.

6) Presumably the US chose Guantanamo Bay, Cuba as the detention site of the
suspected terrorist captured in Afghanistan b/c they thought the detainees would be
out of reach of American cts.

7) Rasul v. Bush

i) All three ingredients in Eisenberg are present here.

ii) PP: Petitioner aliens filed various actions challenging the legality of their
detention at the Guantanamo Bay Naval Base. They invoked the court's
jurisdiction under 28 U.S.C.S. §§ 1331 and 1350 and asserted various causes
of action including federal habeas corpus. The United States Court of Appeals
for the District of Columbia Circuit affirmed dismissal for want of
jurisdiction. The aliens petitioned for a writ of certiorari

iii) LEXIS: The U.S. military had held the aliens, along with approximately 640
other non-Americans captured abroad, at the Naval Base at Guantanamo Bay.
The court distinguished them from the Eisentrager detainees in important
respects: They were not nationals of countries at war with the United States,
and they denied that they have engaged in or plotted acts of aggression
against the United States; they had never been afforded access to any
tribunal, much less charged with and convicted of wrongdoing; and for more
than two years they had been imprisoned in territory over which the United
States exercised exclusive jurisdiction and control. No party questioned the
district court’s jurisdiction over the aliens’ custodians. The court held that 28
U.S.C.S. § 2241 required nothing more and that it conferred on the district
court jurisdiction to hear the habeas corpus challenges. Furthermore, the
fact that the aliens were being held in military custody was immaterial to the
question of the district court’s jurisdiction over their non-habeas statutory
claims. 28 U.S.C.S. § 1350 explicitly conferred the privilege of suing for an actionable tort on aliens.

iv) Ct says that Johnson was a constitutional analysis b/c no statutory right existed at the time. The US Sup Ct says that we do not need to reach the constitutional argument in this case, b/c §2241 gives habeas to the detainees.

v) The judgment of the circuit court was reversed and the case was remanded for the district court to consider in the first instance the merits of the aliens' claims.

vi) Page 356-357—this case is about statutory jurisdiction. We don't need to worry about Eisentrager. Kennedy says this case is different b/c no detainees have been tried and convicted, but in Eisentrager the captives were tried and sentenced.

vii) You don't have to have constitutional habeas, b/c Congress has given jurisdiction through §2241.

viii) Page 357 Bradon says it overrules Aaron v. Clark.

(i) Bradon did not involve war, alien, or overseas.

(ii) Professor does not believe this case is not appropriately placed here.

ix) If Eisentrager were before the ct today then the ct would give statutory jurisdiction to the US, but Eisentrager has never been overruled.

x) Basically, Rasul is capable of being construed as granting habeas right to all territory's in custody of the US.

8) The Court decided that 28 USC §2241 gives federal courts jd to hear the detainees' claims. But the court does not decide whether the detainees have constitutional or other legal rights that the courts may enforce.

9) Suspension of the Writ of Habeas Corpus? The Court concludes that a statute, 28 USC §2241, provides jd. The Court therefore does not have to address the question whether the Constitution would provide jurisdiction in the absence of the statute. The Constitution specifies: "the Privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." US Const Art I §9, cl.2. CONGRESS acted on their constitutional power by amending §2241 found below. Where does this restriction apply, worldwide, or only w/in territory under the effective sovereignty of the US? Would the war on terrorism fit w/in the exception? Why did Congress limit the statute to GITMO? There were no outstanding applications for writs anywhere in the world, except GITMO.

10) Congresses basis for amending the constitution is under Article 3 of the Constitution (the article gives Congress the right to limit federal ct jurisdiction.)

i) In response to Rasul, Congress amended the federal habeas corpus statute to address habeas corpus petition filed by detainees at GITMO. 28 USC §2241:

(a) Except as provided by §1405 of the Detainee Treatment Act of 2005, no court, justice, or judge shall have jd to hear or consider—

1. an application for writ of habeas corpus filed by or on behalf of an alien detained by the DOD at GITMO; or

2. any other action against the US or its agents relating to any aspect of the detention by the DOD of an alien at GITMO who
i. is currently in military custody, or
ii. has been determined by the US Ct of Appeals DC Circuit in accordance w/ the procedures set forth in §1405(e) of the Detainee Treatment Act of 2005 to have been properly detained as an enemy combatant.

11) Even under constitutional habeas analysis, war, overseas, and alien are all present so the detainees, in addition to the statutory §2241 prohibition of writ, detainees would not have a right to habeas.

12) Suspension of the Writ of Habeas Corpus by the President? Could the President himself suspend the writ of habeas corpus? President Lincoln took this step to permit the detention of confederate sympathizers in MD. Chief Justice Taney ruled that he could not. Lincoln ignored the ruling. Later, the Atty General issued an opinion confirming that the president had this power. The DOJ has not withdrawn this opinion. In past history, the President has in four instances suspended habeas.

13) Rumsfeld v. Padilla (NOT A GITMO Habeas Corpus case—read this case w/ the subsequent Padilla case)
   i) PP: Respondent detainee, a U.S. citizen, sought habeas corpus relief from confinement in a military facility as a suspected terrorist, and the detainee named petitioners, the U.S. Secretary of Defense and the facility commander, as custodial officials. Upon the grant of a writ of certiorari, the Secretary and the commander appealed the judgment of the U.S. Court of Appeals for the Second Circuit which held that jurisdiction was proper
   ii) The President ordered the Secretary to place the detainee in military custody. The detainee was transferred from federal custody to military custody in another judicial district (the 4th Circuit—pro military circuit.) The detainee sought habeas corpus relief in the original district, contending that the Secretary was the proper custodial official for habeas purposes since he possessed the legal reality of control over the detainee and was subject to state long-arm jurisdiction in the original district through subordinate officials. The United States Supreme Court held, however, that habeas corpus jurisdiction was limited to the district in which the detainee was confined and the commander of the military confinement facility was the only proper custodial official for habeas purposes. The detainee sought release from present physical confinement. Thus the recognized exceptions to the immediate custodian rule did not apply. Further, the court in the district where the petition was filed lacked jurisdiction over the commander since the commander was a resident of the district where confinement occurred (thus no diversity jd, or arising under). Padilla should have filed in the right district—South Carolina. So the case was not done with, but postponed. Any unique circumstances of the case were insufficient to alter the traditional habeas corpus jurisdiction rules
   iii) After this decision Padilla refiled his petition in Federal District Court for the District of South Carolina.

14) Padilla v. Hanft
LEXIS: Al Qaeda operatives recruited a U.S. citizen to train for jihad in Afghanistan. He was armed and present in a combat zone during armed conflict between al Qaeda/Taliban forces and U.S. armed forces and later traveled to the U.S. for the purpose of blowing up apartment buildings, in continued prosecution of al Qaeda's war of terror against the U.S. The President designated him an "enemy combatant" against the U.S. and directed the Secretary of Defense to take him into military custody. The district court ruled that the President lacked authority to detain the citizen. On appeal, the court reversed, finding that Congress of the United States, in the Authorization for Use of Military Force Joint Resolution, 115 Stat. 224, provided the President all powers necessary and appropriate to protect American citizens from terrorist acts by those who attacked the U.S. on September 11, 2001. Those powers included the power to detain identified and committed enemies such as the detainee, who associated with al Qaeda and the Taliban regime, took up arms against the U.S. in its war against these enemies, a power without which the President could well be unable to protect American citizens.

HELD: The detention of petitioner being fully authorized by Act of Congress, the judgment of the district court that the detention of petitioner by the President of the United States is without support in law is hereby reversed.

Padilla gets charged w/ conspiracy to aid a foreign terrorist organization. He is then removed from federal jurisdiction, by the government by charging him and removing him from military custody. The US Sup Ct did not get to look at the underlying issue of Padilla. The 4th Circuit is pissed and withdraws its opinion—they went out on a limb to come up w/ a good opinion and the gov't left them hanging. Padilla was given what he wanted (charged w/ a crime and tried in civilian ct). Recently (2 days ago), the US Sup Ct denied a wrii of cert—the US Sup Ct should have ducked the substantive issues in the original case.

15-2 Diplomacy and the Courts

1) Many Int'l problems have diplomatic solutions. Accordingly, many detainees held in foreign countries sometimes request their own govt to exercise diplomacy to gain their release. A question arises whether cts can order their govt to take further diplomatic steps.

2) Customary International Law requires that the UK take reasonable diplomatic means of getting the release of its citizen—what is reasonable is fact intensive. The UK and Australia were successful in the release of their citizens from GITMO.

3) An example of diplomacy for a prisoners release is the recent release of the US journalist held by Iraqi insurgents. Also, in January 2005 following "intensive and complex" diplomatic discussions, the US agreed to release all of the Britons held in GITMO w/o charges.
16-1 Military Commissions
1) A military commission is a panel of military officers acting as a military tribunal.
2) Many times the US uses military commissions to try persons suspected of violating the law of war.
3) What are the advantages and disadvantages of using military commissions instead of regular cts? B/c they are quicker, maybe for sentencing reasons, u don’t have to charge them w/ a statutory crime, NO JURY, not public record which could give up intelligence, etc.

16-2 Constitutional Limitations
1) Article III, sec. 1 and 2. page 384
2) Amendment V page 384
3) Amendment VI page 384
4) The Supreme Court has addressed the application of these standards in military commissions:
5) Ex Parte Milligan (1866)
   i) He’s a southern sympathizer found in northern controlled territory of IN. The order to execute was not executed.
   ii) This was a violation of constitutional rights b/c IN was not the seat of rebellion like the South, and so he should have been tried in a regular criminal court.
   iii) LEXIS: Petitioner prisoner was arrested and confined in a military prison. At trial, the prisoner objected to the authority of the military commission to try him, but he was sentenced to death. He filled a petition for discharge from unlawful imprisonment in the Circuit Court of the United States for the District of Indiana. The judges of the Circuit Court for Indiana filed a certificate of division and certified questions to the Court.
   iv) The prisoner argued that the military commission (commission) did not have jurisdiction to try him. It was also argued that the Indiana circuit court did not have authority to certify questions and that the Court did not have jurisdiction to hear and determine them. The Court held that the circuit court had jurisdiction to entertain the prisoner’s application for writ of habeas corpus and to hear and determine it. The judges of the circuit court also had the duty to certify the questions on which they could not agreed to the Court for final decision. After reviewing the Constitution, the Court determined that the commission was not a court vested with judicial power by Congress, and therefore the prisoner’s rights were infringed upon when he was tried by the commission. The prisoner’s rights were further infringed upon when he was denied a trial by jury. Thus, the Court held that the appropriate remedy was to issue the writ of habeas corpus. Moreover, because the military trial of the prisoner was contrary to law, on the facts stated in his petition, the prisoner should have been released from custody.
   v) The Court held that the proper orders were entered in the last term, and accordingly, a writ of habeas corpus should be issued and that the prisoner should be released from custody. Further the Court held that the commission
did not have jurisdiction to try and sentence the prisoner because Congress did not sanction the commission.

6) *Ex Parte Quirin* (1942)

i) LEXIS: Petitioners, eight German born U.S. residents, challenged the judgment of the U.S. Court of Appeals for the District of Columbia, which held that the President of the United States could try petitioners under the Articles of War, 10 U.S.C.S. §§ 1471-1593, at a military tribunal, and not in a civil proceeding for offenses against the law of war.

ii) LEXIS: Petitioners, eight German-born U.S. residents, were captured by the United States, as they tried to enter the country during war time, for the purpose of sabotage, espionage, hostile or warlike acts, or violations under the law of war. The President of the United States held that petitioners were to be tried before a military tribunal under the Articles of War, 10 U.S.C.S. §§ 1471-1593. Petitioners challenged the President's authority, arguing that under the U.S. Const. art. III, § 2, amends. V and VI, petitioners had a right to demand a jury trial at common law in the civil courts. The court found that petitioners were alleged to be unlawful belligerents, and that under the Articles of War, they were not entitled to be tried in a civil proceeding, nor by a jury. The court also determined that trying petitioners before a military court was not illegal and did not violate the U.S. Const. amends. V and VI relating to "crimes" and "criminal prosecutions." Thus, the court affirmed the President's authority to try petitioners before a military tribunal without a jury.

7) *Reconcile Milligan and Quirin*

8) Did the Court in *Quirin* overrule *Milligan*? Recall what the plurality said in *Hamdi v. Rumsfeld*, "Quirin was a unanimous opinion. It both postdates and clarified *Milligan*, providing us with the most apposite (Appropriate or apt) precedent that we have on the question of whether citizens may be detained in such circumstances. Brushing aside such precedent—particularly when doing so gives rise to a host of new questions never dealt w/ by this court—is unjustified and unwise."

16-3 *Military Commissions and Terrorism*

1) The Supreme Court, as noted above in *Quirin*, upheld the use of military commissions to try German saboteurs during WWII. Could military commissions also try terrorists during a war on terror?

i) See, Military Order of November 13, 2001 issued by President Bush regarding trials of suspected terrorist in military tribunals—on page 413

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**Chapter 17 Combatant Immunity**

17-1 *Principle and Exceptions*
1) Soldier who kill or injure enemy soldiers or who destroy enemy property in combat do not face liability for murder, assault, and battery, or any other crime.

2) However, the principle of combat immunity has limits:
   i) The principle only applies to lawful combatants (aka “privileged belligerents”).
   ii) In addition, combatant immunity does not shield anyone from war crimes.
       Thus, even if a soldier is a lawful combatant, he or she may not kill prisoners or attack innocent civilians with impunity.
   iii) Finally, soldier’s immunity ends once taken into captivity, so that he may be charged of any crimes committed after being captured.

3) This case gives special attention to the question of who is a lawful combatant and who is not:

4) US v. Lindh
   i) Lindh claims that count one of the indictment should be dismissed because as a Taliban soldier, he was a lawful combatant entitled to the affirmative defense of lawful combatant immunity—however, the defendant does not claim immunity as a to the other counts on the indictment because he was a member of Al-Qaeda, and his membership to this group would void immunity.
   ii) LEXIS: Defendant, an American citizen, was indicted for his actions in joining certain foreign terrorist organizations and serving in combat against American forces. Defendant filed seven motions for dismissal on a variety of grounds, including lawful combatant immunity and selective prosecution as well as dismissal, or alternatively, transfer of venue, arguing that he could not receive a fair trial in this district owing to pre-trial publicity.
   iii) The Government alleged that defendant remained with his fighting group after learning United States military forces had become directly engaged in the fighting. Inter alia, the court held that, just as the sheer volume of pre-trial publicity did not compel dismissal or transfer, neither did the nature of the publicity. The court ruled that impartial jurors could be identified in voir dire. Contrary to defendant's contentions, there were many reasons that transfer was inappropriate. Moreover, although defendant had a Sixth Amendment right to select competent and experienced counsel from another district, he was not entitled to rely on the exercise of that right to effect a change of venue. The group with which defendant affiliated lacked the command structure necessary to fulfill the first criterion for lawful combatant status, as it had no internal system of military command or discipline. There was no clear hierarchical military structure, and wore no distinctive sign, uniforms, or insignia. Further, members of the group failed to observe the laws and customs of war. Thus, defendant's status as an unlawful combatant was correct and he was ineligible for immunity on this basis.
   iv) How do you answer the question “whether lawful combatant immunity is available to one who takes up arms in combat against his own country?”

Chapter 18 Offenses Triable by Military Commissions

18-1 Nature of Offenses Triable
1) Military commissions have limited jurisdiction—they can only try certain types of offenses.

2) In recognition of this restriction, the Military Order of November 13, 2001 limits the jurisdiction of the military commissions that it created to the trial of “offenses triable by military commissions.” What are the offenses triable? In general these offenses consist of violations of the law of war and perhaps certain other offenses, like piracy, that violate customary international law.

3) Application of Yamashita
   i) LEXIS: Petitioner, commanding general of the Japanese army, sought a writ of habeas corpus challenging: 1) the jurisdiction and legal authority of a military commission which convicted him of a violation of the law of war, and, 2) an order of the Supreme Court of the Commonwealth of the Philippines, which denied his petition challenging the jurisdiction of the military commission.
   ii) Petitioner contended that the military commission which tried him was unlawfully created and without jurisdiction. The court disagreed and denied the writ. First, the commission was not only created by a commander competent to appoint it, but his order conformed to the established policy of the government and was in complete conformity with the Articles of War, 10 U.S.C.S. §§ 1471-1593. Second, there was authority to convene the commission, even after hostilities had ended, to try violations of the law of war that were committed before the war’s cessation, at least until peace was officially recognized by treaty or proclamation. Third, the charge against petitioner, which alleged that he breached his duty to control the operations of the members of his command by permitting them to commit specified atrocities, adequately alleged a violation of the law of war. And finally, petitioner was not entitled to any of the protections afforded by the Geneva Convention, part 3, Chapter 3, § V, Title III, because that chapter applied only to persons subjected to judicial proceedings for offenses committed while prisoners of war.
   iii) The legal authority issue is that the general was charged w/ a crime that many argue did not exist at the time the general is accused of committing that crime. The court on page 427 says that the general’s conduct “would almost certainly result in violations which is the purpose of the law of war to prevent.”
   iv) In Yamashita, the general argued that the US military tribunal in which he was tried was operated in violation of article 63. The US Sup Ct rejected this argument on the grounds that the general was tried as a combatant rather than a prisoner—see next chapter 19.

18-2 Definitions of Offenses
1) No universally accepted definitions of offenses against the laws of war have emerged since the time of the Yamashita case. As a result, the US decided that it must supply its own definitions through the MILITARY COMMISSION INSTRUCTION NO.2 Page 435.
2) US v. Al Bahlul
Chapter 19 Trial and Appellate Procedures

19-1 Procedures of U.S. Military Commissions

Military commissions traditionally have followed special trial and appellate procedures. These procedures have differed from the procedures followed in civilian cts and in ordinary ct-martials.

This case is about US military procedures to use in trying suspected terrorist:

* Military Commission Order No. 1, Procedures For trials by Military Commissions of Certain Non-US Citizens in the War Against Terrorism PAGE 444

19-2 Requirements of the Geneva Conventions

1) Article 63 of the Geneva Convention of 1929 (later article 102 of Geneva Convention III of 1949) addressed the procedures requirements for trying POWs. It said:

"sentence may be pronounced against a POW only by the same cts and according to the same procedure as in the case of persons belonging to the armed forces of the detaining power." In other words, to try a POW, the detaining power would have to use the ct-martial procedures used to try their own soldiers when they commit crimes. This provision strives for basic fairness.

2) In *Yamashita*, the general argued that the US military tribunal in which he was tried was operated in violation of article 63. The US Sup Ct rejected this argument on the grounds that the general was tried as a combatant rather than a prisoner.

3) The Sup Ct followed this holding in *Eisentrager* was well.

4) However, article 85 of Geneva III of 1949 says that "POWs prosecuted under the laws of the detaining power for acts committed prior to capture shall retain, even if convicted, the benefits of the present convention."

5) *Sadak v. Turkey* (European Court of Human Rights)

Chapter 21 Compensation Persons Injured By Responses to Terrorism

21-1 Claims Against the Government

1) When a govt responds to terrorism it may injure persons who have no connection to terrorists or it may destroy their property. Should the injured persons have a right to compensation from the govt?

2) In the US, the federal govt has to pay when it takes or destroys private property—5th Amendment Takings Clause. But its have recognized a military exception. Generally, the govt does not have to pay just compensation for property damaged in military actions or taken for reasons of military necessity.

3) What about Tort liability? The US govt, like the govt of most nations, has sovereign immunity. Thus, the Federal govt generally does not face tort liability, unless it has waived its immunity.

4) The US has not waived its immunity for claims “arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.” 28 USC §2680 (j) In addition, if the govt does not assert sovereign immunity, a claim of negligence can succeed only if the govt in fact fails to exercise ordinary care.

5) *El-Shifa Pharmaceutical Industries v. US*

   i) Pres Clinton acted on erroneous info and bombed this business
ii) Business wants compensation

iii) The complaint alleged that destruction of plaintiffs’ facility constituted a taking of private property for public use within the meaning of U.S. Const. amend. V. The U.S. Court of Federal Claims dismissed the complaint. Plaintiffs appealed.

iv) Baker v. Carr factors:

(a) under the six Baker tests, the power set forth in U.S. Const. art. III, § 1, did not encompass judicial supervision over the President’s designation as enemy property the private property belonging to aliens located outside U.S. territory. The court had to satisfy itself that at least one of the tests was inextricably present in the facts and circumstances in the case before it could conclude that the case presented a nonjusticiable political question. The first Baker test was satisfied, i.e., there was a textually demonstrable constitutional commitment of the issue to a coordinate political department. The "issue" for purposes of the first Baker test was the inherent power of the President to designate as enemy property the private property of an alien that was situated on foreign soil.

v) This case is a little harder to understand b/c this was not an enemy property, but it was thought to be. The judiciary says, the decision to mark property as that of an enemy is the power of the president and not for the judiciary to question. Page 539.

6) The owner of El-Shifa asked Congress and the CIA to provide compensation, but received no relief. Would the owner have done better if he had sued the US in tort in a federal district ct instead of bringing a takings clause claim the court of federal claims? No, b/c the US enjoys sovereign immunity and there is no indication that the US would have waived that immunity.

7) The Sudan complained to the UN Security Council that the attacks violated the UN charter and requested an investigation, but the Security Council has taken no action. Why? B/c the US is one of the P5s, thus has veto power. Would Sudan have any better success in suing the US in the ICJ, like Nicaragua and Iran did in the cases? No, b/c after the Nicaragua case, the ICJ does not have jd over American citizens.

8) In Afghanistan, Congress has compensated innocent victims of military bombing campaigns.

9) Farrell v. Secretary of State of Defense (House of Lords)

i) The P, Olive Farrell, whose husband Patrick McLaughlin was killed in Newry, subsequently sued the UK in the European Court of Human Rights. The British Govt settled this case out-of-court, Paying Farrell 37K Euros.

ii) Patrick was one of three men shot and killed in Northern Ireland by a soldier who had received information that that night there would be a bomb attack by three men on the National Provincial Bank in that town. The soldiers were on the roof top. They told the three suspects to stop, but they did not. The Soldier said, “halt, I'm ready to fire.” The men did not stop. The soldier fired and the three men were killed.

iii) The claim by the widow was that the death of her husband was caused by the negligence of the Ministry, its servants and agents, and by assaults and
batteries committed by them. The jury determined that the four soldiers had reasonable cause to believe that the three men had attempt to place an explosive at the bank and that they had not used disproportionate force. The Court of Appeals ordered a new trial to determine whether there was negligence in planning the military operation. The House of Lords now reverses that order.

10) Military forces attempting to attack suspected terrorist might injure non-terrorists or destroy their property in a variety of circumstances. Sometimes the military might target non-terrorist on the mistaken belief that they are terrorist. Other times the military may target terrorists but unknowingly harm bystanders. In still other cases, the military may target terrorists knowing that bystanders inevitably will be hurt. Is compensation more justified in some cases than others?

11) Compensation depends on whether the military is using property taken or has strategically destroyed property during its military operations
   i) If the Army is taken the property to be used to help the army, then you get compensated.
   ii) If your property is destroyed to keep out of the hands of the enemy, then there is no compensation.
   iii) What is the distinction? You need to have the power to blow things up and have to pay for the damage.
   iv) 5th Amendment says “taking for public use”—destroying the property is not a taking, but using the resource for your army is a taking
   v) If you are destroying something, you don’t know how much it’s going to cost, or how much harm you will prevent (destroying a house to prevent the spread of fire)

12) Military forces should have the power to conduct the battle in the way they see best to fight the enemy.

21-2 Claims Against Private Parties
1) Persons who feel that they have suffered from responses to terrorism also may make claims against private parties. They may happen when a person believes that someone else has wrongly accused them of involvement in terrorism, and he or she has suffered b/c of the accusation.

2) Hatfill v. The NY Times
   i) LEXIS: The scientist sued the newspaper after one of its columnists wrote several columns implicating the scientist in a federal investigation into the mailing of letters laced with anthrax in the fall of 2001. On appeal of the district court’s judgment dismissing the scientist’s claims, the court reversed. The court held that the scientist’s complaint adequately alleged that columns, taken together, were capable of defamatory meaning, as the unmistakable theme of the columns was that the FBI should investigate the scientist more vigorously because all of the evidence known to the columnist pointed to him. The court also held that the alleged misconduct was extreme or outrageous under Virginia law because if the scientist’s allegations were true, the newspaper intentionally published false charges accusing him of being responsible for anthrax mailings that caused five deaths without regard for the
truth of those charges and without giving the scientist an opportunity to respond. The scientist's allegations were also sufficient under Fed. R. Civ. P. 8 for his intentional infliction of emotional distress claim

ii) The judgment dismissing the scientist's defamation and intentional infliction of emotional distress claims for failure to state a claim was reversed and the case was remanded for further proceedings

3) Dr. Steven J. Hatfill subsequently sued the US DOJ asserting that leaks from the govt harmed his reputation. This litigation continues.
Terrorism and the Law

- Participation counts.
- csranor
- Office Hours—M/W at 12:30; Th. 4-5
- Phone (404) 727-6811 office; (404) 352-2855 home

Today:
- What is terrorism?
- Next week we'll talk more about legal responses to terrorism. Ch. 1-2 try to define it kinda, etc.

Munich:
- He asks what the movie teaches about who a terrorist is.
  - One kid says it's a revolutionary.
  - But MLK was a revolutionary.
- Burton says it's a non-gov't actor that uses violence.
- Is the use of fear a component of the definition?
- Politics is probably a key component.
- Robbins brings up the notion that a gov't could be a terrorist organization too.
  - Nazi regime, Mao China, Stalin USSR, etc.
  - But Adam brings up the point that a gov't is less underground than a terrorist network. Gov't has bases, set locations, etc.
- Important distinction that Shanor agrees with is the subjective intent of the actor. Massad and the CIA don't try to instill fear in a general population. That's not their aim. Al Qaeda does try to.
- Main point though is that there isn't a universally accepted definition of terrorism. We get some core concepts that people agree with, and then some things on the periphery and some exceptions, etc.
- But for sure, we have:
  - Use of violence
  - Instilling fear, most generally in a civilian population
  - Usually by non-state actors
  - Usually with some political goals in mind.
- There are still some exceptions to those though.
- Keep in mind too though that there may not even be good definitions of what "law" is! These are all amorphous concepts.
- What's basically happened is that certain acts have been prosecuted as terrorist acts, as narrowly defined in a given statute.

Al Qaeda:
- From Ch. 2 of 9/11 Commission Report
• Report straightforwardly declares that Islam does not support or produce terrorism, and that bin Laden has no religious standing in the Islamic community, etc.

• P. 56 talks about the organization of Al Qaeda. Bin Laden in a sense made it a corporate organization.
  o “the organization structure included as its operating arms an intelligence component first, ...a financial committee, a political committee, a committee for media affairs and propaganda. . . .”
  o Basically, this is an organizational structure committed to terrorist acts and it’s kinda new in terms of how developed the organization is.

• There have been different and changing relationships between al Qaeda and Sudan and al Qaeda and Afghanistan.

• Shanor says that since the 9/11 chapter was written, there have been several studies showing that once affiliated al Qaeda cells have become smaller and more autonomous. More fragmented and each more independently capable of carrying out some attacks.

• 9/11 commission didn’t see any priority to capturing killing, trying or dealing with bin laden as an individual.

Ch. 12
Tripod of policies on P. 63 is important.

1/18/06

• Again, from last time, we tried to define terrorism and realized how messy it was. But from a law enforcement perspective, it doesn’t make that much difference, according to the author.
  o One of the reasons for this is that it falls into categories of other crimes anyway—if you kill someone, regardless of motive, it’s murder!
  o Also, where terrorism is in a statute, even though it’s hard to define, it’s usually defined within the scope of the statute.

• What does that mean for the prosecution and defense though?
  • If you’re a really aggressive prosecutor and you want the death penalty, let’s say, you may not always be able to use state law. New York, for example, doesn’t have the death penalty!
  • So, from the prosecution side, you say that the crime met the statutory definition of terrorism.
  • From the defense side, conversely, you just say that the statutory definition of terrorism wasn’t satisfied.

• Shanor talks about the notes on p. 5, #1-4.

• It kinda brings up the question as to whether there can be such a thing as state sponsored terrorism.
  o It talks about clandestine agents.

• The definition we’re discussing is in note 1: “Premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents.”
• What about the Unabomber? Was he a terrorist?
  o He doesn’t seem to fall under the group factor of the case book.
  o Moreover, even with the so-called lone wolf provision in the definition, there’s something about American v. Non-American??
  o Lone terrorists probably don’t fall under the statute because they’re not a group or an AGENT, arguably because agents have a principal!
• What about the DC Snipers?
  • Phly not. It’s not politically motivated!
    • Although there is the supposed fact that one of the snipers wanted to start a multiracial utopia in the back woods of Canada. That would be politically motivated.
    • But providing a cover for the killing of the sniper’s ex-wife wouldn’t be political.
  • What about the U.S.S. Cole bombing? Is that terrorism under the definition in the book?
    • NO. it’s not against non-combatants arguably.
    • But on the other hand, it’s not like the sailors on the ship thought of themselves as non-combatants at the time.
    • I guess you could just say that if you’re uniformed personnel on board the ship at the time of the attack, you’re a combatant.
    • But if we’re using a definition like that of combatants, Robbin brings up the good point that the attack on the Pentagon wouldn’t be terrorism because those people were working in the Pentagon, so they’d be combatants. In essence, just a definition of combatant as “military personnel” could be too broad.

If you’re defending the people that did the USS Cole attack, how else would you defend them under the statute?
• We have the combatant component. But were the cooks and janitors on the ship combatants? You could argue not. If you were defending, you would have to just argue that those people, when they died, were collateral damage. The TARGETS, however, were combatants.

Kasi v. Virginia
• Basically, a Pakistan native was living in Virginia and was living in VA. He shot a few CIA agents and then fled back to Pakistan and was there and in Afghanistan.
• In that time, his roommate filed a missing person report and the police searched the apt and found incriminating mat’ls, so they were on the look out for him.
• They found him in Pakistan, brought him back, and then tried him for murder.
• They tried the guy in VA because it has the death penalty.
• Didn’t make sense to go after the guy as a terrorist because the definition for that crime had so many extra elements.
• This guy’s defenses were as follows:
First, there was a newspaper that did an interview with one of the jurors and one of the jurors said that they decided on the DP because the guy was an immigrant who attacked the American way of life.

Also, a juror described him as a terrorist.

- Basically then, the guy was asserting prejudice on behalf of the jurors. Thus, juror misconduct.
- Still, the court dismissed the arg because it says we don't look behind the veil of juror deliberations. As long as the instructions were correct, the typical answer is that jury deliberations were done under the right instructions and we don't pierce that veil.
- The SECOND arg was that the crimes were POLITICAL, and because they were political, he should be given some sort of First Am. protection, which would commute his sentence from death to life in prison.
  - Court says the guys args were inconsistent though.
- Court holds that the sentence of death was proper.
- Assuming the guy was a terrorist, is the DP a good idea for terrorists?
  - If we do it, it's one less terrorist we have to deal with.
    - But a counter arg is that it promotes martyrdom.
    - Another counterarg is that there were 20000 trained by al qaeda at one point. It's hard to pick em off one by one and make a difference.

Laws Aimed Specifically at Terrorists (appendix A is the statute for support of a terrorist organization):

- Case book editor selects 2339B (AEDPA) and uses US v. Hammoud
- note that the statute in the back in the appendix is a little different than the one in Hammoud. It was amended because prosecutors were having a hard time getting convictions under the old way.

Hammoud

- D is a supporter of Hizballah
- Guy comes to US and gets permanent resident status, even though he came with fraudulent documents.
- Guy has a bro in the US and begins to start smuggling cigs to MI to make money off of selling them below the tax price.
- The evidence that he supported Hizballah was that he sent money to them and engaged in having meetings at his house. Basically, he was giving financial support. That's the focus of the case. The guy was giving 3500 dollars of his own money to Hizballah.
- So he was convicted of a variety of crimes, i.e. money laundering, transportation of contraband cigs, and mat'l support of a designated foreign terrorist org.
- He says the statute isn't const. because he has a First Amendment right of association. He can be a member of an org that provides good charitable services. But the court responds that it's impossible to know whether the guy's money went to humanitarian efforts rather than terrorist ones.
• Does this statute and holding have any impact on membership in orgs that are designated as FTO’s?
  - Even though the case isn’t about just having your name on a roster to support the org or abstracdy supporting the org, does the holding chill our First Am. right to do this or send money?
    ▪ What if you send a check that you designate for orphans and NOT terrorists?
    - It’ll get you in trouble after this case.
    - So, why doesn’t that infringe on free ass’n?
    - Because the court applies the O’Brien test (4 factors) that balances indiv. Rights and gov’t interests. In this case, there’s a substantial gov’tal interest in curbing int’l terrorism. And in the balance, Hammoud is free to preach that the org is great. Court also says this effect on free ass’n is only incidental, not necessarily a violation of first am.
  ▪ Basically, there’s a line between general advocacy and specific attempts to incite violent acts.

• What about the second arg that Hammoud makes? Overbreadth
  - Hammoud argues that you’re also targeting legit speech when you make a law that covers both legit and illegit speech. He’s saying in part that the provision is overly broad because it would sweep within its contours people who have just joined, given money designated for humanitarian activities, didn’t give money but engaged in training, etc.
  - But the court says that if the statute targets the CONDUCT and not the speech, it’s fine. Here, the statute was legit, and Hammoud’s conduct was not in the speech area.
  - There have been some revisions to the statute that take care of some of the overbreadth and vagueness problems.
    ▪ At the time of the Hammoud case, it was “whoever provides material support or resources...”, and now it adds “knowing or intending that they are to be used for [terrorist activities].”
    ▪ Secondly, the statute has been amended to define material support or resources in a more careful way. “any property tangible or intangible including currency or monetary instruments, false documentation, etc.” was the statute at the time of the Hammoud case. Now, there’s an EXCEPTION for medical and religious materials. So if you want to help one of the causes these organizations help, send them medical or religious materials! But you still can’t give them money and earmark it for medicine. Just send the medicine.
  - But is the effect any different? By buying the medicine, you’re freeing up the organization’s cash for attacks. The organizations can also pawn the medicines for cash!

• Training:
This is something designed to impart a specific skill as opposed to general knowledge.

- Someone who teaches a language course to someone in Hezbollah could have been a trainer under the old broader definition of training. Even a lawyer could be a trainer in some ways. Or a flight instructor, etc.
- What if your client tells you in confidence that he really supports Hezbollah and wants to help and send them something? If you tell him send Korans or bandages, that could be “expert advice or assistance” prior to the 2004 amendments.
  - It’s expert because you spend three years getting it in law school!
  - The new 2004 definition of expert advice or assistance talks about scientific, technical or other specialized knowledge. But see my comment! Also, other specialized knowledge still can apply to lawyers! The problem’s still there.
    - After the 2004 amendment case (Humanitarian Law Center), the court would find that a lawyer wouldn’t be culpable for this because he can’t be held accountable for con. due process reasons.
- Final arg was that the statute wasn’t legit because it doesn’t allow you to challenge the FTO’s designation as an FTO. But how likely is that? It’s gotta be the most improbable thing ever!

Note 1, p. 18. Why would Congress generally want to avoid making courts decide who is a “terrorist” or what is “terrorism”?

- Maybe because courts can’t react fast enough. The organizations change, and by the time something goes through the judicial system, the holding becomes moot.
- Moreover, courts don’t have the peripheral vision. They’re focused on the facts of a SPECIFIC case.
- There’s also a notice issue. If the secretary of state designates an organization as an FTO, from that date forward, you have to make sure your money doesn’t go to that org. If the check is dated the day before publication of the notice, you’re fine, but the day after, you’re in trouble.
- But courts aren’t good at giving prospective notice. They’re doing after the fact adjudication.

What about note 2—practical reasons for laws prohibiting financial help to terrorist orgs? Are they maybe more important in preventing terrorism than laws preventing the terrorist acts themselves?

- If we wait until the bomb goes off, sure we’ll catch more terrorists and have better proofs, but you’re not accomplishing your goal of prevention.
- But with money, if you dry up the money, you dry up terrorism.
- Second point with regard to prevention is that it’s easier. Why do you go after Al Capone for tax evasion? They’ve been killing people! But the tax evasion crime is easier to prosecute.
**US v. Rahman**

- Rahman is tried for sedition, not treason. Court says they’re different. Treason has a greater stigma and also, there’s a loyalty requirement for citizens to violate the treason offense that isn’t there for the sedition ones.
- There’s also a punishment component. Treason used to carry gory awful penalties, and now it just carries the same penalties as other capital crimes.

First Amendment in Rahman:

- If it’s too vague, it punishes political views and religious practices.
- But court says that didn’t happen here. The court says that the First Amendment protects advocacy to use the force, but not the conspiracy to execute that advocacy.
- For example, Rahman said turn the rifle on President Mubarak’s chest and kill him, etc. in the name of Allah. That’s pretty specific and is not protected.

What about using his speeches and teachings to convict him?

- In an of itself, that’s advocacy. But the court says that the religious nature of the speech doesn’t protect the speech.

**Ch. 2: Extra Territorial Criminal Jurisdiction**

Why would the US want to exercise jurisdiction over events taking place in another country?

- Because they’re plotting to kill US citizens
- Note that if it’s an embassy attack, that’s US property so it’s territorial jurisdiction.

- Why don’t we let other gov’ts deal with it though?
  - We don’t always trust the other gov’ts
  - We get good PR for the capture and trial, etc.
  - Some crimes also could be in NO country’s territorial jurisdiction, i.e. those on the high seas.
  - What if other countries object to extradition though because they don’t support the DP?
  - When do we want extradition to OTHER countries?
    - If they’ll torture suspects maybe!

- Limits on extraterritorial jurisdiction:
  - **Yousef**
    - Yousef asserts that he can’t be tried in the US because he didn’t have sufficient contacts with the US and didn’t commit the crime in the US.
    - Court says it has jurisdiction.
    - Talks about applicable law:
      - FN 24 on p. 40 gives a number of bases for extraterritorial criminal jurisdiction. Know these and what they cover.

- Nationality Principle
- **Universality principle**—so heinous as to be universally condemned by all nations.
o Point 19 talks about the crime of piracy on the high seas and the life sentence that comes with that if you’re found in the US. Yousef argues he wasn’t found in the US. But the court doesn’t buy it; you were found in Pakistan and brought to the US and now you’re here.
o So, even if it’s forcible, so long as you’re here, you’re within the court’s jurisdiction. I think maybe the court overturned the jurisdiction for count 19 though. Not sure. Double check the case.
o As a prosecutor, you learn to charge the suspects when they come in the country! Not before! US attorney did that and it worked.

Final point briefly is the notion that was accepted by the district court that there was universal jurisdiction over terrorists and terrorist activities. Court of appeals rejects that.

- Universal jurisdiction is, as a general matter, about crimes that are universally condemned to such a degree, i.e. crimes against humanity, torture, genocide, war crimes, etc. that any country can assert jurisdiction over these crimes.
- But the court says here that you can’t assert universal jurisdiction over terrorism. The reason is that not enough states condemn it. Most do, but not all.
- Some DC district courts have concluded the opposite though.
- Court relied in our case on section 32, and that actually provides for jurisdiction over someone found in the US. That’s basically universal jurisdiction, and the court says statutory and treaty law trump international law, but then the court doesn’t really follow through with that.
- What about hijacking? Isn’t that the modern day equivalent of piracy/a crime on the high seas? Should the court have universal jurisdiction over that then?

Another important aspect of the case is the fact that it’s an example of the courts punting on their responsibilities to look at customary international law.

2/1/06

- Missed last time. Get notes.
- Today we’re discussing immigration law and terrorism.
- We read about what terrorist activities can lead to refusal of entrance into the US or deportation.
- Note that the activities that can get you refused from the US don’t necessarily require an actus reus like the one you’d need in criminal law. But we’ve moved from a criminal law standard to the civil law standards used in immigration. So, if you’re outside the US trying to get in, equal protection and due process don’t apply. You only get certain protections once you pass immigration and the passport check. So, you could be in a plane in St. Louis, having just landed, and you’re still not in the US for immigration purposes.
- But what about terrorist activities that can get you excluded? That’s not entirely left to speculation.
- Note that the definition of terrorist activities on p. 115 in that statute, however, precludes you if you broke a law in your native country, but what you did wouldn’t necessarily violate a law here. But the provision also says that act AND
the following exclude you, and all of the things listed in “the following” are crimes in the US.

- Additionally, there’s an aspect of the act that is striking as well—there doesn’t seem to be a mens rea requirement in this act. The other acts we looked at penalized you for trying to have an effect on civilian populations, etc. Is that a glaring omission?
  - The point is that we try to keep people out of the country for terrorist activities, but we don’t require them to have an intent to achieve terrorist ends. But shanor says this may not particularly matter in reality, as the acts that we keep people out for are those that are had anyway, i.e., if you hold someone captive at gun point. Why do we want you in anyway, regardless of your intent?

- Notes after the statute suggest that our officers may be allowed to be too demanding to people coming into the country after 9/11. But is that okay? After all, they did mess up and grant one of the 9/11 hijackers entrance into the country 2 weeks after the attack.

- Note that congress specifically acted to disallow entrance of PLO members into the country. That’s unusual—usually, they just leave the discretion to the people doing the border checks.

*Adams v. Baker*

- Adams was involved with Sinn Fein in Ireland and was denied entrance into the US for terrorist activities and membership in terrorist organization.
- Even though he’s an excludable alien outside the US, he raises a first amendment argument, saying there’s an exception in the statute for those whose sole basis for exclusion was their membership in a terrorist org.
  - So, because he’s outside the US, he doesn’t really have a first amendment right, but rather, a statutory right that just mirrors first amendment considerations.
- Standard of review is very forgiving. Look only for clear error.
- Top of 123 talks about the consular official’s reasonable belief standards, a lot of administrative discretion, etc.

What if someone’s already in the country though and the US wants to throw them out? Does the same standard apply? Can you just be summarily thrown out?

- Not really, you’re looked at as a person with 5th and 14th amendment at least minimal due process rights, even if you get in by mistake.

**Immigration sweeps:**

- Involve people who are in the country. We’ve done this before in the US with eastern Europeans who were thought to be Bolsheviks, germans around WWI, germans and Japanese around WWII (even with citizens, as we know—see Korematsu).
- Now, post 9/11, the inspector general wrote a report about the immigration sweep after the terrorist attacks.
The inspector general doesn’t focus on whether it was right to detain the people and do the sweep, but rather, whether it they were treated properly once detained. He concludes they weren’t.

- Not fast enough access to counsel, period of time of incarceration was too long, some people were beaten/abused in detention, etc.
- So basically, it’s the implementation of the sweep that the inspector general criticizes, not the fact that the sweep occurs.
- So basically then, there’s no due process going on, but an issue this implicates is equal protection.
- Even though the people that were swept up had committed immigration violations, why were only the Arab ones picked up?
  - On one hand, you can say that if the people weren’t Arab when they did the immigration violation, they wouldn’t be in jail, i.e. the Mexicans and Italians who did so weren’t swept up with them.
  - But on the other hand, they violated the law, there’s not resources to arrest everyone, so do what we can. This is more efficient.
  - There’s no equal protection disparate impact case, See Washington v. Davis, but there may be a disparate treatment issue.

- The call-in program.
  - Kinda missed this. Not so sure.

Public information:

*Center for Nat’l Security Studies v. US Dept of Justice*

- Plaintiff wants through FOIA the names of people detained, names of lawyers, times and dates of detention, etc.
- Judge Sentelle writes majority opinion.
- Under FOIA
- Big law enforcement concern that Al Qaeda could see that there’s a really aggressive program for rounding people up in one city, but maybe not another. So, Al Qaeda could try to get people into the country through cities where people aren’t rounded up as much.
- First amendment interests didn’t prevail either. First amendment gives you right to speak, not necessarily receive information.
- This was the holding even though the court is supposed to construe FOIA exemptions narrowly.
- Note also that this was not a case about detainees wanting to make themselves public. It’s not about detainees saying to the media, my name is X, I was picked up on X date, and this is what happened to me. Those people would have the right to do that. But this is a FOIA request, and the interests of the center for national security studies may be at odds with those who were detained.
• Another Judge dissents, saying the public has interest in learning what the
government is up to. The information here is relatively harmless, he says, and it
ought to be up to the government to justify its position.
• Note that there’s also been a new national security provision added to FOIA, I
think since this case was decided.

He says that Kate Martin is very correct in the note after the case. She observes that
government secrecy goes up and citizen privacy rights go down in times of national
security threat.

Bellout v. Ashcroft
• US has a provision allowing people to get out of deportation if they can show that
it’s “more likely than not” that they’ll be subjected to torture if the US returns
them to their native country.
• Court nonetheless rules to return this guy to Algeria who was a terrorist there.
Says that the AG didn’t find that the guy would be tortured, so the court defers.
• But what if someone isn’t eligible for asylum but can prove that more likely than
not, they’ll be tortured when they get back.
• There’s a basic principle in international law that precludes you from being sent
back to a country that will torture you (more likely than not). But you still can
send someone to an altogether different country.
• In this case, the court defers to the AG, says there’s no evidence in the record that
the guy will be tortured because there’s no evidence that the Algerian gov’t even
knows about his activities or whereabouts. But if you were the petitioner, how
can you convince the US court that you were going to be tortured?
  o Maybe provide evidence that other people in your situation have been
tortured?
  o Look for docs by orgs that monitor international human rights, or more
importantly, use state department reports showing that the country the guy
will be sent back to tortures people as a matter of policy.

Terrorism and Economic Sanctions

Kashani v. Tsann Kuen China Enterprise Co.
• Deals with contracts that are illegal because they relate to countries that the US
has defined to be terrorist regimes.
• Here, plaintiff and defendant entered into deal to make and sell computers in Iran,
and Iran was on US list of countries that couldn’t be traded with.
• Defendant breached the supposed contract by stopping the production of the
computers, so plaintiff sued.
• It would have been illegal to fulfill the contract, note, but it wouldn’t have been
illegal to get restitution from the D for the money that P expended in reliance on
the K. Shanor thinks restitution would have been available here had the P made
and big down payment to the D.
• But the way the court interprets the K here, there are no damages because there’s
no legally recognizable contract.
• Case is interesting because the court applies CA contract law because that’s where the supposed contract was executed. But we’re talking about international law and federal sanctions imposed by the US government. Should there be preemption of the CA contract law then? What if state law didn’t find the K to be illegal? Conceivably, we could have mixed results about what Ks were legal and not, having no uniformity between state and fed law. Shanor says it’s interesting because there’s no federal specialized common law here regarding illegal contracts.

• Shanor’s main point is that he’s not sure you need CA law to get to this result. Maybe it would have been better for policy reasons to create a federal common law on the issue.

Note that there’s an issue about sanctions with the burdens falling often on innocent parties. For example, the US says no US trade with Iran.

• Two adverse effects could happen:
  o Innocent Iranians are harmed
  o Other non-American businesses do business with Iran instead. So, the result is the same, but US companies pay the price.
  o To be effective, it’s better to have MULTILATERAL sanctions.

2/8/06

Schneiderman

• We didn’t do this last week, but it deals with stripping of citizenship.

• Guy was naturalized citizen, and 5 years after he obtained that status, gov’t tried to revoke it and deport him. Basically, they said he was a commie.

• Big point is that we should think in terms of stripping someone of citizenship as a possible quasi-criminal and quasi-civil consequence for engaging in terrorist activity or being a member of a terrorist org.

• Schneiderman says burden of proof rests with gov’t, and citizenship is very important and shouldn’t be removed. Not enough to show that he was a commie, he wanted gov’t to show that he was the type of commie that didn’t believe in const. amendments and that he wanted the gov’t to be replaced by com. Revolution.

• The implication with terrorism is that citizenship may not be enough???
  o Also, think of the difference between mere abstract support of Al Qaeda’s agenda versus supporting Al Qaeda’s use of force to achieve that end.

MILITARY FORCE:

• So far, we’ve seen the problems in using criminal law—obtaining proof, getting service of process, expediting people, etc.

• Balancing desire to prosecute, try, convict and sentence people with national security interests and occasional needs for secrecy that could be compromised by public trials (i.e. the info could allow the terrorists to revamp their strategies to be more effective).

• With regard to civil law, the bottom line is that it’s not terribly effective. Deportation doesn’t always solve the problem as the terrorist could come back!
- As for sanctions, they’re often not tremendously well enforced, and their effect is questionable.
- So, in chapter 7, we deal with states’ use of force to fight terrorism.
- First question though is whether country can use force when it’s a member of the UN. Does the UN allow it?
  - Basically, you can only use force when authorized, or you can use it for self-defense.
  - Can you use self-defense against terrorists though?
    - Assuming there’s a terrorist attack in a country that’s a member of the UN, does the right of self-defense allow that country to retaliate with a self-defense rationalization.
- What are the issues that arise in connection with a country’s desire to use military force to deal with terrorists?
  - Well, first, a terrorist organization often isn’t affiliated with a government, so when you go after the terrorists in a state that’s not attacking you, you have problems of territorial integrity.
  - Also, a pre-req to self-defense is that you have to be hit by an “armed attack”. It’s unclear whether a terrorist attack counts as this.
  - Pp 161-162 gives examples of this lack of clarity. Kinda depends on how severe the attack is. If it’s not that severe, i.e., only a few people die, it could count as just an ordinary murder.
  - Ex. Of Attack on Israelis in Tunisia that the Israelis believe was supported by the PLO. Only three people died.

*Israeli Separation Barrier Case* (from Week 5 handout)
- Suggests that maybe the self defense approach doesn’t work at all because it’s not a NATION that attacked.
- Implication is also that “armed attack” requires a state on the opposite side when you exercise your right of self defense. If this is true, you can’t use military force as part of your anti-terrorist campaign under UN law.

Casebook Editors questions:
- #2, p. 161: is military force effective for countering terrorism?
  - On one hand, it may be a good deterrent, at least to countries who would otherwise have harbored terrorists. See the Afghanistan war.
  - But on the other hand, does this perpetuate more?
  - P. 162, second example gives example of our use of it to bomb Libya, to try to bomb bin Laden, etc., and all of those examples failed.
  - Also, what is military force? CIA operations on a small scale or large scale invasions? Shanor says for the purposes of our discussion, military force constitutes all of the above.
  - In any event, the point is that whether force is the best counter-terrorism measure is questionable. It’s a policy debate.
  - *But there also is such as thing as blow-back: if you go into Libya and bomb them, you may kill a few terrorists, but you also make enemies in Libya.* The point is that force may beget force.
- Look to Israel—they’ve got the most experience of anyone in the world at fighting terrorism. How’s the progress been? Well, there’s still terrorism, and terrorism won an election, but it’s possible, and Sharon says likely, that the force has still decreased the amount of attacks that there WOULD HAVE BEEN.

- There’s examples on 161-163 of the various times where force has been used. They’re maybe helpful for debating whether enough force was used, etc.

- NATO policy is mentioned on 164:
  - Policy is that armed attack against one country is armed attack against all countries.
  - What about congressional authorization to use force? Does that matter?
    - In effect, maybe not.
    - What if it’s the North Korean system that declares an attack to be an armed attack? What if it’s not our country that makes that declaration (we’re pretty biased because we think the US system is fair and legit)

**Nicaragua Case**

- Nicaragua took the US to the Int’l Court of Justice and alleged that the US had violated various int’l and customary laws by getting involved with contras within Nicaragua.
- Allegation was that US was in violation of these laws by using force because it hadn’t been attacked. We laid mines, attacked some Nicaraguan ports, attacked some people across the border, armed the contras, and established a naval base.
- The Int’l Court of Justice says that’s inappropriate under int’l law.
- What were our justifications though?
  - We said Nicaragua attacked our allies, i.e. Honduras and several others.
  - But isn’t it permissible for us to help our allies?
    - The court says that the evidence that Nicaragua attacked those countries was lacking. But how can the court gain access to a sufficient amount of knowledge to make that determination?
- Point after is that we’ve rejected compulsory jurisdiction and we don’t want to get involved in forums where we’d have to appear and defend ourselves, and finally, there was some skepticism about the Court’s refusal to accept letters from El Salvador and elsewhere that would have supported the US position.

**Case Concerning Oil Platforms**

- International Court of Justice said that there was no proof that a missile that attacked an oil platform came from the US?????
- What’s the burden of proof?
- Double check this stuff.
- But a big factor is that we didn’t have sufficient evidence to do all this.
- Question is whether we need to amend international law to change the meaning of “armed attack” and the burden of proof you need to establish it?
- What about preemptive use of military force and preemptive use of military strikes?
  - Do we recognize anticipatory self-defense?
• It’s never really been accepted or rejected formally by anyone.

**Israeli Separation Barrier Case**
• Deals with the wall Israel is building.
• ICJ (int’l Court of Justice) says the wall is illegal because it encroaches on the land of Palestine.
• But what’s illegal about building a wall?
• Basically the rule is that it is illegal to acquire territory to build a wall. Israel wasn’t just building on its own land.
• Also, court says that Article 51 doesn’t give any cover, because if there’s terrorism inside the area that Israel built around, that doesn’t work. It’s domestic terrorism then.
• Court says cease construction, dismantle it, and make reparations.
• Judge Burgenthal writes a separate opinion, arguing that the ICJ should have decline to give any opinion on the matter. The argument is that we don’t have the facts, and we’re giving the opinion based on assumptions, such as the nature and scope of the deadly terrorist attacks. Then, on principle, he objects to language in the opinion that says something about retaliation by an armed attack by another state. Basically, he says the opinion shouldn’t have been written.
• Subsequently, the Israeli Supreme Court heard the case, rejecting and adopting parts of the ICJ’s opinion. The result was that Israel continued building the wall, but moved certain parts of the wall.

Lori also gave some supplemental materials to the Israeli Barrier Case.
• The first two are journal articles, both of which disagree with the way the ICJ applied Article 51 to the case.
• The third article is one that addresses the US response to 9/11 and talks about applying article 51 in relation to the use of force in Afghanistan, etc.

**DOMESTIC USE OF MILITARY FORCE:**
• In the US, we have a statute, 18 USC § 1385, that says that whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years.
• The statute was passed during Reconstruction, and amended to refer to the Air Force as well.
• Bush was looking to repeal this, but seemingly failed.
• But the response is that no violation of the posse comitatus act has ever been found.
• Also, there are exceptions to the statute.
  • First, it’s a criminal statute. You can’t sue for this. It’s either used by the gov’t or it’s not.
  • The statute also failed in Padilla ex rel. Newman v. Bush
    • Padilla wasn’t being detained by the military to execute a civilian law.
• There’s also exceptions for aerial reconnaissance, military equipment supplies used in a bunch of instances over time by civilian authorities, disaster relief with the military being involved, etc. there’s still probably a military power that can be used by police factors, and there’s also an exception for domestic violence?

• So, the question is whether the military can fight terrorism in the US in assistance of state and local officials?
  • Police officers may not be able to shoot to kill without as much justification.
  • What about using the air force directly? Would we ever really need to do this?
    o The book gives an example of 9/11!
    o Or what about letting the military defuse a nuclear bomb?
    o Shanor’s big point is that there are a lot of exceptions to posse comitatus and there probably ought to be. But you also want to have some rules when you CAN’T use the military too probably. Like for coups.
    o There are also federalism issues at stake here.
  • Padilla case showed that if the gov’t would have used the military to arrest him, and then give him to the police for trial, that would have violated posse comitatus. But if they would have found him and detained him and not turned him over to civil authorities, that would have been fine. Designation as enemy combatant keeps things strictly military and allows the military to get involved, even in this country.

Russian Federation Case (note 2 o p. 180)
• Case said that use of military force was okay?? Dealt with Chechnya. Opinion said you can’t remove the credentials of journalists (but that never would have come out this way today).
• What would be the outcome of this type of situation in the US?

Northern Ireland Reference No. 1 of 1975
• A member of the British armed forces was in northern Ireland and was patrolling in IRA territory and came across a possible combatant. The guy tried to run and the guy shot and killed him.
• Question was whether the military guy would be subject to the same scrutiny as a police officer.
• Court, on p. 184, says there’s little authority in English law concerning the rights and duties of an armed forces guy in a crowd who acts in aid of civil power.
• There’s little authority in English law for this because soldiers aren’t on the street much and thus aren’t put in this situation.
• Trial court and house of lords says that the proper standard was whether the shooting was reasonable in the circumstances.
o But what about the circumstances of a military person dealing with terrorists? Little time to think, reasonable belief that guy was part of IRA, you want to prevent future attacks, so you shoot and it’s okay!

o Basically, the court here said that the military guy would be subject to a lower standard than civil authority. Maybe not expressly, but implicitly. In application, if a military guy shot and killed someone in the future and this rule were applied, the military guy would get off probably.

2/15/06

TARGETED KILLING OR ASSASSINATION OF SUSPECTED TERRORISTS

- Yemen did it.
- Bill Clinton tried to do it at a camp in Afghanistan to try to kill bin Laden. Missed bin laden, but did kill some.
- While there have been US executive orders that each president has signed since Eisenhower?? that deal with assassination and forbid it, Bush’s response to this is that even though he too signed on, assassination deals with heads of state, not run of the mill terrorists.
- Dershowitz makes a policy argument that this is a pretty good idea because it avoids collateral damage and collective punishment.
- But keep in mind public reaction to this kind of policy. Especially if it backfires.

There was the Report of the Special Rapporteur. That was the Yemen predator situation. Missed the notes on it.

McCann v. United Kingdom

- Deals with proportionality of response and the circumstances under which it’s appropriate.
- EU Court of Human Rights comes down hard on the soldiers here. Why?
- One of the problems here was that the planning didn’t leave much room for error. Another problem was that this may have been a disproportionate use of force. Majority says that they should have shot to wound, not shot to kill.
- But keep in mind that the intel said that the guys that were shot had explosives on them, and the authorities found explosives in their car the next day!
- Could the UK have argued merely that it engaged in the lawful killing of unlawful enemy combatants? That’s what the US argues.
  o Problem here is that the UK hasn’t declared war on the IRA. They treat it is more of a civil war going on. It’s almost like Israel saying it doesn’t recognize Hamas. And by calling something a domestic disturbance, there’s a lesser likelihood of int’l limitations on what the nation can do.

Chapter 10: GROUP PUNISHMENTS

Demolition of Homes:

Collective Punishments Generally:
• It’s a deterrent.
• It’s useful in that states can use it when they can’t find the actual person who’s culpable to punish. If it takes a village to support a child, maybe it takes a village to support a terrorist. So we as the state are still responding and maybe even having a good result while we’re at it.

Almarin v. IDF Commander in Gaza Strip
• Guy goes out and kills a young Israeli girl. He says that Israelis control all the work.
• Whatever the military officer did here (not sure), court says guy was allowed to do it, per the straight application of the statute (Regulation 119).
• But sharon says that this bulldozing occurred in a territory where the regulation doesn’t apply.
• Moreover, is this the kind of violence to which this regulation is directed?
  • What happened here was more run of the mill murder than a terrorist attack type of thing.
• And what about the point that focuses on whether this was in Gaza or not?

Another way to deal with terrorists is just to deport them!

DEPORTATION:
Israeli law allows it, but international law does not.
• Two of the cons to deportation are that:
  • Deported person would be even more radicalized if he got back in the country
  • Deported person may be able to coordinate with others who want to do an attack once in the new country. So the deported person may not come back personally, but he may help another get in the country and execute an attack.
• Yet, Israel believes that deportation, on balance, improves their security.

Association for Civil Rights in Israel v. Minister of Defence: read this and get the facts

Chapter 11: MILITARY SEARCHES
US v. Green
• Deals with the interface between military facilities, operations, and special dangers v. civilian spaces, situations, and dangers.
• This is a road block check point at issue.
• 1 in every 6 cars gets stopped.
• Emma Lucile Green drives her car through and gets stopped.
• They find coke in her car and she’s sentenced to 24 months of imprisonment followed by some other stuff too.
• The amount in the car was for more than just personal consumption.
• Chick complained that there wasn’t probable cause to stop her.
• But the court said there’s a national security interest in having checkpoints on bases like this. Not just a regular crime control situation. We’re near a military
base and there’s greater concern for terrorism against military targets than civilian targets!

- Why confine this to the military though? Why not do it in front of buildings in Manhattan, or like we did in the subways for a while.
- This was a district court case, not military case.

Searching Computer Databases:

- Privacy objections?
  - We’re just searching databases that already exist. Visa, for example, has a huge database.
  - Credit reference agencies collect all this information.
  - What’s the problem with government using them?
    - CUZ GOVERNMENT HAS THE AUTHORITY TO DO SOMETHING WITH IT!
- Could be quite effective, as most people are electronically linked to whatever they’re doing, but are we willing to compromise our privacy in this fashion?
- What about having the DOJ administer this rather than the DOD?

2/22/06

- Guest speaker from Sutherland. Talking about Guantanamo.
- Guantanamo was set up by the gov’t to detain people picked up in Afghanistan and Pakistan. Goal was not to have to treat the people they picked up as POW’s. Fewer rights.
- Gov’t wanted to set up a place to hold these people, isolate them, interrogate them, determine what information they might have that could be helpful to us in fighting terrorists, etc.
- Many in the gov’t and military advised against using guantanamo in that fashion.
- In January 02, the first people were brought to guantanamo to be imprisoned/interrogated. Shortly thereafter, a lawyer in Milwaukee, filed a petition for habeus corpus. Filed in DC. Had to have local lawyer sign on to do that and couldn’t find a single lawyer in the District of Columbia that would sign onto a habeus petition to get terrorists out of guantanamo. A public defender finally signed on.
- Then, in Rasul, the USSC held that the great writ does reach guantanamo because it was a camp created by the US on a piece of land that is totally under US control. Check to see what the case said. Not sure what the holding was. Missed it.
- Basically, point was that these people in Gitmo have few if any rights, difficulty accessing courts, evidence, due process, and it’s tough to figure out what to do with them if we deem them not to be a threat anymore. Send em back to their countries? Their countries don’t want them often (unless they’re gonna detain them too), and we don’t either.

Jan 02 first men brought to GB. Shortly thereafter (6 months), Milwaukee lawyer was asked to file a petition for Habeus Corpus. The lawyer received
death threats, and filed suit in DC, but he had to have a local lawyer sign on and he could not find a single lawyer who was willing to sign on.

US Supreme Court held that the great writ does reach to GB because the camp is on a piece of land totally controlled by the US.

No person held as Enemy Combatant can take advantage of writ of Habeus Corpus.

Chapter 12- READ IT

Classification of detainees

POW- Cant be prosecuted

Can be coercively interrogated

Must receive humane treatment

4 conditions on bottom of pg 230:

a. Being commanded by a person responsible for his subordinates
b. Fixed distinctive sign
c. That of carrying arms openly
d. That of conducting their operations in accordance with the laws and customs of wars

If violates laws of wars not entitled to POW status

Presumptive POW- When there are doubts as to whether POWs

The fact that someone is not a prisoner of war does not mean that you get to treat them inhumanely.

Unlawful Combatants- quirin

German comes ashore attempting to commit espionage

a. US Supreme Court held that UC's can be detained and tried by military courts
a. Can also be “protected persons”

Ordinary Criminal Suspects- Basic rights of a typical criminal suspect

Non-combatants/non-terrorists-
18 USC 4001a-

Chapter 17 Combatant Immunity –

The use of military force includes detaining as enemy combants

Due Process Required

If you are detaining someone for an extended period of time must have a justification

Pg 250-

Detainee has burden to challenge military error.

Mobbs declaration- pg 247

On the issue whether habeas applies- it is Oconnor, Scalia

What process is due Oconnor 1 +Thomas

Content of habeus petition would be that they classified it wrong

After the Hamdi decision he was allowed to go back to Saudi Arabia

Padilla in supplement

CITIZENSHIP CASES

In Re Territo- Can a citizen be a POW? Yes he can be- There is no authority to say you can't be a POW.

Public Prosecutor Case- Confrontation Campaign-

Duration Cases

Pg 22 in the supplement

3/8/06

- Exam is in class. Open book. Presented with terrorism scenario and list problems and solutions.
- Hypo:
  - Torture: would it be torture to threaten to kill a guy with your gun when really you're not even pointing it at him and it's not loaded?
- Some say yes, and this really happened in Iraq I think and the guy was sanctioned for it.
- It could fall under a “threat of force” for torture.

- Geneva Convention:
  - For someone who’s not a POW, what kind of protections do they get in terms of treatment? What governs their treatment?
  - CONVENTION AGAINST TORTURE!
  - For POW, can’t use physical means to intimidate or coerce them to divulge certain things. Must be treated with dignity, etc. That’s all in the third Geneva Convention. This applies (the 3rd Geneva convention) only in an international armed conflict, which applies now to Afghanistan, Iraq, etc. But it wouldn’t apply to civil war, which was going on in Afghanistan before we came in.
  - But the FOURTH Geneva Convention says to treat nonPOWs like POWs until you figure out what to do with them I think.
  - Common Article III of the Geneva Convention is the absolute baseline. It’s common international law and it’s called common article because it’s been an article in each Geneva convention. It gives the minimum standards for how people no longer in combat (including those detained) must be treated.
  - Also need to know about Geneva Convention IV which applies to persons detained in the time of war and includes people who have put down their arms and are detained.

There’s also the McCain Amendment (the Detainee Treatment Act of 2005) that says that, for intelligence gathering, the military can’t do anything not authorized by the manual.

Why are there higher standards for POWs than those who don’t qualify?
- It’s an incentive program to comply with the laws of war. There’s still the notion of the noble soldier, etc.

_Ireland v. United Kingdom_

- Missed the beginning part of the case. And the holding.
- Judge Fitzmorris says in dissent that we should make more subjective determinations as to what’s inhumane.
  - But our chick who’s leading the class says, then what’s torture!

What about degrading things? Cruel, inhuman and degrading are grouped together in one of the things.

_Israel_ case (not sure what it was called)
- Court was addressing 5 techniques used to interrogate prisoners.
One of the differences between the Israel case and the Ireland case is that Israel seems to say that there’s inherent discomfort that comes with interrogation. I think the Ireland case didn’t say that.

Israeli case was really detailed about what you could and couldn’t do I think.

DOD press report was next.

US law regarding torture:

- For example, when someone is arrested by the police and handled roughly, the police held that the standard is what is “shocking to the conscience”. That comes from <i>Rochin v. CA</i>,
  - There’s a whole bunch of cases that give examples of how info can be extracted through torture. But keep in mind that all of this is the civilian standard.
- The DOD report, paragraph 6 and paragraph 8 (pp. 16 and 17, respectively).
  - The things discussed seemed more designed to humiliate rather than elicit information. It becomes not about the exigencies of the situation, but rather, about cruelty. If this is just sadistic, it seems problematic.
  - These are all less horrible acts in paragraph 6, but then we get to the worse ones in paragraph 8.

Big discussion though in class on the disconnect between the laws of war and the training soldiers get on the same. They learn more about their weapons and how to kill, and then when they’re put in the position of kicking a prisoner in the balls, they don’t think it’s as bad as killing (on the battlefield that is—you can’t kill a detainee I don’t think) and they don’t have a ton of training that tells them they can’t do that!

<i>Bosnia guy case in Atlanta</i>

- Guy was in Atlanta and caught because one of the guy’s victims recognized him.
- A group called the center for justice and accountability brought the suit.
- Court looked at Geneva Convention and Common Article III.

The point in all this is that it’s very easy to state the law. You can’t torture and there aren’t meant to be any gaps in this—shouldn’t matter what the status of the person is. But torture is kinda vague, and there still are gaps in the law of who’s protected.

Read Ch. 20 for next time.

3/22/06

- Exam is April 28, and there’s a review on April 19th.

Compensation for acts of Terrorism:

- What sources of compensation are out there?
  - Terrorists themselves via tort law.
This clearly seems to be an ineffective though.
  ▪ Some don’t have deep pockets and for those that do, the assets may be frozen via international treaties, individual countries’ decisions, etc. as counterterrorism measures, the money might be hard to find, whatever.
  ▪ The other big problem could be jurisdictional. Hard to find them to serve process on them, maybe no minimum contacts, etc.
  ▪ I would say that a third and more practical problem is just plain finding the terrorists. If we can’t find ‘em to kill ‘em or arrest ‘em, how can we find them to serve process?!!

**Price v. Socialist People’s Libyan Arab Jamahiriya**

- Case talks about suing state sponsors of terrorists as a way to get compensation.
- Terrorist exception to sovereign immunity is pretty broad.
- Court says it won’t dismiss the case against Libya.
- But Libya also says in the case that they didn’t do it; they didn’t sponsor the terrorists in questions. But Libya offers no proof for this.
  ▪ Then again, how do you prove that you did not support terrorism when there is an allegation that there were beatings of people working in Libya for a Libyan company, etc.
  ▪ The whole issue may be a vicarious liability scenario. If it’s not an independent contractor doing the beatings, Libya would seem to have some extent of liability.
- Anyway, Shanor’s main point is that it’s not easy for Libya to get off the hook if the exception to the foreign sovereign immunities act applies. You don’t get off the hook in a pretrial motion the way that you would most times in the sovereign immunities act.
- Bottom line is that if you’re the plaintiff and you plead the exception to the sovereign immunities act, the defense of sovereign immunity is pretty much dead.

**Boim v. Quranic Literacy Institute**

- Claim is that two charities in the US that are on the terrorist list gave money to Hamas and gave money to Boim to kill people.
- Statute on point here. 18 USC § 2333.
- Theories as to why what took place constituted international terrorism under the act:
  ▪ That the organization gave money (but that was a loser because just giving money doesn’t show intent to advance terrorist acts)
  ▪ There’s a proximate cause argument too. I guess it counts as terrorism if the act of giving money was the proximate cause.
  ▪ There’s the arg too that giving money was itself criminal. That’s different than the first point because here, if you give money to a LISTED terrorist organization, you were on notice that that’s what the terrorists do and you’ve supported them! Your money is fungible and can go anywhere in the organization.
- The last theory was one of criminal law. You gave money, so you're aiding and abetting. The court says maybe. But shanor says that if it's just giving money that's aiding and abetting, you'd maybe have a heightened intent requirement for liability.

- Defendants raise a first amendment defense, via the right to associate with who they'd like. If they have the right to associate with anyone, they can give money to anyone is the claim.
  - The court rejects this and says that the statute that may incidentally touch on this right is narrowly tailored and passes first amendment scrutiny.

Part 2 of the chapter: claims against the gov't for not providing security.

- This is not a winning claim, but why not?
  - Under US law, this would generally be dealt with as a political question, making it nonjusticiable.
    - A branch of that is to say that the decision of how much security to provide is a discretionary judgment by political actors, so the courts can't get into. Courts don't seem institutionally capable of deciding how much security is the right amount of security.

*A v. United Kingdom & Ireland*

- Plaintiff's husband was shot and killed and the claim was that the gov't didn't take enough security measures to stop the terrorists.
  - At the time of the incident though, there were 10,000 British troops in N. Ireland. Should it have been 20,000? That's too hard to say, especially for the courts. It's like having the courts rule on whether Rumsfeld sent the right amount of troops to Iraq.

- There was also a statute of limitations issue in the case. The plaintiff filed after the statute had run, but the plaintiff couched her claim by saying that she was TODAY facing insecurity because of the gov't's failure to provide sufficient protection of me, not just my dead husband. This makes it an ongoing claim.
  - This is interesting though because if she gets into money, it would involve her dead husband.

- Another claim/jurisdictional issue: before you can bring a claim before the European commission on human rights, you have to show that you've exhausted your other remedies.
  - In this case though, it was very clear that the P had no claim under British law. You don't have to exhaust your remedies in other courts if those efforts would be futile.

- Another problem with the plaintiff's claim:
  - She claims that Ireland claims northern Ireland; thus Ireland has the responsibility to make it secure. Court rejects this argument. It's not rooted in reality.

- So in short, even though you have the right to life under the European Human Rights regime, that right to life doesn't require perfect security at an infinite expense to gov'ts.
Macharia v. United States

- This case followed the embassy bombings in Nairobi.
- Fed court dismisses the claim, saying that three exceptions to the federal tort claims act mean that the plaintiff can’t win.
  - 1) Discretionary function.
    - What about discretionary function makes this a losing claim under the federal torts claim act?
      - The claim didn’t meet the two-step prong:
        - You have to find a federal statute, regulation or policy that these people violated.
          - Here, there was nothing that dealt with the government’s failure to secure the embassy and warn of a potential attack.
        - Second step deals with discretionary policy stuff as opposed to actual negligence.
          - But you still need a first step federal regulation or policy. And how can you discretionarily avoid the policy if in fact it exists.
  - 2) Foreign countries
    - But why wouldn’t the US gov’t be liable for torts committed overseas? Is this a funny exception?
      - We’re not completely in control of what happens in foreign countries.
      - Here, the bomb blew up outside of the embassy. Had it occurred ON EMBASSY GROUNDS, that would be us territory though, technically, so that would be an interesting caveat. But on the flip side, even if it was on embassy grounds, US doesn’t have control over everything surrounding, where the threat actually comes from.
  - 3) independent contractor
    - like Abu Ghraib.

CLAIMS AGAINST PRIVATE PARTIES FOR NOT PROVIDING SECURITY

Stanford v. Kuwait Airways Corporation

- terrorists boarded a flight in Beirut and then another in Pakistan or Kuwait, I think. They hijacked the flight and landed it in Tehran and killed two American diplomats.
- The Kuwait airways corporation was allegedly negligent because it took passengers without appropriate security precautions from a notoriously dangerous and terrorist-populated area (Beirut) and allowed them on the plane. Because of an agreement, the passengers didn’t have to be re-screened on connecting flights, and the terrorists boarded the plane in Beirut first because they knew it was easy there with regard to security.
• No one knew in this case how the weapons got on board, but the practices of the security people were horrible. People bought tickets with cash, people could buy tickets for groups of others, no checked baggage, etc.
• There has to be duty, failure to use due care, etc. basically, just goes through tort analysis.
• But the point is that terrorism doesn’t break the chain of causation and that the breach can come from owing a duty of security.
  o Here, the D didn’t take even minimum precautions and all this was proximate enough cause and no break in the chain of injury.
• Have the Ps won as a result of this decision though?
  o They didn’t recover money from Kuwaiti Airlines because of just this opinion. This was just a motion! They still need to recover from a jury! And before the jury, the airline will argue that this isn’t our fault, but the terrorists’! if you wanna point the finger, point it at the terrorists!

But consider cases like the one above as opposed to *In re Sept. 11 Litigation*

*In re Sept. 11 Litigation*
• Average compensation amounted to one million dollars.
• You can recover more quickly from these big litigation funds, but you may get less than you want.
• Of the sept. 11 victims, 2% of the victims decided they wanted to file their own mass tort lawsuit (about 70 people). The vast majority then went through the fund.
• There were three sets of defendants here.
  o Aviation defendants:
    ▪ They have a duty to people on the ground too; not just those that are in the air.
    ▪ What about the Warsaw convention, which limits damages to $10,000 per passenger? That doesn’t apply here because it pretty much just applies to international flights.
  o Building owners:
    ▪ Allegation is that the building was a fire hazard, people couldn’t get out of the building, etc.
    ▪ The building owners respond that they had no liability because they weren’t responsible for planning for planes to crash into the buildings. The gov’t didn’t even plan for this or foresee this, and how could they!
      • Response is that they should have just planned for major fires generally.
      • I don’t know which won.
  o Boeing
    ▪ Allegation was, among other things, that the cockpit doors should have been different. Much more solid.
    ▪ Cockpit doors have changed since 9/11.
- Boeing argues that its cockpit design was not unreasonably dangerous. The record as of this point didn’t support Boeing’s argument though. There had been a lot of hijackings.
- In any event, we don’t know what the outcome will be, but we know as of now that the court ruled not to dismiss this claim.

What if your spouse died on 9/11? Would you go with the compensation fund/special master or the independent tort suit?
- As a tort victim, you could get 10s of millions; through the fund, you average a million.
- Maybe some people went with the fund because they thought it was fair. There’d be more to go around in the end, the government set up that fund, etc.
- Also, it’s probably a faster resolution with the fund.

What about suing the US for its role in the 9/11 disaster. US waived its sovereign immunity (not sure when/how), the security people and FAA all failed their duties and weren’t necessarily independent KS (especially the FAA).
- Maybe you could distinguish the Castle-Rock case.
  - Knowing what we know now, there’s some potential liability that could have driven people in Congress to make a fund applicable to this case.

CLAIMS AGAINST INSURERS:

World Trade Center Properties
- Issue is whether the events of September 11 constituted one or two occurrences.
  - If just one occurrence, the liability is 3.5 billion dollars. If it was two occurrences, it’s 7.0 billion dollars.
- Four insurers in the case. Three were the same; one is different.
- For the three who were the same, it was one occurrence. For the different one, there’s a possibility that a jury could say it was two occurrences. The case did go to trial and the jury said it was two occurrences.
- It’s a matter of contract, insurance law, etc. there are decisions also discussed that talk about first-party and third-party cases. More sympathetic to first party cases... not really following.
- Why would we have shortly after 9/11 legislation in the form of the Terrorism Risk Insurance Act of 2002?
  - Answer is that the insurance industry saw an opportunity. The potential liability could be disastrous, so the insurance companies all want to add to the policy that if the terrorists caused the damage claimed, it’s not covered!
  - So then, Congress offered to provide terrorism insurance. Gov’t reimburses insured for up to 90 percent of losses and insurers don’t have to pay anything.
    - This law went into effect 4 years and was set to expire in 2005.
    - But then on Sept. 22, 2005, president signed the terrorism risk insurance extension act.
• He passed around the sample exam from Maggs today. Shanor says he'd give one like that.
• Note that most of these are based on military responses, which Shanor says will be most of the exam, but not all.
• Read chapters 15 and 16 for next week. 15 deals with habeus corpus and diplomacy. 16 deals with authority for military trials. April 12, Peter Richards will lead the discussion on ch. 18 and 19.

Materials today deal with **compensation of persons injured by responses to terrorism.**
• Basically, if you were injured as a result of a response to terrorism, your chance to collect is poor. Plaintiff's lawyers aren't eager to take these cases at a financial matter.

**US Law:**
• **5th Amendment** prohibits taking property for public use without just compensation?
• Why doesn't this apply in the terrorism response realm?
  o *El Shegja* says this is a political question.
  o Basically, Clinton bombed some plants in Libya. Destroy the plant and the owners of the plant sue and want 50 million for the value of the plant. The say the plant wasn't used for military purposes (at least there was no proof of) and it looked like Clinton was the victim of erroneous information (like what happened to Bush in Iraq).
  o *El Sheqja* pharmaceutical plant was involved, and court held it was a political question because the Const. also grants the executive the power to conduct war and make military and security decisions. Court considers anti-terrorism activity by the pres to be in the realm of warmaking activity/powers.
  o But why is this a political question? Pres can make war, but why shouldn't the pres who makes war and makes a mistake have to pay?
    • Court goes back to political question doctrine and says that if a certain power is left to a certain branch, judicial branch isn't there to overstep its bounds. Moreover, there's no real judicial standard to apply to address the question. For instance, there's no standard on how good intelligence should be before a bombing. 50%? 95% sure? Moreover, we don't even have the facts to know how sure the intelligence community was before the bombing.
• **Shanor emphasizes the baker v. carr factors on 539-540.**
  • The factors are probably in descending order of importance.
  • Court basically says that the first factor is most applicable, and the court deals a little with the second and third, and definitely deals with the fourth factor. The fifth factor isn't
really relevant here because the decision’s already been made. Sixth probably isn’t at issue because something about no redress there either???

- Court also looks at the fact that the const. grants to the pres the exec. Power; he’s the commander in chief of the army and navy, and the opinion follows from here. Baker v. carr says xxx, but here, the Court basically says that the text is often ambiguous, and at least when the pres. Isn’t opposed by Congress, we’ll give him the power to act.
  - Case law has always said too that when you wage war, you can destroy enemy property.
  - This is a little harder though because the plant wasn’t enemy property. So court says that rather than set up standards for whether this was enemy property, the text says that this is the pres’ decision to make, not ours.

- So the point is that the pres. Power to destroy enemy property has been expanded through the political question doctrine to encompass property that may not be enemy property but the pres thinks may have been.

But Shanor gives a hypo:

- You’re a farmer in France in WWII and US comes through the property and eats all the crops and basically kills the farm. They slaughter the animals, drink all the wine from the cellars, etc. after the war, you come back and say you’re French, you’re grateful, and you’re supportive, but you should be compensated so you can start your farm again. Is that legitimate under US law?
  - Probably. That would probably be treated as a taking. If your property is used to help the army, you get compensated; if your property is destroyed (even by mistake), you don’t get compensated. This distinction isn’t perfect, but what might be the reasons for it?
    - War involves blowing stuff up. You need to be able to blow stuff up without having to pay for it as part of your military campaign.
    - I say also that maybe it comes out as a very rough (although not necessarily accurate) distinction between ally and enemy.
    - What about the fact that you want to provide incentive to the military to do all they could to win the war.
  - If you didn’t eat the farmer’s stuff, you’d have to pay for it via rations. If you didn’t take it for your use then, you’d be paying for it anyway through military appropriation. You can also figure out what you’ve taken, whether it was worth it, etc.
    - Conversely, if you’re destroying stuff, you don’t know how much exactly it costs, you don’t know beforehand how far the fire will spread, etc. pretty soon, you’ll have huge liability.
• If you take the farmer’s stuff and use it to feed the troops, you know how much it’s worth pretty much and it’s not a disincentive for military forces to conduct the battle and war in the way they think is most likely to be successful.

• Note though that as note 3 points out, we still sometimes give a few grand to the family of people who died collaterally abroad, i.e., Afghan citizens.

• Another question about the case:
  o Would the owner have done better if he sued in tort in federal district court rather than for a taking in federal claims court?
    ▪ A private individual would probably be liable for the same (i.e., conversion), so why not the army?
      • Stick within the bounds of tort doctrine and say that US wasn’t acting negligently or intentionally with respect to El Sheefá. That probably would fail though.
        o It had to have been one of the two, I would say.
    ▪ But what about forum/venue? These could be problems.
    ▪ And so could sovereign immunity maybe!
      • But note that there’s a statute that waives sovereign immunity. The Tort Claims Act.

• On 528, Maggs sets out in the text a failure to waive immunity for military activity by … during time of war.
  • If you represent El Sheefá, what’s your response to that?
    o This isn’t a time of war! It’s before the war on terror!

• Point is that with tort liability, there are exemptions under the Federal Tort Claims Act, including one for DISCRETIONARY ACTION. Clinton’s decision to bomb was probably that. There actually was a tort case that followed and because there was discretionary action at issue the court held that there was no subject matter jurisdiction.

• Shanor also likes the note about the Sudan complaint to the UN, and the Security Council took no action. Not surprising because we’re on the security council and we veto that kind of stuff.

• Could Sudan have done better suing in the Int’l Court of Justice?
  • Probably. But there’s no way to enforce the judgment unless we voluntarily submit to the ICJ’s jurisdiction. That’s not gonna happen.

*Farrell v. Secretary of State for Defence*

• British case. Bunch of British military think they find some bombers. They shoot, and 3 guys end up dying.

• As it turned out, the bag that one of the guys was carrying only had a coat and some cash. But the question is whether we can use lethal force in situations like this.
  o If the guys have a bomb, you need to stop them.
But the widow argues that the operation wasn’t planned properly and wasn’t executed properly. Shouldn’t have shot to kill she says in her first claim, and in her second claim, she says that if it was planned right, they wouldn’t have had to shoot to kill.

- **Response** was that the planning didn’t matter. It mattered how it was carried out, and it was carried out fine.
- Also interesting that they seem to be applying criminal law to an incident involving use of force by soldiers.
- Note though that there’s a body of British law that says that maybe she could have recovered if the operation was planned poorly. But it wasn’t.

**Isajeva Case???

- Bunch of Russian rebels were there and the Russian military offered to let some people leave the village. As people were leaving the village though, the Russian military opened up on the village and there was a blood bath.
- Russians didn’t really care about the casualties though.
  - But think about it, if there was a road where people thought they could safety leave the village, the rebels would probably try to take that road too and get out safely. But there wasn’t any evidence the Russians had knowledge that particular cars were rebels, etc.
- So I think the Plaintiffs in this case won.

Based on the Isajeva case though, what would it mean for the US in Iraq?

- Quite possibly, the Isajeva court opens the door to the possibility that the difference between regular and smart bombs could be the difference between liability and no liability for the military.

**Note 1:**

- P subsequently sued in European Court of Human Rights and elsewhere and the British gov’t settled. Why?
  - Maybe because the force seemed excessive in reality. They shot guys in the back who weren’t armed.
  - Moreover, Britain may have been in trouble before the Eur. Human Rights Court.
  - Plus, the case had a lot of problems and the amount being sued for was really high. The $30 million settlement was pretty reasonable in the end apparently.

**Hatfill v. NYT Co.**

- Case involving the guy suspected of the anthrax attacks.

**District Ct. Opinion:**

- Claims were defamation of character, IID (emotional distress), indirect defamation (i.e., that he got caught with his pants down in a gov’t lab.).
• District court says that none of the claims work. The defamation one didn’t work because (not sure why, despite the Richard Jewell 1996 Olympics analogy), the IIED claim didn’t work because the standard of conduct for that was too strong.

4th Circuit:
• Still in the deciding process. Could be either defamation or IIED, but by applying VA law, imputing circumstances of the crime to hatfill is enough for defamation. The other statements are capable of defamatory meaning too.
• Court also says that VA law requires that for something to be IIED, the misconduct has to be extreme or outrageous. If the allegations here were true, that could qualify, but they remand to determine that.

4/5/06

• Note for the final that we’ve covered all chapters in the book.
• Ch 17 was done by the guest speaker. Basically, it was about defenses to when you kill somebody because you say they’re a combatant. You get immunity for that but not terrorists???

Today is Ch. 15. Habeus Corpus/Access to Courts
• Suspension of habeus corpus originated under Lincoln as a military action. Thought was that MD may secede from the union, and had that happened, Washington would have been surrounded by VA and MD and both would have been confederate states. Ultimately, MD rejected motion to secede, but as of then, those who favored secession had started favoring terrorist methods like blowing up RR lines, etc. That’s when Lincoln first suspended habeus corpus.
• We don’t have a habeus corpus suspension, so now we talk about habeus jurisdiction.
• There’s a statute 18 USC 2241 (p 339) and constitution, which says that writ of habeus corpus shouldn’t be denied except…
• For the statute, check text on p 339.
  o Basically, talks about jurisdiction. When is something in jurisdiction?
  ▪ Part c of statute talks about when it’s not.

Johnson v. Eisentrager
• Here, a German national caught in China brought the action. Allies alleged he was still involved in war activities even though he surrendered.
• Proceedings were brought against him, but he claimed that he was entitled to habeus corpus.
• He was being held in Germany at a prison and the US operated the prison after WWII.
• Eisentrager is petitioner and Johnson is the head guy at the prison, a federal official.
• SO the petition is really from overseas in a facility supervised by a US officer, it’s on german soil, but Germany is no more as of that point. It had been split by the allies and was under military jurisdiction.

• Eisentrager wants out and USSC looks at the case and says they don’t have jurisdiction.
  o But why? He petitioned the dist ct of DC. The person who was detaining him and had immediate authority was in Germany. The argument for the guy getting it was basically that you were a subordinate in command and therefore subject to jurisdiction in at least some US court.
  o Court says no based partly on §2241, which doesn’t reach incarceration outside the US. There’s a case that says this! Aarons v. Clark.
    ▪ Government and the Court cite that case.
    ▪ So in summary, the statutory holding is that within their respective jurisdictions does not mean extraterritorial jurisdiction for any US territory court.
    ▪ In Rasul v. Bush, however, the same language of 2241 is at issue.

• Second argument by Eisentrager was that the Const of the US was being violated. They were holding him without just cause, there were due process problems, the war was over, etc.
  o Given that there wasn’t a suspension of habeus corpus in WWII, unlike in the Civil War, why can’t Eisentrager succeed even without 2241?
    ▪ Because he’s an alien overseas. In a constitutional sense, the bottom line holding is that an enemy alien held overseas by US forces has no constitutional habeus right.
      • Johnson doesn’t established standards for this though, doesn’t say how to get him out, doesn’t say whether the result would have been different had he claimed he was being tortured, etc.
      • Court doesn’t say that there are NO circumstances whereby an enemy alien has a constitutional right, but still, as a general matter, an alien doesn’t have a US const. habeus corpus right if he’s being held overseas.

• There are also some policy reasons behind this. Basic consideration in habeus practice is that the prisoner is produced before the court.
  o This is a lot to ask of the military when the guy is over seas. It would diminish the war effort, diminish the prestige of commanders, etc. Basically, court wants to allow military to do its job without judicial interference during wartime.
  o Second policy argument is that there would be no reciprocity if we granted habeus to enemy aliens. Basically, if we give this to our enemies, they’re not gonna give it back to us.

• Note that a lot of the opinion turns on the fact that he’s an enemy alien.
  o One could conceivably argue that he doesn’t qualify as enemy alien, but that would have been tough for Eisentrager though because he was caught while fighting!
• Again, the crux of the opinion are that there are a few key factors at play here:
  o Overseas
  o Alien
  o War.
• Court doesn’t tell us whether the result would be the same if any of the factors fell out.
  o What if he was a US citizen overseas? Citizenship is often a basis for jurisdiction. What if it wasn’t a war? That would change the policy reasons for sure. What if the enemy alien wasn’t overseas? There’s territorial jurisdiction of some district court in the US over whatever part of the US it is. If the guy’s in a prison in a deserted desert in NM, the NM district court has jurisdiction over that territory. So the case could come out differently. He may not get out, but the court may at least acknowledge jurisdiction.
  o But note that thousands of aliens were detained IN THE US in facilities that treated them well during WW2 and NO ONE TRIED TO GET OUT. The germans didn’t want to go back and fight.
  o If US won, they’d go back to Germany after the war and wouldn’t be in trouble because they were POWs and wouldn’t even be enemies of the state because Germany didn’t exist anymore. IF Germany won, however, they’d just wait until Germany freed them from the prison they were in and again, they’d be fine because they weren’t doing anything disloyal; they were just POWs.

All of this stuff has big implications for the war on terror.
• For Guantanamo, we have at least two of the factors for the prisoners.
  o They’re overseas (Cuba)
  o They’re enemy aliens (it is a WAR on terror so they’re enemies, and they’re definitely aliens).
• Enemy is a designation made by the US military.
• Under the Geneva Convention, you’re supposed to have a hearing. But these people don’t get the benefits (maybe cuz it’s not a war?? Or maybe cuz they’re not uniformed?)
• Perks of Guantanamo are that
  o We can control the prisoners; if we keep them in Afghanistan, there may be an Afghan gov’t that tries to get them out with their own laws
  o We know that the prisoners probably won’t be subject to habeus because of Johnson.

Rasul v. Bush
• Habeus corpus petition in US courts. USSC takes the case ultimately and says that the gov’t loses.
• Why did the court say that Johnson didn’t control here though?
  o Because Johnson says:
- Because of Aaron v. Clark, no statutory right.
- Because no stat, consider const, and there's no const. right.
- They say that Eisentrager was decided on const. grounds, not statutory, but here, the statute governs, so the court doesn't need to get to the const. issue in Johnson.
- At top of 356 down to 357, Stevens emphasizes that this is statutory jurisdiction here. Kennedy says we should look carefully at Johnson, and the critical distinctions are that:
  - Guantanamo is practically a US territory and is far removed from hostile areas
  - Prisoners are being held indefinitely here, whereas in Eisentrager, the prisoners were tried and found guilty and sentenced to a military term of a set period.
- Big point of Stevens on 357 is that Eisentrager doesn't preclude the exercise of statutory jurisdiction over prisoners' claims. Congress has given jurisdiction through statute to the courts, so you don't need the const. jurisdiction.
  - Braden v. 30th Judicial Circuit of KY. IN Rasul, Court says that case overturns Aarons v. Clark, which was the basis for the holding in Johnson.
    - That's huge. If Eisentrager came up now, the Court would hold that 2241 allows the Court to hear the claim.
    - But note that Braden was factually very different from these cases.
      - Moreover, it never purported to overrule the Aarons case when it was decided. Shanor says there was much too much emphasis on this by the court.
- Shanor says this is a horrible opinion. But it's the law now.
  - Basically Rasul is capable of being construed very broadly. Talk to Jon about his take on the case. He seemed to have gotten the point.

Shanor then refers us to page three of the Feb. 28, 2006 RECENT LEGISLATION ENACTED BY CONGRESS Handout.
- Johnson says habeus statute doesn't cover you.
- Rasul says after Braden, habeus does cover you.
- Now, congress is saying no habeus with the statute it's talking about.
  - But that's with regard to just statutory habeus. What about constitutional habeus?
    - Are we at war? We're definitely not in the theater of operations at Guantanamo, so the policy reasons drop out.
    - Basically, if you're the gov't, you could just argue that Congress codified Eisentrager, which was never overruled.

Rumsfeld v. Padilla
- guy was affiliated with al qaida and was caught and detained in a facility in the 4th Cir.
- Guy was a US citizen too.
• Basically, case goes to Supreme Court next and Rehnquist says that he’s a citizen in the US held by the US, but still, Court won’t hear the arguments because he filed in the wrong district court. He filed in NY instead of SC and should have filed in just SC.

• Predictable outcome though is that the counsel will just refile in SC and the Court doesn’t get rid of the issue at all.

• So then Padilla gets dealt with substantively by the 4th cir. in a decision that says basically that the president can do this.
  
  o Government then moots out the 4th circuit holding though, taking the guy out of military custody and preventing the SC from hearing the substantive issues in the case. 4th Circuit then withdraws its opinion because it’s pissed, and it orders the gov’t to defend itself for having done this. Basically, the Court went out on a limb for the gov’t, and then the gov’t recanted and gave Padilla what he wanted.

  o A similar case finally made it to the supreme court the day before yesterday and the Court denied cert.
    
    But Souter, Ginsburg, and Breyer say they would have granted cert. Huge issue. Does the pres have the power to detain a US citizen on US soil... see handout. Basically, these three go on to criticize what the gov’t did in Padilla, as the gov’t can just go about mooting out what it wants, because it can undo the mooting just by recanting and putting the guy back in military custody.

*Application of Abbasi*

• Argued in great Britain. Petitioner’s son was British citizen being detained in Guantanamo. She tried to get him out through diplomatic channels, but that failed, so she brought suit in C. Britain.

• She argues two things:
  
  o Customary int’l law poses a duty on the UK to take positive diplomatic steps.
    
    • Britain has done this though; it just hasn’t done EVERYTHING she wanted. Plus, court says common customary law just hasn’t gone that far.

  o Then she argues under a statutory arg. something with human rights... not sure how it came out.

• In the end, the diplomacy worked pretty well; the US ended up turning over most of the citizens it was detaining in Guantanamo that were citizens of allied nations.

**CH. 16: Authority for Military Trials**

• Uniform Code of Military Justice is for trial of our SOLDIERS overseas for doing stuff.

• But here, we’re talking about trials of our ENEMIES overseas for doing stuff.
  
  o Our own soldiers will be entitled to court martials, where you get a court martial judge, court martial members aren’t subject to command influence/they’re independent, there’s evidentiary rules, etc. A lot of
protections. Miranda rights too that are even broader than the civilian ones.

- But military COMMISSIONS aren’t subject to the same legal regime as the court martial.
  - There’s something said about the judicial power of the united states, the trial of ALL Crimes by jury, speedy trial, compulsory process, and in a broad sense, DP of law under the 5th amendment.

**Ex Parte Milligan**
- Southern sympathizer was caught during the CW and sentenced to death before a military commission.
- Court says he shouldn’t have been tried by a military commission because:
  - Courts of INDiana were open
  - Rights like trial by jury were denied
  - This wasn’t theater of war in Indiana; battles were far away from there.
  - Even though there’s a rebellion, there’s no justification for suspending const. safeguards here.
    - *Milligan* would be of huge relevance to Padilla. Other courts in the US are open, he’s a citizen, and there’s no military necessary that should overcome his entitlement to those protections of his rights.

**Ex Parte Quirin**
- US citizens caught during WWII and were accused of cooperating with Germans.
- Note that the people caught started in uniform and then weren’t because they changed into civilian clothes.
- Court holds that no civilian trial here though, despite what *Milligan* says, as these guys are enemy combatants. They’re more threatening than Milligan because milligan simply opposed the government’s positions. Here, the guys wanted to blow up stuff in the US, so court says that military trial is fine.
- Question is whether the commander in chief, who set up the military commission to try people like these saboteurs, had the power to set up these commissions and try such people in them. Court says YES.
  - What are the advantages of these military tribunals?
    - Not public
      - This could preserve nat’l secrets from getting out or prevent damaging enemy info from getting out.
    - No jury right
    - Maybe harsher penalties.
    - Faster than civilian courts. Had the SDNY had the case, it could have taken YEARS!
    - Different evidentiary rules, so stuff like hearsay could probably get in.
  - Countervailing interest could be to try people in public to get gov’t support; they see how well the gov’t’s doing at apprehending and punishing truly bad people.
- But the case here was early in the war, and FDR was more concerned with just locking these people up than being popular.

- What about Bush’s order using the military tribunals though!!
  - It’s pretty much modeled after FDR’s in *Quirin*. So that would suggest it would be fine. But the differences are:
    - FDR’s was set up to deal specifically with named people we caught (the germans in that case)
    - Bush’s, however, is for Al qaeda members and sympathizers. It’s for unnamed people, and thus is broader.
    - But Bush’s order is narrower in a certain respect. Bush’s order only gets at aliens; FDR’s was for CITIZENS TOO!
      - So look what happened with John Walker Lindh. He was a citizen and his trial was in a civilian ct. in CA.
      - There’s also a pending case about military commissions.
        - *Hamden v. Rumsfeld*. Hamden’s a non-citizen so he’s subject to Bush’s order.
          - It’s chiefly a case saying that **these types of tribunals don’t need minimum const. standards.**
  - *Hamden* is in Ch. 16 supplemental materials (pp 32-38)
    - DC Cir, not 4th Cir. *Hamden*.

*Hamden*
- Hamden argued that the court wasn’t an article III court and (he started talking fast... not sure)
- DC Circuit rejected the argument.
  - Gov’t argued:
    - Pres is commander in chief and can set up these tribunals
      - Court never reaches this question
  - Court instead talks about
    - Authorization for use of military force
    - Statutory authority for court martial and military commission.
  - Court basically says these statutes are enough authority for military commissions.
    - Cites *Quirin*, etc.
- Remainder of opinion deals pretty much with int’l law
  - 1949 geneva convetion doesn’t give private rights and isn’t enforceable in court.
  - P. 37 cites *Eisentrager* and says that political and military authorities determine these questions, not the courts.
  - Thus, 1949 convention can’t be judicially enforced.
    - Even if it could, that wouldn’t help Hamden though.
      - Hamden’s not a POW under this convention, and Al Qaedaa isn’t a signatory.
o Only point of disagreement is Common Article III and whether it applies to Hamden.
  ▪ Result is that it doesn’t matter because there’s no private right to enforce it anyway.
  ❏ 2 more matters:
  ▪ Assuming you have authority for a military commission, what procedures do we use?
    • Hamden says all procedures in Uniform Code of Military Justice.
      o DC Circuit says, no you don’t have to follow all the procedure for courts martial.
  ▪ Finally, army regulation 190-8 doesn’t provide a basis for relief because that doesn’t apply here either the court says. No reason why the military commission couldn’t be a competent tribunal under that provision.

**Today:** 2 Chapters

**Offenses triable by military commissions:**
  o Violations of the laws of war
    o Goes back to the libre code (sp?)
    o But we don’t have a definitive list of the laws of war. The closest we come to this is the list on p. 435 for military commission instruction #2. that’s not necessarily complete; it’s just a list of crimes and elements for trials by military commission under pres’ post 9/11 military order.
      ▪ There are arguments about whether this list is complete and/or overinclusive

**Yamashita**
  o Guy was commanding general for imperial Japanese army in Philippines.
  o After WWII, he’s charged with
  o 286 witnesses and 3000 and some pages of testimony. About 15 pages of testimony per witness.
    o Basically, these witnesses weren’t brought in for trial; it was all just affidavits and there was no way to contradict them.
    o Trial was just a few weeks after Yamashita surrendered to the allies.
    o So the point is that the evidence and prep is different than you’d usually expect in a criminal trial.
    o Moreover, there was no evidence directly saying that he had done any of the things he was accused of. Hard to tie crimes to him.
  o So point is that there was some, but not great, evidence that the crimes were committed.
  o The alleged crimes basically involved failure to prevent war crimes.
  o Big issue in the case is whether failure to prevent a war crime is actually a war crime.
o Majority says yes. Looks at various treaties that hint that the commanders of an army must supervise to ensure that subordinates don’t violate the laws of war.

o No real statute or treaty on point, but court basically just derives holding (meaning liability) from other sources.
  - **Says the guy had to take all measures within his power to restore public order and safety.**
  - Dissent says what the hell else can this guy do? He was stressed out; his troops were en route; McArthur had basically just started counterattacking, meaning we were the ones the really created the chaotic situation that allowed the war crimes to occur when the Japanese were in retreat.
  - Note also that if the military commission is okay, then they can try him for these types of things, but since the issue is whether this is a violation of the laws of war, that’s how the Supreme Court says that assuming the military’s facts were sufficient to show that the guy was in command and didn’t take all measures, then he was liable for war crimes.
  - Obviously, the case shows that the laws of war are both expansive and flexible. There wasn’t any prior publication of what the laws of war were, and there have been a lot more publications of these laws since 9/11, but that was the status of the law at the time of this case.

o Interesting footnote on 429 talks about failure of officers to prevent things committed in their presence. Case the footnote cites says that the guy there wouldn’t be liable because no power to prevent the war crimes. Court here nonetheless says that Yamashita had the power to prevent the crimes. Case therefore turns heavily on how much power D has to prevent the crimes he’s charged with not stopping.

o Rutledge asserts that the offense was defined after it was committed and the definition was too vague. Court responds as follows:
  - You don’t need the precision of the criminal law indictment when you’re dealing with war crimes. Essentially, court is staying flexible and saying we’ll know it when we see it.
    - Basically, court doesn’t just want something to go unpunished because it wasn’t defined properly.
  - But note that no one on the court deals with the ex post facto law issue:
    - That’s when something’s not illegal when you do it, then after, it becomes illegal, and you get charged.
    - The fact that the court doesn’t talk about this suggests we’re more flexible about the ex post facto issue when dealing with war crimes.

o Definitions of offenses laundry list on 435.
  - On the list of war crimes is perjury and false testimony.
    - How are these war crimes?!!
Because if you have someone on the stand in a military commission and this wasn't a war crime, you'd give them the ability to lie. Military commission has same need as regular court to make sure that those who testify and submit documents do so truthfully.

Last week in oral arg before the supreme court last week, a lot of focus on the conspiracy war crime, described on 437-438.

Guy argued it's not a war crime, but a common law crime.

- If you wanna talk about aiding the enemy, etc., that's a war crime, but conspiracy is not, the guy says.

- The answer to this guy's arg is basically that we're talking not just about any old conspiracy, but a conspiracy to violate the laws of war. And because that's the kind of conspiracy we're talking about, it is in fact a war crime.

Laws of war apply to any human being who violates them. So even though al Qaeda may not be a beneficiary of certain provisions of the Geneva convention because they're not signatories, they still can be liable for commission of war crimes.

- War crimes can either be committed by combatants or people who aren't combatants.

- With the POW issue though, there's a piece of the Geneva Convention in 1949 (or 1929??) that says POWs are entitled to Court martial. The point is that the Convention only applies to people who commit offenses WHILE IN CUSTODY AS A POW.

  - Yamashita committed his crimes before, and that's why he gets a military commission rather than court martial.

  - War crimes as POWs could include just regular crimes like theft or assault once you're detained and in custody. Basically, if you just commit a crime under the UCMJ once you're detained, and many of these are like regular crimes, you go before a court martial and the trial proceeds the same way as if a member of the detaining forces committed the same crime.

  - Basically, whatever the rules are for your own people are the ones you apply to POWs too, so hence court martial.

Note 1 more thing about Yamashita: the Japanese had some laws that they applied to their POWs and the Uchiyama case basically says that the Japanese are guilty of war crimes for holding grossly unfair war crimes trials. Judge and prosecution were collaborating, etc.

**Al Bahlul**

- Basically, talks about the details you need with a charge sheet.

- Then, brings up various crimes and goes through elements and crimes.

- A lot of the factual law is paragraph 15 of the charge.

- Question 2 after the case has to do with the timing of things.
- As of 9/11, was the US engaged in armed conflict with al Qaeda? If the answer’s no, the laws of war probably don’t apply.
- Here, al bahlul may have said some things to incriminate himself both before and after he was in custody. Can we use those statements against him in a military tribunal when he didn’t receive a Miranda warning? Probably. Can we use hearsay against him? Probably. Basically, that’s the whole deal with the military tribunal—if it’s probative, it’s in.
- What about the fact that al bahlul could have said (or maybe he did) that he only confessed because he was tortured?
  - This used to be admissible under March 24, 2006.
    - The latest military tribunal instruction says that the US will neither commit nor condone torture, and the prosecution therefore shall not offer any statement that has been extracted through torture.
    - But according to this basically, it’s up to the prosecutor to decide whether it was torture or not. And the new order doesn’t say exactly what process the commission uses to determine whether the prosecutor’s determination is right.

**PROCEDURES OF US MILITARY COMMISSIONS:**
- Military commission order 1:
  - These differ from ordinary procedures in civilian trials because
    - Different rules of evidence
    - You’re in front of a group of military people, not a bunch of civilians doing jury duty.
    - More authority under conduct of trial on p. 446 to close the proceedings to the public.

Notes from the al bahlul hearing:
- Basically, lawyer says that client’s preference is to represent himself; second preference if that’s not allowable is to have a yemenese lawyer represent him; third preference if that’s not possible is to have military lawyer with yemenese lawyer assisting.
- The guy in charge says that self representation isn’t possible because prisoners at guantanamo have poor access to documents because of security clearances, they don’t speak English well, and they don’t know the law well usually.

Note 2 p. 449:
- Basically says that, since *Yamashita,* the Geneva convention of 1949 replaced the 1929 one and the 1949 one says non prisoners of war do get court martial process. Does this overrule *Yamashita*?
  - The deal is that there’s academic argument both ways. Some say it changed yamashita, others disagree.
  - The language from *Oie Hee Koi,* in the House of Commons says that the new convention’s provision was used for the limited situation where .... (not sure what he said).
Shanor doesn’t think it changed *Yamashita* though. But still, it’s an open question.

Side note: if you’re under the MCMJ, you have to be given a Miranda warning.
- The difference between military commissions and court martial also makes a difference in terms of appeal procedures.

**Appeal Procedures:**
- Military commission (or maybe instruction?) No 9:
  - Procedure for appeal is a three-officer board. There’s processes you’re supposed to use, they have certain qualifications, and once they do their thing, the secretary of defense reviews it, and once he reviews it, he gives it to the president to review.
  - But is there any judicial review after the military commission and executive branch review processes.
  - No habeas for guantanamo bay, but if you look at p. 4 of the handout from last week, it says that the DC Court of Appeals has a mandatory review of sentences over 10 years and a discretionary review for lesser sentences. After that review, you can go to the supreme court.
  - Standard is whether the decision is consistent with the standards and procedures specified in the military order.
    - If it’s consistent but there’s evidence in there that doesn’t meet normal evidentiary standards, that’s fine!
  - Also, it says that to the extent that the Const. and US laws are applicable, court looks into whether the standards and procedures from military order number 1 are consistent with the const. and the laws.
    - So basically, you have to argue two things before the DC Ct. Appeals:
      - First, I have certain const. rights, basically.
      - Second, those rights were violated.

*Sadak v. Turkey*
- Case before European comm’n on human rights.
- 4 people who were supposed to be terrorists.
- Got sentenced for 15 years for belonging to a terrorist organization
- They complained to the Eur. Comm’n of Hum. Rights that they didn’t get a fair trial.
  - Basically, the argument is that there was a military judge. That was unfair, they alleged, because basically, military judges won’t be independent, and the convention requires independent tribunals.
  - Tribunal says that the court was not independent and agrees to that extent. Court says that the tribunal wasn’t independent or impartial because it’s got a military judge.
    - Bush would probably be relieved that we’re not a part of this European Court!
Turkish puts up some args, but the European Court rejects them all.
So, after the case, the guys who were on trial were turned free by Turkey. But
then Turkey arrested them on other stuff, retried them before another court that
didn’t have a military person on it, and then the guys were convicted.
  But then the appeals court in Turkey overturned that (a civilian judge was
on the appeals court) and said it still wasn’t impartial.

Last note: int’l covenant on military and ... rights.
  Sets standards for fair trials and appeals
  What’s the implication for trying terrorists?
  The argument that’s still out there to be made, Shanor says, is that the
  ICCPR doesn’t apply. Reason is that this is military, and these are
  military trials for violations of law; these aren’t standard criminal trials to
  which ICCPR applies. That’s Rumsfeld’s position. Note that we’re not
  signatories anyway, but we still may care because enough people have
  signed on to possibly make this customary int’l law.