INTRODUCTION: MODERN TERRORISM

- New terrorism differs from old
  - Funded by huge amounts of money
  - characterized by young people w/ few prospects
  - no traditional nation-state, but they are organized
  - use media to propagate or take credit
  - there are no innocents
  - very broad goals
  - range of tools to tackle terrorism is broader than criminal law

- Roots of Al Qaeda:
  - receptive audience in South Asia because US armed them in Afghanistan
  - supported leaders of repressive regimes
  - creation of unsustainable social programs
  - restoration of pride to victims of successive foreign masters
  - Islam is important because religion provides a sustaining force & there’s a cohesion between religion and practice

- 9/11 report doesn’t mention oil

- **What is terrorism**
  - No precise definition
  - Most terrorism violates ordinary criminal laws
  - Some definitions focus on motives, methods, victims, targets
  - One US code provision defines terrorism as “**premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents**” (22 USC § 2656(d))
  - Core characteristics
    - Use of violence
    - Instilling fear, most generally in a civilian population
    - Typically committed by non-state actors
    - Usually committed with a political objective
  - Ambiguous terrorism
    - Unabomber: non-state actors
    - DC snipers: was it just extortion?
    - USS Cole: attack on military, although it wasn’t engaged in combat at the time
**Terrorism and Crime.** Antiterrorist statutes provide *diverse definitions of terrorism.* Ironically, however, such statutes often proved less useful in practice than ordinary criminal laws. Specialized statutes which filled spaces not otherwise covered by criminal law, like “material support” and Britain’s “encouragement of terrorism” statutes, raised *special statutory, constitutional, and policy issues.* In the criminal procedure field, antiterrorism cases raised *significant problems of jurisdiction, proof, and trial* not common to criminal law cases generally. Indeed, we saw significant differences in the law’s dealings with evidence gathering in criminal cases and the gathering and use of national security intelligence. Finally, the nature of terrorism and terrorists led us to assess punishment enhancements and broader concerns. Crim law/procedure as used against terrorists might be brought more in line with that used against regular criminals. Could have sentencing enhancements.

**CRIMINAL RESPONSES TO TERRORISM**

- **Ordinary criminal law** applied to terrorists
  - Criminal statutes are *easier to prosecute* than a terrorism act
  - *Kasi* (CIA killer) was an ordinary murderer
    - D’s political motivations shouldn’t mitigate death sentence
      - 1st amt doesn’t protect *politically-motivated violence*
    - Don’t investigate jury deliberations
      - If jury was angry at D, it’s because he was a murderer, not because of his views or status as immigrant
  - Some fed laws are specifically *aimed at terrorism*
    - But the laws *apply to everyone* who commits the acts, not just terrorists
      - Need not prove terrorist motive or affiliation
        - Except for “Providing Material Support to Designated Terrorist Organization,” which requires State Dept to designate groups as terrorist
    - Illegal to give *material support to a Foreign Terrorist Org (FTO) (2339B)*
      - legal services and medical supplies aren’t material support
      - Designation of FTO
        - State Dept, not courts, define who is FTO
          - Organization is foreign organization
          - Engages in terrorist activity, as defined in 18 USC § 1182(a)(3)(B), or terrorism, as defined in 22 USC § 2656f(d)(2), or retains the capability and intent to engage in terrorist activity or terrorism.
          - The terrorist activity or terrorism of the organization threatens the security of US nationals or the national security of the US
        - FTO itself can judicially *challenge the designation*
          - Um, not likely
        - D accused of providing support can’t challenge designation as FTO
          - Lack of right to challenge FTO designation is ok; Congress determines the elements of crime (Hammoud)
• **Rationale**
  - State Dept can act quicker than courts
  - Courts deal with specific cases, not general situations
  - State Dept issues designation; courts can’t be prospective
  - Statute is constitutional (Hammoud: gave money to Hezbollah)
• **Doesn’t inhibit freedom of association**
  - Only prohibits conduct of providing material support, not association
  - It’s a facially neutral statute that restricts some expressive conduct, and is valid if it meets O’Brien standard
    - It’s w/in constitutional power
    - Gov has substantial interest in stopping terrorism
    - That interest isn’t related to suppressing speech
    - The effect on expression isn’t greater than necessary
• **Overbreadth:** Not overbroad b/c it doesn’t prohibit mere association; it requires conduct
• **Vagueness:** Not vague b/c material support is defined as a number of enumerated actions
  - Easier to follow the money than prove the crimes themselves
  - No intent to further illegal activities of organization required (Paracha; Marzook; Assi)
  - Gov must prove D knew recipient was FTO or had engaged in terrorist activity (Marzook)
  - Don’t need knowledge that what he provided was “material support” (Paracha)

○ British Terrorism Act prohibits encouraging terrorism but they rarely use it, probably so as not to dry up sources & further isolate Muslims.
  - statements likely to be understood by some or all of the members of the public to whom it is published as a direct or indirect encouragement or other inducement to them to the commission, preparation or instigation of acts of terrorism
    - publishes a statement to or causes another to publish
    - at time of publication, intends to directly or indirectly encourage or induce people to commit, prepare or instigate acts of terrorism or is reckless as to whether members of the public will be directly or indirectly encouraged or otherwise induced by the statement to commit, prepare or instigate such acts or offences.
    - glorifies the commission or preparation (whether in the past, in the future or generally) of such acts or offences
  - Irrelevant whether it refers to a particular terror act
• Treason & Sedition
  o Sedition conspiracy (2384) only prohibits speech where it’s an agreement to use force against the US (Rahman)
    ▪ Requires conspiratorial agreement
    ▪ No vagueness: not vague to accuse people of levying war against US
    ▪ Overlaps w/ treason but they’re different offenses
      ▪ No 2-witness requirement
  o Treason has greater stigma, a loyal requirement and worse punishment
  o Speech can be used to show motive

• Extra-Territorial Criminal Jurisdiction
  o Congress can enforce law beyond US boundaries when it clearly expresses intent to do so.
    ▪ Court must follow that intent unless it violates DP.
    ▪ Congress has long list of offenses that give extra-judicial jurisdiction
      ▪ Richard Reid, shoe bomber: needed extra-judicial jurisdiction over him, which was easy b/c it was American airline
  o Terrorism doesn’t automatically trigger extra-territorial jurisdiction, although D.D.C, statutes & treaties say there is universal jurisdiction
    ▪ Antihijacking Act, 49 USC § 46502(b) (1994)
    ▪ Destruction of Aircraft Act, 18 USC § 32(b)(3) (1994)
    ▪ International Convention for the Suppression of Terrorist Bombings, which US ratified
  o US Atty Manual requires Asst AG’s authorization for investigations, GJs, & indictments about overseas terror, allowing for coordination within gov & with foreign govs
  o Yousef: planned airplane bombings
    ▪ US aircraft statute covers all civil US aircraft wherever they are
      ▪ There’s jurisdiction over the airplanes that would be entering the US
    ▪ D’s physical presence is proper:
      ▪ D could be charged b/c he was later found in US, even though he was brought here in custody, just as long as it’s lawful
      ▪ D wasn’t charged until brought to US
    ▪ Jurisdiction also appropriate under cust int’l law
      ▪ Passive personality principle: jurisdiction over acts that harm state’s citizens abroad (plot was to bomb US aircraft carrying US citizens)
      ▪ Objective territorial principle: jurisdiction over conduct committed outside a State’s borders that has, or is intended to have, a substantial effect within its territory (purpose of attack was influence US policy)
- **Protective principle:** jurisdiction over acts committed outside the State that *harm the State's interests* (attacks were intended to affect US & its foreign policy)
- FN24: Nationality principle (acts by citizens) & universality principle (acts so heinous as to be universally condemned)
- Cust int'l law appropriate where there's no treaty or controlling decision on point by executive, legislature, or judiciary
  - US statute also gives proper effect to Montreal Convention protection of airplanes.
  - Can even prosecute for attacks on non-US plane & non-US citizens
    - US may want to exercise jurisdiction over a crime occurring in another country to
      - provide fair trial,
      - ensure that terrorists don't get safe haven,
      - other country may not have capability to carry out trial,
      - different sentences
      - some crimes (eg high seas) may be w/in no jurisdiction
  - **Extradition & Rendition, infra**

**TERRORISM PROSECUTION**

- **Withholding evidence and witnesses**
  - D has **right to complete defense**, including *access to evidence* and compulsory process for *obtaining witnesses* in his favor and witness statements
  - Classified Information Procedures Act (CIPA) allows govt to provide *summary of classified info* instead of the documents itself (or docs w/classified stuff deleted)
    - Only for documents
    - Gov determines what's classified
      - Courts can look at the original documents to ensure that it's complete & accurate
      - *Balances nat'l security interests & crim defense rights*
  - For non-documents (eg depositions), court may require *summaries*
    - Analogous to CIPA
    - Summaries don't allow D to see how the answers were brought about, and other things about an interview that wouldn't show up in a summary
  - **Producing witnesses** (Moussaoui)
    - If witnesses have material testimony for D's defense, Gov can *produce them, drop the charges, or suffer sanction*
      - Gov won't produce witnesses, but that wasn't *punitive decision.*
        - Just like CIPA, substitution is appropriate where it will not materially disadvantage D
      - Production of witnesses is reserved to judiciary, not executive branch. Separation of powers doesn't bar *every exercise of jurisdiction over president.*
        - Balance gov interest in protecting intelligence-gathering, secrecy, and transporting terrorist witnesses against D's constitutional rights to exculpatory evidence

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- balance favors production of these witnesses (or their testimony) because they're material to the defense
- DCt could issue a testimonial writ (gets them to testify) to noncitizens outside US boundary (who are in US custody); lack of subpoena power irrelevant
- German court: US won't produce D's witnesses so lower court should weigh the evidence based on interpretation most adverse to gov (Mounir El Motassedq)
  - Basically, death knell for prosecution
    - Desire to convict can overcome professional judgment and broader obligations to justice system & rule of law (Koubriii: Gov admitted error & dismissed charges by not turning over evidence and materially misleading court, jury & defense in non-sporadic and non-isolated way, violating Ds' DP, confrontation & fair trial rights)
    - B/c this information was known, did terrorists instead target a nearby civilian site. Probably not; other alternatives exist.
    - Web of information/mosaic theory: providing Ds with access to other terrorists may give them small but useful bits of harmful information

- Material witnesses: holding people to make sure they show up for trial
  - person may be held as long as there is probable cause that he or she has material evidence regarding a criminal offense
  - DOJ held numerous Muslims after 9/11
  - may be temporary while gov waits to charge you a la Terry Nichols

- Extradition & Rendition
  - Extra-judicial jurisdiction, supra
  - Immigration: Deportation & Human Rights infra
  - Don't need to obtain warrants to arrest people overseas b/c president's foreign affairs powers, the costs of imposing a warrant requirement, and the absence of a statutory basis for obtaining warrants abroad.
  - Extradition: D surrendered through diplomatic channels for trial and punishment in the requesting country
    - treaties operate on the basis of reciprocity: extraditable offense must be a criminal offense in both countries
    - some countries won't extradite their own citizens
    - some countries won't extradite fugitives who could receive the death penalty
      - Mexico won't send Ds who could get life without parole
    - doctrine of specialty: customary international law: extradited D be tried only on charges set forth in the documentation provided in support of the extradition
    - people who are going to be extradited who fear torture may ask for judicial review of extradition decision (Cornejo-Barreto)
- habeas review is available for torture claims by people who will be extradited (Mu-Xing Wang)
- to avoid rendition, must show that it is more than likely that he/she will be tortured (in re JE)
  - Evidence obtained through torture can be used in extradition hearings to demonstrate PC (Matter of Extradition of Atuar)
  - may require independent corroboration for the evidence obtained by torture (Gill; in re extradition of Atta)

- **Rendition:** alternative for US, trick D into leaving where he is
  - *informal surrender:* Pakistan turned WTC bomber over to US
  - *lure:* enticing terrorist to ship in international water
  - *abduction:* Adolph Eichmann kidnapping
  - *military rendition:* using troops
  - **Legality of abduction** not a defense to fed ct jurisdiction (Ker-Frisbee doctrine)

- **International investigations**
  - Problems & good points in dealing w/ Cole bombing investigation: CIA didn’t *share info* w/ FBI; Yemeni resistance/trouble getting access to witnesses; *cultural awareness* (although this was done ok); interrogation was done well (culturally sensitive & no torture); *physical evidence* (much evidence explodes); possibly terrorists trained to resist interrogation
  - US ambassador threw FBI agents out b/c they were making her job harder

- **Lacking sufficient evidence**
  - **Warrant or consent** typically required for searching, so PC usually needed
  - FBI didn’t take certain actions against Moussaoui b/c of lack of evidence
    - Agent suspected he would hijack a plane, but HQ didn’t think threat was credible. FBI doubted PC for criminal warrant to search computer
    - Moussaoui was arrested on immigration charge
    - FISA search required PC that Moussaoui was agent of foreign power
  - If you don’t know for sure he’s a terrorist, then get him on another charge like immigration, a la Moussaoui.
  - Can also use special tools, such as **FISA statute.**
    - FISA requires PC that they’re *agent of foreign gov or foreign group*; you don’t need evid of crime.
      - The PC that they’re foreign agent substitutes for evidence of crime.
        - Foreign power includes factions of nations
        - Agents can be US citizens
      - Additional FISA restrictions for US citizens and permanent residents:
        - person must be about to violate U.S. law
        - cannot be targeted “solely on the basis of activities” that are *protected speech* under the First Amendment, and
        - information must be “necessary to” *U.S. national security, national defense, or foreign affairs.*
- FISA allows electronic surveillance, covert physical entry, pen orders & business records, and roving wiretaps of any phone the target may use.

- Patriot Act allowed surveillance whenever national security information was “a significant purpose” of the surveillance, permitted intelligence officers to “consult” with law enforcement officers to “coordinate efforts to investigate or protect against” threats to national security. AG required that all FISA-obtained information concerning “any crime which has been, is being, or is about to be committed” must be turned over to the DOJ for potential prosecution.
  - FISC stopped last requirement, but FISCR overturned it
  - If they find evidence of a crime, while they only have PC that you’re a foreign agent, DOJ didn’t let it be used in criminal prosecution. But gov policy – and Patriot Act - has now changed and FISA info can be turned over to prosecutors.

- FISA warrants can now be used against lone wolf terrorists.
- FISC & its appellate court, FISCR, have ex-parte, secret determination
- FISCR: FISA orders are reasonable, and are close anyway to normal search warrants carried out under Title III (see chart). FISA surveillance and searches are special needs cases for Fourth Amendment warrant purposes. Therefore, no warrant based on probable cause is required as a prerequisite to surveillance.

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<thead>
<tr>
<th>Application neutral magistrate include:</th>
<th>TITLE III</th>
<th>FISA</th>
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<tbody>
<tr>
<td>- “Full and complete statement” of the facts and circumstances relied upon, including:</td>
<td>- Statement of facts and circumstance to justify:</td>
<td>- Statement of facts and circumstance to justify:</td>
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<td>- details of offense</td>
<td>- targeting a foreign power or agent; and</td>
<td>- targeting a foreign power or agent; and</td>
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<tr>
<td>- description and location of facilities surveilled</td>
<td>- targeting facility (must be used or about to be used by foreign power or agent)</td>
<td>- targeting facility (must be used or about to be used by foreign power or agent)</td>
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<td>- description of type of communication to be intercepted</td>
<td>- Certification that significant purpose is to obtain foreign intelligence information</td>
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<td>- identity of the person committing the offense, if known</td>
<td>- Statement of proposed minimization procedures</td>
<td>- Statement of proposed minimization procedures</td>
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<td>- “Full and complete statement” that other investigative procedures have been tried and failed or appear unlikely to succeed</td>
<td>- Certification, and statement of basis therefore, that information cannot reasonably be obtained by normal investigative techniques</td>
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<th>Order granted if finds:</th>
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<tr>
<td>- Probable cause to believe target has committed, is committing, or is about to commit enumerated crime</td>
<td>- Probable cause to believe target is a foreign power or agent</td>
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<tr>
<td>- Probable cause to believe facilities to be surveilled are being used in connection with the offense</td>
<td>- Probable cause to believe that each facility at which surveillance directed is used or about to be used by foreign power or agent</td>
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<tr>
<td>- Probable cause to believe communications concerning the offense will be obtained by surveillance</td>
<td>- Proposed minimization procedures meet statute’s requirements</td>
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<tr>
<td>- That normal investigative techniques have been tried and failed, or appear unlikely to succeed if tried</td>
<td>- Information sought can’t reasonably be obtained by normal investigative techniques</td>
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| Duration | Up to 30 days | Up to 90 or 120 days, or one year, depending on nature of target |
| Notice | At end of surveillance period | Only if communications introduced in criminal |
| Suppression | Yes | No, so long as government moves for *ex parte* and *in camera* consideration |
| Sealing     | Yes | No |
| Other       | Annual report with "general description" of surveillance | Keep Congressional Intelligence Committee "fully informed" |

- **National Security Letters**: administrative subpoena for gov to *get information* from third parties, like banks, phone companies, libraries
  - no judicial process
  - no one served w/ a national security letter can speak about it
    - can't indicate to the person whose records are involved that the gov came & looked at it.
    - 1st *amt issues* (*Doe v Gonzalez*: remand to consider impact of new Reauthorization Act)
      - Concurrence: limited ban on speech ok, but unconstitutional if it extend beyond investigation's duration

- **NSA surveillance**: NSA monitored calls between US and persons overseas suspected of terrorism (*ACLU v NSA*)
  - **State secrets privilege**: evidentiary rule developed to prevent the disclosure of information which may be detrimental to national security.
    - privilege applies when a reasonable danger exists that disclosing the information in court proceedings would harm national security interests, or would impair national defense capabilities, disclose intelligence-gathering methods or capabilities, or disrupt diplomatic relations with foreign governments.
    - State secret priv doesn’t apply b/c P isn’t *relying on or requesting classified information* to support its claim (Gov has publicly admitted the program) and Gov doesn’t need classified information to defend its claim
  - **Standing**: ACLU wasn’t targeted but *nobody knows who was targeted*, so ACLU says overseas people won’t talk to scholars, lawyers, etc.
  - Hamdi showed that 5th *amt applies* to exec branch, so 1st & 4th do too
    - 4th *amt*: wiretapping has undisputedly gone on, it has undisputedly been implemented *without regard to FISA* and the more stringent standards of Title III, and is thus obviously in violation of the Fourth Amendment.
    - 1st *Amt*: compelling justification needed to *regulate speech*
  - **Separation of powers**: FISA sets out *statutory power*; Prez violated it
    - AUMF says nothing about surveillance or intelligence. Even if it replaces FISA, there are still 4th & 1st *amt violations.*
    - Prez also lacks *inherent power* to monitor calls; he must follow constitution.

- **Difficulty capturing suspected terrorists**
  - Despite detailed Bin Laden indictment, we can’t arrest him
  - *Rewards* don’t necessarily help
• Providing security for trials (Koubriti)
  o Must balance security with prejudice it creates against D
  o D has right to speedy & public trial; no exception for terrorists
  o Courts sometimes have juries sit anonymously and meet in undisclosed places
    ▪ protect jurors, but when such heightened measures can prejudice jurors, signaling that D is dangerous & connected with terrorism
    ▪ Court has discretion over anonymous jury based on D’s involvement in organized crime, participation in group with capacity to harm jurors, previous attempts by D to interfere w/ judicial process, severity of punishment D faces, and whether publicity could lead to jurors being exposed (Koubriti: high media attention and emotional nature of charges justify anonymous jury)
      • anonymous jury doesn’t undermine presumption of innocence
      • anonymous jury can reach fair verdict even if it’s unpopular
    ▪ could seek more less-visible security

• Determining appropriate punishment
  o Evidence is relevant to death penalty if it’s probative of an enumerated mitigating factor or rebuts prosecution’s evidence for conviction or aggravating factor, or is about D’s background, record, or character (McVeigh)
    ▪ evidence of D’s views of Waco ok but not evidence of whether they were reasonable, since gov’s actions at Waco isn’t on trial
      • Besides, D read the reasonableness evidence after bombing so it didn’t influence his actions
    ▪ Victim impact testimony aids jury in making reasoned moral response to crime
      • If the testimony is emotional, that’s because D caused so much death
  o Nichols was sentenced to life imprisonment; probably resulted from being apologetic
  o What is appropriate punishment for helping terrorists?
    ▪ D-member of 9/11 cell in Germany guilty of 3000 counts of aiding & abetting murder and sentenced to 15 years.
  o Many terrorists want to die, so what can you do
  o Are jurors fearful of retaliation if they impose death sentences?
  o Sentencing guidelines: terrorists w/ no criminal history are different than normal first-time offenders b/c of likelihood of recidivism, difficulty of rehabilitation, and need for incarceration (Meskini: terrorism guideline may increase both offense level & criminal history category; no DP violation)
Terrorism and Civil Law. Two areas of the law significantly impacted by terrorism are immigration and victim compensation. Border Security and immigration law have undergone a fundamental shift from the era of the Immigration and Naturalization Service welcome mat to the Homeland Security era of profiling, deportation, exclusion, and surveillance. Compensating victims of terrorism involves surveying contract, tort, insurance, and compensation fund issues in the context of potential payees ranging from terrorists and their supporters to private parties and governmental entities.

IMMIGRATION LAW

- **Exclusion** of suspected terrorists
  - Around world, governments **deny entry** to terrorists
  - US denies entry to people who may have engaged in “terrorist activity” or have other links to terrorism. 8 USC 1182
    - terrorist activity: an unlawful activity using hijacking, violence to compel a third person, assassination, nbc weapons, or threats, attempts & conspiracies to do those things.
    - stop illegal immigrants at border & send them back
      - no DP rights
    - **PLO singled out** as terrorist organization by Congress instead of letting Exec Branch make decision
    - effectiveness of statute depends on accuracy
      - eg months after 9/11, INS issued visas to 2 deceased hijackers
  - **Erring on the side of caution** keeps out many legitimate people such as students
    - State Dept has substantial authority to overly exclude people
    - After 9/11, dramatic drop in foreign students at American universities
  - **Limited judicial inquiry** (“narrow judicial review”) in immigration legislation b/c it’s a fundamental sovereign attribute of the political branches, even when the challenge is made by US citizens (Adams)
    - Reasonable belief may be formed if evidence linking the alien to terrorist violence is sufficient to justify a reasonable person in the belief that the alien falls within the proscribed category
      - Adams: sufficient evidence of P’s involvement in IRA; no need to prove BARD
    - Appellate courts look only for “clear error” in D.Ct decision
    - judgment can be based on hearsay b/c FRE & FRCP don’t apply
  - **Alien has burden** of establishing that he is eligible for a visa
  - Schneiderman: Naturalized US citizen couldn’t be deported for not being attached to constitutional principles b/c he’s a communist activist
    - Citizenship is too important to be removed just b/c Schneiderman is a commie. Gov must show he didn’t believe in constitution & wanted Communist overthrow of gov

- **Immigration Sweeps**
  - After 9/11, US conducted large-scale immigration sweeps to arrest anyone suspected of possible terrorist involvement
    - Many people were held for long periods of time; some were sent to other countries
- Many people were held as *illegal immigrants or material witnesses*
- DOJ IG: Significant problems in how 9/11 detainees were treated
  - Lack of timely notice of immigration charges
  - Detainees were held until cleared by FBI, but this took an average of 80 days
  - Should have taken more care to *distinguish between aliens w/ terrorism connections and those captured incidentally*
  - DOJ didn’t address how it could hold aliens to conduct clearance investigations after receiving final orders of removal or voluntary departure
  - Detainees were held under highest security conditions
  - Guard staff told people specific detainees weren’t there
  - Hard to get counsel
  - Pattern of physical & verbal abuse
  - *Harsh conditions*, including 24 hour illumination of cells
    - Call-in program asked people to call in. This led to many deportations.
      - *Could have preempted attacks; who knows?*
      - If you didn’t call in when you were supposed to, there’d probably be no real consequence.

- **PUBLIC INFORMATION**
  - FOIA mandates disclosure of *gov records* unless gov proves an enumerated exemption. (Center for Nat’l Security Studies v DOJ)
    - Exemption 7(A): *law enforcement records that could reasonably be expected to interfere with enforcement proceedings.*
      - DOJ can establish a law enforcement purpose with a “rational nexus between the investigation & one of the agency’s law enforcement duties” & “connection between an individual or incident and a possible security risk or violation of federal law”
      - Even though the names are contained in traditional public records like arrest warrants, INS charging documents and jail records, the *list of names* is clearly compiled for law enforcement purpose.
      - *Gov’s declaration* that the disclosure is reasonably likely to interfere with enforcement proceedings is *sufficient*
        - Judiciary shouldn’t 2nd *guess top counter-terror officials*
        - Gov’s expectation that disclosure of detainees’ names would enabled terrorists to map course of investigation & impede it is reasonable.
  - Also, no 1st *Amendment* right to *non-judicial documents* that aren’t part of a criminal trial
    - Distinction between investigatory information & access to information related to a gov adjudicative process
    - No right to receive information
  - Dissent: public has interest in learning what gov’t is up to; info here is harmless; gov should have to justify its position
Bassiouni: FBI’s records on head of Arab organizations fall within the parameters of law enforcement activity, such as the investigation of terrorism

- DEPORTATION & HUMAN RIGHTS
  - UN Convention Against Torture prohibits extraditing person to a country where they’ll be tortured. Congress has passed similar act.
    - People to be extradited may petition for judicial review of the Secretary’s decision using standards in the CAT protecting against non-refoulement (Cornejo-Barreto)
    - habeas review is available for CAT claims in the context of removal (Mu-Xing Wang)
    - Evidence obtained through torture can be used in extradition hearings to demonstrate probable cause (Ogbudimkpa)
    - Can use evidence obtained through torture in an extradition case because Article 15 of CAT is not self-executing (Matter of the Extradition of Atuar)
    - confession obtained through torture can’t be used, but court may have been willing to consider it if supported by independent corroborating evidence (Gill)
    - confessions procured by torture are corroborated by significant other evidence, and therefore are worthy of belief (In re Extradition of Atta)
  - Asylum-seeker has burden of proving “more likely than not” that he’ll be tortured (Belmont: substantial evidence that P engaged in terrorist activity)
    - alien ineligible for asylum if AG decides there are reasonable grounds for regarding alien as a danger to the US or that alien is inadmissible or removable for terrorist activity
    - No judicial review for designation of terrorism
  - Way to prove potential torture:
    - evidence that other people in your situation have been tortured
    - int’l human rights orgs’ reports
    - State Dep’t reports showing that the country tortures people
  - CIA’s Extraordinary Rendition Program
    - CIA flies terror suspects to other countries where they may be tortured
  - Aliens are much more subject to deportation & exclusion than citizens; to a slight extent, naturalized citizens may be subject to deportation
  - What constitutes torture
    - “suspension for long periods in contorted positions, burning with cigarettes, sleep deprivation, and...severe and repeated beatings with cables or other instruments on the back and on the soles of the feet, ‘...beatings about the ears, resulting in partial or complete deafness, and punching in the eyes, leading to partial or complete blindness’” (Matter of GA)
    - severe beatings and cigarette burns (Al Saher)
    - rape (Zubeda)
    - For an act to constitute torture it must be: (1) an act causing severe physical or mental pain or suffering; (2) intentionally inflicted; (3) for a
proscribed purpose; (4) by or at the instigation of or with the consent or acquiescence of a public official who has custody or physical control of the victim; and (5) not arising from lawful sanctions.” (In Re J-E- 23 I. & N. Dec. 291)

- ECHR: prohibition on rendition applies to the risk of torture or inhuman treatment by private individuals or groups as well
- Not torture: serious persecution (e.g., threats, unjust charges, fines, illegal searches and seizures) nor verbal abuse alone (Gui; Quant)

- Current legislation would require information about rendition/torture and prohibit it

SANCTIONS / TERRORIST FINANCING

- **Unilateral sanctions**
  - US sometimes imposes economic sanctions on terrorist orgs & nations supporting them
    - *Freezing assets, prohibiting trade & assistance, etc*
    - Seek to punish terrorists & deny them resources
  - Criticisms
    - costly & ineffective
    - They harm US businesses
    - Other countries trade anyway
    - Harm innocent citizens of countries like Iran
  - So US puts *pressure on foreign companies*
    - ILSA bars foreign firms that make significant investments in Iran & Libya from conducting certain transactions in US or w/ US businesses
  - Sanctions can render *contracts made in violation unenforceable* (Kashani: US citizens can’t enforce contracts to build in Iran; unenforceable as illegal and against public policy)
    - *US citizens are bound, even if their activity takes place overseas*
    - No damages but restitution would have probably been ordered
  - US citizens cannot *facilitate trade* between a foreign country (Hong Kong) and Iran, even though the statute does not bar trade between the two countries (Bassidji: Guarantees of payments made by US citizen to further a deal between Hong Kong company and Iranian company illegal)
  - Sanctions don’t apply to *information and informational materials* (Kalantari: Person who imported and copyrighted three films from Iran did not lose copyright protection as a result of the trade embargo)
    - Berman Amendment prevents executive branch from restricting flow of information protected by the First Amendment
  - Executive order prohibiting participating in and assisting *export of goods* to Libya in violation of sanctions is not unconstitutionally *vague* (Soussi)
  - *Freezing of assets* of Libyan agent and dissolution of stock options not a violation of the *takings clause* of the Fifth Amendment (Paradissiotis)
• **Fighting terrorist financing:**
  - Aggressively going after charities
    - Muslim charities complain their fundraising efforts are being harmed
  - regulating hawalas, and requiring them to provide info
    - Can convict Ds of running unlicensed hawalas
      - Patriot Act doesn’t require proof D knew he had to register
  - **Bank spying:** requiring banks to report on their customers
    - must report transactions over $10K & suspicious ones over $5K
      - banks’ negligence?
    - NSA program only monitors international calls, whereas SWIFT transactions may contain all data; there’s supposed to be an Al Qaeda tie on the other end of the NSA calls, but it doesn’t matter who you write a check to. Most of the data isn’t seen by anyone, just machines.
    - Europe panel faults sifing of bank data: doubts about legality of Bush program that monitors international financial transactions
    - Initial proposal for USA Patriot Act gave gov lots of leeway for data-mining. Congress killed it.
  - taking tax-exempt status from those who engage in terrorist activities
  - expanding definition of US to include territories
  - freezing assets
  - Fed LE sometimes uses restrictions to investigate crime like strip clubs

• **Multilateral Sanctions**
  - Weakness of unilateral sanctions leads US to sometimes press UNSecCoun to institute multilateral sanctions, as in embassy bombings in Africa

**MILITARY FORCE**

• Military force in **foreign countries**
  - Military responses becoming more common
  - Force can only be used if you go through UN or act in self defense
  - May act in **self defense** (UN Charter Art 51)
    - Security Council rebuked Israel & US for retaliatory attacks
    - Must declare that your response is in self-defense. You have to go through procedural pre-requisite of complaining about it, although you’re not required to do it before responding. You can do it after the fact.
    - Response must be **necessary and proportionate** (cst int’l law)
    - Anticipated attacks must be imminent
      - Harder to determine what’s imminent
  - To claim self-defense, US has **burden of proving it was attacked** by Iran (Iran oil platforms)
    - Missile fired by Iran wasn’t proven; other acts weren’t proven to be directed specifically at US, as opposed to other ships
    - Moreover, US response wasn’t necessary, as evidenced by its lack of complaint
US's right to collective self-defense in response to attack on another state
  - ICI: not enough evidence Nicaragua attacked US allies
    - That they provided arms was not an attack
  - Merely providing funds to arm contras isn't use of force

Bush Doctrine: National Security Strategy
  - stop rogue states and their terrorist clients before they can threaten or use
    WMDs against US & allies
    - inability to deter potential attacker, the immediacy of threats, and
      magnitude of potential harm do not permit solely relying on a
      reactive posture
    - greater the threat, the greater is the risk of inaction—and more
      compelling the case for taking anticipatory action to defend
      ourselves, even if uncertainty remains as to the time and place of
      the enemy's attack

Israeli separation barrier
  - Wall would impede liberty of movement of PA territory inhabitants,
    impede their right to work, health, education, and an adequate standard of
    living, and would contravene 4th Geneva prohibition against deporting or
    transferring the civilian population of an occupied territory.
  - Threat is w/in the territory, so it's domestic, not international self-defense
  - Implies that you can only use self-defense if party that attacks you is a
    state
    - However, UN Charter's language does not link the right of self-
      defense to the particular legal personality of the attacker, and UN
      endorsed US self-defense after 9/11
  - Beit Sourik Village Council, Israeli SC:
    - international law applicable to belligerent occupation permits
      military commander to take individual's land to build security
      fence, on condition that it is necessitated by military needs
    - bar seizures of certain land because the seizures would impose
      disproportionate harm to local inhabitants

Domestic use of military
  - Posse Comitatus Act prevents military enforcement of civilian laws
    - No private right to enforcement (Padilla ex rel Newman)
    - Padilla is being detained to interrogate him about organization military US
      is in combat against & prevent him from rejoining that organization, not
      so the military can enforce a civilian law (Padilla ex rel Newman)
  - Titular standard: reasonable standard may be used when military is used to
    enforce domestic laws (AG of Northern Ireland)
  - UN Charter restricts military force internationally but no international restriction
    on military force w/in US
    - Fighter jets are used for protection, not enforcement. Military can provide
      training or material for civilian law enforcement or natural disasters
  - Russian Federation has similar prohibition on using military force internally as do
    many other countries, but can use the military when necessary (eg Chechens with
    tanks)
TARGETED KILLING

- Lieber Code allowed for killing enemy combatants
  - Law of armed conflict doesn’t require giving enemy forces opportunity to surrender
    - Eg Can bomb sleeping soldiers w/o prior warning
  - Can’t assassinate enemy leaders
  - Hague Convention may also prohibit targeted killings
- Dershowitz: assassination avoids collateral damage and collective punishment
  - But possible negative public reaction, especially if it goes wrong
- US and Yemen jointly planned attacked on car that killed 6, including senior Al-Qaeda terrorist
  - Yemen justified its response to UN
    - Had made every effort to bring these people to justice
    - Letting these people remain free would put innocents at risk
  - US also justified its response
    - US first denies jurisdiction of UN Special Rapporteur
    - The killings were governed by international law of armed conflict, and were not extrajudicial executions
  - Terrorists are at war with US
    - They have training camps & have attacked soldiers
- Although we can kill enemy combatants, most people feel it’s not permissible to just kill someone who’s an enemy combatant in the US, where he can be arrested. If there’s a better alternative, you should probably use it.
  - Assassinate only if there’s no alternative and you’re engaged in armed conflict
- McCann, ECHR: Gov didn’t stop possible terrorists from entering at the border, but they didn’t have enough evi at the time; security forces had little choice but to kill

GROUP PUNISHMENT

- Intended as deterrent, especially when perpetrator can’t be punished, so deter those who can influence or stop the terrorist
- Almarin (Israel):
  - IDF’s ability to destroy house includes parts owned by terrorist’s family.
    - Punishment doesn’t have to be purely individualized.
      - Permissible to destroy whole home, not just the portion of it.
    - However, commanders should use reasonable discretion & proportion.
      - depends on the circumstances, like if the home is separate from the rest of the house, severity of act, whether others in home were aware. Some sense of proportion should be used.
- Geneva prohibits punishing people for actions they have not committed.
  - Prohibits collective punishment.
  - Israel says it’s inapplicable because this isn’t international armed conflict.
- Deportations occurred without a hearing, but court says it doesn’t matter. You get a hearing afterwards and can come back in if a hearing says it’s ok (Assoc for Civil Rights in Israel)
- international law worries about deportation across state lines, not within the state
COMPENSATING VICTIMS OF TERRORISM

Compensation: if we de-mythologize 9/11, and turn it into an incident of 3,000 murders, then we don’t need a special compensation fund. Claims could be in US courts or international/foreign courts.

- Claims against terrorists & their sponsors
  - Suits against Foreign States
    - Antiterrorism and Effective Death Penalty Act of 1996
      - Exception to foreign sovereign immunity
        - But you still have to get their assets
          - For Iran, must get US to unfreeze Iranian assets
        - Foreign state no longer immune from jurisdiction where “money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources. . . . for such act if such an act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency”
      - Applies if:
        - Personal injury or death resulted from an act of torture, extrajudicial killing, aircraft sabotage or hostage taking;
        - The act was perpetrated by a foreign state directly or by a non-state actor which receives material support or resources from the foreign state defendant;
          - The act or the provision of material support or resources is engaged in by an agent, official or employee of the foreign state while acting within the scope of his or her office, agency or employment;
        - the foreign state was designated as a state sponsor of terrorism at the time of the terrorist act or as a result of the act;
        - the foreign state was afforded a reasonable opportunity to arbitrate the claim if the act occurred within the foreign state against which the claim has been brought;
        - either the claimant or the victim was a national of the United States at the time of the terrorist act; and
        - similar conduct by US agents, officials or employees within the US would be actionable
  - AEDPA Does Not Create a Private Cause of Action Against a Foreign State (Cicippio-Puleo): FSIA confers jurisdiction but does not otherwise provide a cause of action against either a foreign state or its agents.
    - Neither AEDPA nor FSIA Flatow Amendment, nor the two in tandem, create a private right of action against a foreign state
But Bodoff (D.D.C. 2006): FSIA creates a federal cause of action for personal injury or wrongful death resulting from acts of state-sponsored terrorism

- Meeting the Standards of the Terrorism Exception to FSIA (Foreign Sovereignty Immunity Act)
  - Allegations of watching beatings while threatened with same treatment sufficient to state cause of action for mental torture (Price)
  - Material support need only proximately cause the terrorist act (Kilburn: Rejects “but-for” causation)
    - Does not need to fund the specific acts that caused the alleged injury
  - Sponsorship of terrorist group that causes death or personal injury to US national alone is sufficient to confer jurisdiction (Flatow)
  - Smith v. Islamic Emirate of Afghanistan: Granted default judgment against Iraq, a designated state sponsor of terror, for providing material support to Osama bin Laden and al Qaeda

- State Law generally provides causes of action in FISA cases (Dammarell)

- Suits against Officials, Employees, Agents of Foreign States
  - Flatow Amendment (Civil Liability for Acts of State-Sponsored Terrorism)
    - “an official, employee, or agent of a foreign state designated as a state sponsor of terrorism . . . while acting within the scope of his or her office, employment, or agency shall be liable to a United States national . . . for personal injury or death caused by acts of that official, employee, or agent for which the courts of the United States may maintain jurisdiction under [28 U.S.C. 1605(a)(7)] for money damages which may include economic damages, solatium, pain, and suffering, and punitive damages. . . .”
  - Ayatollah Khamenei liable for providing material support and resources to Hamas for attack, while acting within scope of his office and employment (Bodoff v. Iran: default judgment against Ayatollah for death of US citizen in suicide bombing in Israel)
    - Punitive damages awarded against Khamenei
  - Can’t recover punitive damages against a foreign state
    - Bodoff: No punitive damages against Iran
    - Multiple D.D.C courts: Punitive damages can be awarded against Iranian Ministry of Information and Security because it is an agency or instrumentality of the Iranian state
    - But Roeder: Iran Ministry of Foreign Affairs is part of government, not an agency or instrumentality
      - Not clear whether this affects application of punitive damages
Suits against Terrorists

- Lockerbie case: Libya surrendered the two Libyan officials accused of the bombing.
- Special anti-terrorist court in France tried and convicted six Libyan officials for another plane bombing

Suits against Groups/Individuals Supporting Terrorists

- Anti-Terrorism Act (18 U.S.C. § 2333): “any national of the United States injured in his person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefore in any appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney’s fees.”
  - SEE ALSO CRIMINAL PROVISIONS SUPRA

- Boim (Ps go after sponsors b/c terrorists don’t show up to court)
  - Funding of terrorist organization not sufficient to constitute an act of terrorism under 18 U.S.C. § 2331
    - merely giving money to terrorist groups is not enough; otherwise, the statute would have a virtually unlimited reach, especially against charities
    - must have knowledge & intent to further terrorism
    - not like murder-for-hire
    - funding is too vague and doesn’t require showing of proximate cause
  - Funding meeting the definition of aiding and abetting an act of terrorism does create liability
    - Material support or resources: currency or other financial securities, financial services, lodging, training, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials. 18 U.S.C. § 2339A(b)
    - Knowledge & intent to give material support or resources: If you give them money & you know you’re giving them money, it doesn’t matter if you intend them to do particular terrorist things w/ the money.
  - Statute on material assistance incorporates definition of int’l terrorism
    - If organization is on the list and you give money to it, you violate the statute and you can be liable.
  - Civil liability for funding a foreign terrorist organization does not offend the 1st Amendment as long as the plaintiffs can prove that the defendants knew about the organization’s illegal activity,
desired to help that activity succeed, and engaged in some act of helping

- Bank’s provision of incentive for suicide bombings through death and dismemberment plan was sufficient to create secondary liability (Linde)
- Defendant could knowingly provide support without intending to advance illegal aims of organization (Assi: to violate statute, D need only ‘knowingly provide material support or resources’ to a group designated as an FTO)
- Defendant indicted for recruiting individual to travel to Israel, take money to family of imprisoned FTO member and scout potential locations for terrorist attacks (Marzook)

- Compensation schemes
  - September 11
    - Claimants receive compensation from government in exchange for giving up right to sue anyone but hijackers and their accomplices
    - Administered by Special Master, who promulgated regulations
      - Special Master to determine "the extent of the harm to the claimant, including any economic and non-economic losses" and then the amount of compensation "based on the harm to the claimant, the facts of the claim, and the individual circumstances of the claimant."
      - Special Master has discretion in determining the amount of awards and how to factor in the various types of considerations (Colaio v. Feinberg)
    - Alternative to tort litigation, designed to provide speedy & certain compensation and prevent airline bankruptcies
    - Based largely on tort principles, so looked to earnings
      - Average award of $1.8 million, highest at $6.9 million
      - Non-economic damages set at standard amount based on number of dependants
      - 97% of eligible families submitted claims
  - Israel
    - Compensation for death and injury
      - Provides compensation for bodily injuries suffered in terrorist attacks, as well as compensation to family members
        - Injured victims receive a lengthy list of benefits, including medical care, a living stipend, disability compensation, additional monetary benefits, and professional rehabilitation
      - Benefits provided to those wounded in terrorist attacks and families of those killed in terrorist attacks have been equated to benefits provided to injured soldiers and to the families of soldiers killed in action
- Views civilian victims of terrorism as involuntary soldiers
- Israeli law makes no distinction between civilians harmed by war and civilians harmed by terrorists
- Israeli courts have generally taken a generous approach in determining whether an act qualifies as a "hostile act" under the law to meet the requirement for compensation
- Scheme covers Israeli citizens and residents, both in Israel and while abroad; foreign nationals harmed by a hostile act while in Israel or in the Territories administered by Israel, provided that they entered Israel legally; and overseas employees of the state of Israel or of an employer pre-approved for that purpose by the Minister of Labor
- Attorney General has ruled that Palestinian victims of Jewish terrorism deserve equal treatment

- Compensation for property damage
  - Property Tax and Compensation Fund Law (1961)
  - Covers war damage (direct damage to property) and indirect damage
  - Courts have ruled that in order for the event in question to be considered a hostile act, a claimant must prove a motive of hostility to show that the hostility was against the State of Israel
    - i.e., the claimant must prove that the Israeli identity or nexus was the justification or causing the damage to the property

- Lockerbie case
  - Once prosecution completed, US, UK, Libya and victims' counsel began to negotiate compensation for victims and their families
  - $2.7 Billion into escrow
    - each family gets $10 million -- $ 4 million upon termination of UN sanctions, $4 million upon lifting of US sanctions, $2 upon removal of Libya from list of state sponsors of terrorism
  - France then sought to increase compensation from the UTA Flight 772 bombing in 1989
    - Libya paid France $34 million in 1999
    - In January 2004, Libya agreed to pay France an additional $170 million ($1 million for each of 170 people who died)
    - Once agreement reached, UNSC terminated the sanctions

- Issues to Address in the Future
  - What is the purpose of the compensation program?
  - What values should the program embody?
  - Why should eligible claimants be treated differently from apparently similarly-situated persons?
  - Why are existing procedural institutions inadequate to compensate these persons?
• **Claims against government for not providing security**
  - International conventions impose duty to provide security
  - FTCA *generally waived sovereign immunity for torts*
    - several exceptions to this waiver
  - **Discretionary function exception** (to waiver of immunity)
    - based on gov’s discretionary function or duties
    - Prevents *judicial second-guessing*
    - Two part test (Gaubert)
      - Court must determine whether any federal statute, regulation, or policy *specifically prescribes a course of action* for an employee to follow
        - If so, employee must adhere to the directive.
      - If there is no federal statute, regulation, or policy and the challenged conduct involves an element of judgment, the court must decide whether the *judgment* is the type the discretionary function exception was designed to shield
        - courts look not to what the decision maker was thinking, but to whether the type of decision being challenged is *grounded in social, economic, or political policy*
        - “determinations about what security precautions to adopt at American embassies, and what security information to pass on, and to whom this information should be given, do not involve the *mechanical application of set rules*, but rather the constant exercise of *judgement and discretion.*”
          (Macharia: security planning at African embassies was discretionary duty)
        - discretion in determining the level of security to employ at an embassy, when to act on received threats, and what funding to grant for security measures. Each of these decisions involve discretion and judgment and ‘when established governmental policy, as expressed or implied by statute, regulation or agency guidelines, allows a Government agent to exercise discretion, it must be presumed that the agents’ acts are grounded in policy when exercising that discretion (Bichage- also embassy bombings)
          - “federal employees responsible for receiving and determining the action to take upon receiving a terrorist threat ‘are empowered to make policy judgments’ that are protected by the discretionary function exception.”
    - **Discretionary function exception to waiver of sovereign immunity generally precludes claims re: wrongful death, injury stemming from military actions** (El-Shifa)
      - decision to bomb the plant was a policy decision protected by discretionary function exception to FTCA
• Use of military force, targeting, etc. is nonjusticiable political question

  o Independent contractor exceptions
    • contractor’s negligence may only be imputed to the United States if the contractor’s day-to-day operations are supervised by the federal government
    • Critical element in distinguishing an agency from a contractor is the federal government’s power to control the detailed physical performance of the contractor
    • Macharia: US gov didn’t have day-to-day supervision of contractors because designing contracts with Embassy guards, handling payments, providing regular advice, submitting names of guards to State Dept. for approval, requiring wearing of uniforms provided by State Dept., etc. did not amount to controlling performance of contractor

  o Foreign Country Exception
    • sovereign immunity waiver of the FTCA does not extend to acts or omissions arising in territory subject to the sovereign authority of another nation.
    • But, a “headquarters claim” arises when a complaint alleges that there were negligent acts in the US even though the resulting injury took place abroad (noted in Bichage)

  o Limits on standing: who can sue? Friends?
  o How much security should gov provide?

  o Political Question
    • A. v. United Kingdom and Ireland
      • Commission held that it cannot address the appropriateness and efficacy of measures taken by UK to combat terrorism in Northern Ireland
      • Similar to non-justiciable political question in US

• Claims against private parties for not providing security
  o Duty to passengers
    • Airline had a duty to protect the plaintiffs from unreasonable risk of foreseeable harm (Stanford: MEA, as a first leg interline carrier, had a duty to protect passengers on other interline connecting flights from unreasonable risk of harm through the use of reasonable precautions in the face of reasonably foreseeable risks)
      • MEA knew or should have known that there was a danger that terrorists would try to board their airline to transfer later to a vulnerable, interline target airplane
      • Proximate cause is not broken by the negligent conduct of a third person when such conduct is normal or foreseeable under the circumstances
    • families won judgment against Pan Am for allowing suitcase with bomb on the plane (In re Air Disaster)
Duty to ground victims

- Aircraft owners and airlines owe duty of care to ground victims (In Re Sept 11 Litigation)
- 5 factors (from 532 Madison Ave)
  - reasonable expectations of parties and society generally
    - Duty is owed to people on the ground because plaintiffs and society generally could have reasonably expected airport screening methods were also for protection of people on ground
  - the proliferation of claims
    - plaintiffs, despite being large in number, are known and suffered harm
      - no impermissible proliferation if claimants are known and circumscribed by those who have, as a result of these events, suffered personal injury or property damage
  - the likelihood of unlimited or insurer-like liability
    - aggregate liability capped by federal statute
  - disproportionate risk and reparation allocation
    - airlines and airport security companies best able to screen people boarding airplanes and were in the best position to provide reasonable protection against hijackings and the dangers they presented
  - public policies affecting the expansion or limitation of new channels of liability

Foreseeability

- airlines reasonably could foresee that crashes causing death and destruction on the ground could occur if hijackers/terrorists got control of a plane.
  - “intrusion by terrorists into the cockpit, coupled with the volatility of a hijacking situation, creates a foreseeable risk that hijacked airplanes might crash, jeopardizing innocent lives on the ground as well as in the airplane.” (9/11 Litig.)
  - “the Aviation Defendants controlled who came onto the planes and what was carried aboard. They had the obligation to take reasonable care in screening precisely because of the risk of terrorist hijackings, and the dangerous consequences that would inevitably follow, which were within scope of duty that the Aviation Defendants undertook to carry out.” (9/11 Litig.)

Duty to Lessees and Business Occupants (In Re Sept 11 Litigation)

- WTC owed a duty to the building occupants to create and implement adequate fire safety measures, even in the case of a fire caused by criminals
• don’t have to be aware of specific hazard – sufficient to have 
foreseen the risk of serious fires within the buildings and the goal 
of terrorists to attack the building
• Same factors as above
  o reasonable to expect that they have a duty to occupants of 
the Twin Towers in designing, constructing, repairing and 
maintaining the structures, in conforming to appropriate 
building and fire safety codes, and in creating appropriate 
evacuation routes and procedures should an emergency 
occur
  o no danger that the number of claims will proliferate beyond 
those who were harmed in attack
  o Ds relationship with Ps, as landlord or their employers'
landlord, placed the WTC Defendants in the best position 
to protect against the risk of harm
  o nature of plaintiffs' injuries: likelihood of injury to another 
from a dangerous condition or instrumentality on the 
property; the severity of potential injuries: the burden on 
the landowner to avoid the risk; and the foreseeability of a 
potential plaintiff’s presence on the property.
    ▪ here, severity and likelihood of potential injuries of 
people unable to escape from a heavily occupied 
building before fires envelope evacuation routes is 
high.
    ▪ duty does not require D to have been aware of a 
specific hazard. It is enough to have foreseen the 
risk of serious fires within the buildings and the 
goal of terrorists to attack the building.
  o Negligent design of plane
    ▪ Boeing D: Ps allege ineffective cockpit doors (In Re Sept 11 Litigation)
    ▪ it was reasonably foreseeable that a failure to design a secure cockpit 
could contribute to a breaking and entering into, and a take-over of, a 
cockpit by hijackers or other unauthorized individuals, substantially 
increasing the risk of injury and death to people and damage to property
    ▪ FAA regulations from the time period in question may help decide 
whether Boeing was negligent
• Claims against insurers
  o Was 9/11 attack 1 or 2 occurrences? (Hartford Fire Insurance)
    ▪ Look to language of insurance policy
      • For some insurers, court held it was 1 occurrence, based on reading 
of policy
      • For Travelers, policy was unclear, and left it to jury, which said it 
was 2 occurrences
o **Terrorist Risk Insurance Act** of 2002
  - Enacted in response to attempt by insurers to exclude coverage for losses caused by terrorism
  - Requires property insurers to make coverage available that does not differ materially from coverage for non-terrorism events
  - Federal govt assumes most of liability insurers might incur as a result of terrorism
    - Govt must reimburse insurers for 90% of losses above a moderate threshold
    - Limits govt’s total liability to $100 billion per year
  - Two year extension passed in December 2005
    - Level has been increased so it’s only for catastrophic events
    - Increases the amount of property and casualty losses that trigger federal payments from $5 million to $50 million in 2006 and $100 million in 2007
    - Increases the financial stake of insurers from $15 billion to $25 billion in 2006 and $27.5 billion in 2007
  - But we haven’t had any terrorism since 9/11

o **Paying ransom for hostages**
  - Kidnapping & ransom insurance encourages kidnappings, violates US policy of not paying ransom
    - K&R insurance industry is directly financing, arguably inducing, and simultaneously profiting from criminal activity
  - Stopping K&R insurance won’t stop all kidnapping, but it could reduce it
    - Could also lead to more under-the-table insurance dealings.
    - Furthermore, smaller payouts from kidnappings could lead to increased number of kidnappings, or kidnappers could target local citizens.

**COMPENSATING VICTIMS OF COUNTER-TERROR**
- Claims against government
  - **Property damaged in military actions**
    - **Takings**: 5th Am’t generally requires fed gov to pay when it takes or destroys private property
      - But, gov generally does not have to pay just for property damaged in military actions or taken for reasons of military necessity
  - **Foreign Property and/or Foreign Plaintiff**
    - US citizen can assert takings claim re: property in foreign country (Turney)
    - Takings clause doesn’t require property be in the US. (El-Shifa Pharmaceutical Industries: declined to overturn Turney)
      - Allows claim by nonresident aliens whose property is located in a foreign country even without any substantial voluntary connections to the United States.
• Non-resident alien can recover for damage to foreign property if there’s **substantial connection** between the US and claimant or property (AshkIr: no standing for Somali national, who sued US for compensation for occupation and destruction of his property by US armed forces)

• Alien can assert claim re: **property located in the US** (Russian Volunteer Fleet, US SC)

**Property destroyed - nonjusticiable**

• President’s constitutional power to wage war includes **power to decide what targets should be destroyed** (El-Shifa)
  - US doesn’t need to answer under takings clause for **destruction of enemy property**.
  - President’s designations is a **non-justiciable political question** b/c it’s a presidential power and courts shouldn’t decide whether president had correct intelligence.

• **US not required to pay compensation**
  - for use of and damage to two buildings US Army occupied during riots in Panama (National Board of YMCA)
  - for destruction of building in Cuba during war with Spain (Juragua Iron)
    • Building was deemed danger to US troops because of yellow fever germs
    • Destruction for safety of US troops is part of wartime efforts and does not trigger just compensation

• Non-justiciable question and **discretionary function exception**
  - Starkist Foods: damage to and destruction of vessel in Panamanian harbor during Operation Just Cause

• **Property located in enemy territory** is automatically treated as enemy property regardless of owner’s status (Aris Gloves)
  - enemy property because it’s in enemy territory

**Property Appropriated/Requisitioned for Troops**

• Armed forces **do need to pay** just compensation for property requisitioned

• Landowner in Saipan received just compensation for loss of use of land when US forces occupied it from 1944 to 1968 (Castro)
  - But, no compensation for coconut trees destroyed during fighting with Japanese

**Property Destroyed to Prevent Enemy from Using It**

• **No compensation required**

• US not required to pay compensation when armed forces destroyed oil refineries in the Philippines to prevent Japanese forces from taking control of refineries (Caltex)

  • **Wrongful Death, Tort Liability and Sovereign Immunity**
    • Often collateral damage
    • Discretionary function exceptions & non-justiciable political questions
- President Reagan *acted as commander-in-chief* in ordering 1986 Libya air strikes and therefore had *absolute immunity* from liability in private civil suits (Saltany)

- **Industria Panificadora:**
  - Panamanian corporations sued US for destruction of property during US invasion of Panama, claiming that US was responsible for order once it defeated the Panamanian Army and therefore was negligent in not providing appropriate numbers of military personnel to maintain order
  - Discretionary function exception applies
  - Precludes challenges to executive branch decisions re: number of military personnel, deployment, etc.
  - Also a nonjusticiable political question under Baker

  - **European caselaw**
    - If *soldiers not negligent* and acts taken are *ultimately reasonable*, don’t need to look at whether *planning was negligent* (Farrell, UK)
      - if there were defects in planning the operation, it wouldn’t preclude defense that person may use reasonable force in prevention of crime or for lawful arrest
    - Violation of ECHR Article 2 when Russian indiscriminate bombing in Chechnya killed civilians (Isayeva, ECHR: Although the operation may have had a legitimate aim, it was *not planned and executed with the requisite care for the lives of the civilian population*)
      - Court provides thorough examination of Russian military operation, plight of civilians, and details failure to protect civilians in planning and execution of operation
    - State’s responsibility may also be engaged when it fails to take all *feasible precautions* in choice of means and methods of a security operation mounted against an opposing group with a view to avoiding and, in any event, to minimizing, incidental loss of civilian life (Ergi, ECHR)
      - Court finds insufficient precautions taken to protect lives of civilians caught in cross-fire during ambush of PKK terrorists, so violation of article 2

- **Russia – Moscow Theater Raid**
  - Compensation to family of victim who was primary breadwinner for his family
  - No moral compensation for victims of raid (includes claims for child’s death, etc.)

- **Insufficient Investigations**
  - Turkish failure to provide *prompt and effective investigation* of woman’s death constitutes violation of article 2 by failure to comply with obligation, implicit in article 2, to hold effective official investigation when an individual has been killed by the use of force (Yilmaz, ECHR)
    - Court couldn’t determine who killed her
- Also violation of article 13 re: right to effective remedy
  - ECHR held that UK did not provide sufficient investigation into individual’s death and UK paid compensation (McKerr)
    - Applicant then demanded further investigation into brother’s death and case went through the UK courts
- **Claims Against Private Parties**
  - If columns accuse P of being the killer, they are *defamatory* per se. A reasonable reader of the columns likely would conclude that Hatfill was responsible for the anthrax mailings (Hatfill v. NYT)
    - compensation from NYT deter newspapers *pursuing information on war on terror*, which could undermine efforts in war on terror
    - en banc dissent: Columns urged *gov action on gravely important matter*, which is protected by 1st amnt
  - Hatfill also sued Donald Foster over article in Vanity Fair
    - Subsequent decisions re: choice of law determined that Washington, D.C. law applied, not Virginia law

**Epidemiology**
- *study of distribution & determinants of health-related states or events in specified populations, and application of this study to control of health problems*
- **Outbreak = epidemic:**
  - Disease occurrence in excess of that expected for a given time
  - Very serious diseases—eg rabies or anthrax—are epidemics even if only one person has it
  - Once you have an epidemic, after establishing that there is an epidemic, verify that diagnosis, identify cases, characterize data, take control measures, formulate & test hypotheses, etc
- Forensic epidemiology: Use of epidemiological methods as part of investigation of a health problem for which there is suspicion or evidence regarding possible intentional acts or criminal behaviors as factors contributing to the health problem
- **Difficulties of simultaneous epidemiological & criminal investigations**
  - Anthrax started with individual doctor in FL reporting unusual results with patient, which got it reported to state level and then to CDC & FBI
  - Takes time to figure out if the anthrax occurred naturally or was criminal
- **Public health surveillance:** all states require health care providers to report certain conditions, which provides a baseline of health conditions.
- Legal basis for epidemiological field investigation: *police powers* to implement regulations. There can’t be any action without legal authority.
  - Jacobsen: need to balance community’s interest with individual’s rights

**US ATTY**
- **Big shift to prevention**
  - Big change in mindset for prosecutors: Ok to lose case if you stop attack.
  - Bin Laden had been under sealed indictment for fatwas against Americans before bombings. Prosecutors go to war with indictments.
There's concern that prosecutors destroy intelligence programs or sources to win cases. And US Atty's offices are set up independently, not always answering to AG. And FBI offices operate with lots of autonomy.

Plus there was wall blocking sharing between intelligence and criminal.

Soldiers would take tons of evidence from places but there was no chain of custody

- Jose Padilla: there was no evidence; but he was detained as an enemy combatant; could also held as a material witness

- Who makes decision that someone is an enemy combatant? Typically it's a soldier or commander. Since it's a US citizen, they felt the president should make the decision.
  - He was given memos from CIA, DOJ & FBI, which then went to DOJ's OJI, which gives advice to Prez.
  - How do you get D to a military brig? Marshals did it but LE was concerned about holding enemy combatant & military concerned about operating in US.
  - Announcement was made by AG.
  - Padilla filed a Habeas petition b/c he was a US citizen. SC: jurisdiction should be in SC, not NY, so case starts over in SC.
  - Padilla not charged with bomb planning b/c the evidence was inadmissible. But he's still charge with the conspiracy to do that stuff.
**Terrorism and War.** Finally, we looked at terrorists as enemies and terrorist organization/nation-state conflicts as international armed conflicts. We examined *military action and international humanitarian law, sometimes in tension* with each other, as legal regimes relevant to the “War on Terror.” The interplay of domestic and international law was considered in decisions to use military force against terrorists, in the detention and interrogation suspects, and trial of accused terrorists by military commission.

**MILITARY DETENTION**

- Geneva applies for **international armed conflict** (common art 2) and non-intn’l armed conflict (art 3); conflict has to reach a certain level, a certain intensity.

- Possible classifications of detainees
  - Detainees’ rights depend on their classification
    - **POW**
      - protected by Geneva Convention III
        - Protections include: treated humanely, respect for their persons & honor, only be required to give basic information, religious freedom, etc.
          - Pages 590-98
        - Can’t be prosecuted or coercively interrogated
        - *Combatant immunity* for killings during war
        - can be held for *duration of armed conflict*
      - Military must classify captured belligerent as POW if he’s captured in conflict w/in scope of armed conflict and meets definition of POW
        - (member of armed forces of a party to the conflict, or militia being commanded by responsible person, having fixed distinct sign, *carrying arms openly*, conducting operations in accordance w/ law of war. Page 588)
      - US classifies regularly Iraqi soldiers as POWs; many were released after major combat operations ended
        - US treated some irregular Iraqi forces as presumptive prisoners of war
    - **Presumptive POWs**
      - If *any doubt* about POW status, they get the protection (presumptively a POW) until *competent tribunal* says they’re not (Geneva III art 5)
        - Army has regulation for determining POW status through tribunal.
          - DoD said it’s not applicable to Gunatanimo detainees because they’re unlawful combatants.
- **Unlawful combatants**
  - Taliban soldiers were originally considered *not regular forces* since their government was *illegitimate*. Eventually they started getting POW status b/c there's no requirement in Geneva conventions that US recognize the Afghan gov's legitimacy.
  - People who fight but don't meet POW standards (i.e. *have broken laws of war*):
    - Fewer rights but should be *treated humanely*
    - Minimum humanitarian protections
  - Padilla & Hamdi are *unlawful/enemy combatants* b/c they associated w/ forces hostile to US and took up arms against US
    - Thus, prez is *authorized under AUMF to detain them* so they don't return to the battlefield (Hamdi & Padilla)
      - **AUMF**: Prez can use "all necessary & appropriate force against those nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks... or harbored such persons, in order to prevent any future acts of international terrorism against US by such nations, organizations or persons."
  - Hamdi: US may classify captured belligerents who don't qualify as POWs as unlawful combatants
    - DP demands that a citizen held in US as enemy combatant have *meaningful opportunity to contest factual basis for that detention before a neutral decisionmaker*
    - Authority to detain enemy combatants:
      - 18 USC 4001a requires Congressional authorization to detain a US citizen
      - AUMF is sufficient authority to detain Hamdi because *use of military force encompasses detention of combatants*
    - US citizenship doesn't prevent being held if you associate with the enemy (based on *Quirin*)
      - Quirin: "citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of... the law of war."
    - Doesn't reach question of whether Exec has plenary authority to detain based on Art II
      - Limits on detention:
        - Does not authorize *indefinite detention*, only for duration of conflict
• There’s still ongoing active combat in Afghanistan
  o Process for determining if D is enemy combatant: must be a competent tribunal
    ▪ Citizen must receive notice of factual basis for his classification and fair opportunity to rebut the gov’s factual assertions before a neutral decisionmaker
    ▪ Less than regular DP, based on gov’s interest and burden of providing greater DP
    ▪ there can be rebuttable presumption for gov, given the exigent circumstances
    ▪ Threat to military operations posed by basic system of independent review don’t trump citizen’s core rights to challenge gov’s case
    ▪ Souter: Geneva should be applied & we should look to army regs to see what a competent tribunal is.
      ▪ AUMF doesn’t authorize D’s detention
    ▪ Scalia: this isn’t detention nor is it suspension of Habeas; D entitled to either criminal trial or judicial decree requiring release
      ▪ Quirin involved admitted enemies; here we need factfinding
    ▪ Thomas: this is war, so good-faith determination is enough
      ▪ Detention authorized based on Bush’s good faith determination, which was based on a 2-page affidavit by a DoD advisor, who says Hamdi is bad
  
• Padilla, cir.: Prez has power under AUMF to detain committed enemies, who take up arms against US, and enter US for purpose of furthering war by attacking US
  o Location of (domestic) capture irrelevant
  o Irrelevant that AUMF didn’t specifically authorize this
    ▪ And AUMF authorizes it anyway
  o Irrelevant that criminal process is available
  o Irrelevant that civilian courts are open
    ▪ Milligan prohibited US citizen from being tried by military tribunal while civilian courts were open but Quirin & Hamdi clarify that Milligan doesn’t apply to enemy combatants

• MCA Definition of unlawful enemy combatant (948a)
  o a person who has engaged in hostilities or who has purposefully and materially supported hostilities against US or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or
o a person who, before, on, or after the date of the enactment of MCA has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal
  • also people who meet POW status but were found to have committed war crimes
  • Some may qualify as protected persons, but may still have very limited rights, especially if they’re “definitely suspected” or hostile activities

- Ordinary criminal suspects
  • Military may turn them over to prosecutors
  • Same rights as normal criminal Ds
    o Constitutional protections
  • John Walker Lindh received this treatment

- Non-combatants/Non-terrorists
  • They get rights of “protected persons”
  • GC IV: must be treated humanely.

- Process for making classifications
  • Tribunal determines status of detainees if doubt arises (GC III, art 5)
    • No specific adjudicatory paradigm is required
    • US argued that there was no doubt that they weren’t POWs
  • US armed forces have joint regulation for tribunals to determine enemy combatant status
    • New process is similar to existing Army Reg 190-8, which had relatively informal tribunals, without counsel or a personal representative
  • Tribunal of 3 neutral military officers determines if preponderance of evidence supports D being an enemy combatant
    • If so, there’s presumption for gov’s evidence
  • US determined that al-Qaeda detainees weren’t POWs b/c al-Qaeda not party to Geneva and Taliban fighters don’t meet the requirements
  • President’s military order for military commission not sufficient (Hamdan)
    • MCA changes that

- MCA definition of lawful enemy combatant (948a)
  o a member of the regular forces of a State party engaged in hostilities against US
  o a member of a militia, volunteer corps, or organized resistance movement belonging to a State party engaged in such hostilities, which are under responsible command, wear a fixed distinctive sign recognizable at a distance, carry their arms openly, and abide by the law of war; or
  o a member of a regular armed force who professes allegiance to a government engaged in such hostilities, but not recognized by US.
  o Court-martials, not military commissions, have jurisdiction over lawful enemy combatants (948d)
• **Duration of detention**
  o Permissible length depends on *reason for detention*
    ▪ POWs must be released and repatriated without delay after cessation of active hostilities (Geneva III)
    ▪ As long as US troops are involved in active combat in Afghanistan, enemy combatants from there can be held.
  o DoD conducts *annual review* of Guantanamo detainees. With help of a military officer, each detainee can tell a review panel of 3 military officers why he’s not a threat to US or allies.
  o Geneva doesn’t discuss *duration for detention of unlawful combatants*, but 5 justices in Hamdi held they could also be held for duration of armed conflict
  o *Exigent circumstances* allowed detention (Lawless, ECHR)
    ▪ European convention grants everyone right to liberty and security of person, but allows deviations in time of war or public emergency threatening life
    ▪ But no deviation from anti-torture provision
  o Stopping terror sometimes means detaining people based on *suspicion*, not reasonable suspicion (Murray, ECHR: 2 hour detention was ok; *tension between individual rights & public safety*)
  o Law enforcement can jail criminal suspects pending trial
    ▪ Right to speedy trial
    ▪ Court can release them on bail
    ▪ Can be held longer if convicted
    ▪ Or hold them as material witnesses, which they’re not supposed to do unless they really intend for them to testify
    ▪ Immigration laws can also lead to detention

• **Conditions of detention**
  o Specified in Geneva III
    ▪ Pages 590-98
  o *Special Administrative Measures* allowed Gov to prevent shoe bomber from having magazine articles about terrorism & letters section (Reid: case is moot b/c those SAMs aren’t in effect any longer so D gets no benefit from them being invalidated)
    ▪ AG can promulgate SAMs that are *reasonably necessary to protect* against risk of death or serious bodily injury.
    ▪ AG must certify that there is a substantial risk that the prisoner’s communications or contacts with persons could result in death or serious injury or serious damage to property that would entail risk of death or serious injury.
    ▪ SAMs may restrict inmate’s housing or privileges, including letters, visits, interviews, and phone usage as is reasonably necessary to protect against violence or terrorism.
    ▪ Inmate must be notified of SAMs and their justification.
    ▪ SAMs are *not indefinite*. New risk evaluation must be conducted each year.
• **Interrogation** of detainees
  
  - **Domestic & International Limitations**
    - 5th Amt priv against self-incrimination & 6th Amt right to counsel
      - Prosecutors can’t use obtained in violation of 5th or 6th
    - UCMJ punishes soldiers guilty of cruelty, oppression or maltreatment of someone under his orders
      - Eg Abu Ghraib soldiers
    - International treaties & conventions also restrict interrogation methods
      - POWs must only give last name, rank, DOB, serial number
      - No physical or mental torture or coercion may be used to gain information
        - A bright line rule was needed
        - Broad to avoid exceptions and because of *reciprocity*
  
  - **Tension** between the need to discover the truth and the public interest in exposing crime (Israel Public Committee Against Torture: Shaking is prohibited b/c it harms the body & violates dignity. Definitely can’t be used outside of necessity)
  
  - **Detainee abuse** (Human Rights Watch study)
    - Mostly by enlisted soldiers
    - 1/3 of those implicated were disciplined
    - Average punishment 4 months
  
  - What’s right punishment for someone who, from a position of power, engages in torture?
    - Should officers be punished more than enlisted soldiers?
  
  - Ambiguity: soldiers are told to get information and that it’s important, but don’t know how far to go
  
  - **DOD rules:** Soldiers must report violations or themselves face discipline
    - Soldiers must ask themselves:
      - if proposed technique was used against fellow soldier, would you consider that soldier to have been abused?
      - Does it violate a law or regulation?
      - Don’t do it if you answer yes to either question.
    - Can’t deprive detainee of necessary food, water or medical care, but what qualifies as necessary
    - Cautions about other more subtle ways that you can be coercive
      - Threats to allow someone else to abuse detainee; impermissible humiliation or degrading treatment,
    - Final warning: don’t take actions objecting to torture in front of the detainee
    - DOD rules don’t apply to CIA
    - Lesser standard than MCA applied to aliens
      - Implies a different, lower standard of torture & abuse for US personnel than it does for alien enemies who engage in comparable acts
- **Habeas**
  - prisoner must be brought before court so judge can determine lawfulness of the detention
    - Gives independent judiciary power to order executive to bring the body before it.
  - **Statutory & constitutional**
    - Constitutional writ (art 1 sec 9)
      - shouldn’t be *suspended except in rebellion*
      - vague scope, but conventional wisdom is that it extends to all citizens, regardless of location
      - If someone arrested in US couldn’t get habeas, that’d be a suspension of the constitutional writ.
        - Contours of constitutional writ are very big.
        - MCA repealed statutory writ for aliens.
    - Statutory writ goes beyond constitution.
  - **Citizens** get habeas, even when they are enemy combatants (Hamdi)
  - **No habeas for alien enemy combatants**
    - Courts lack jurisdiction for writs of habeas corpus filed by an alien detained by US who has been determined to have been properly detained as an enemy combatant or is awaiting such determination (MCA § 7)
      - applies to all cases, without exception, pending on or after enactment of MCA which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained since 9/11 (MCA § 7)
    - Criticism: millions of aliens in US, including legal immigrants
      - DOD could order resident alien detained, and they would go to CSRT w/ no habeas escape
    - **Constitutional habeas** would probably protect them
      - Bush admin: no constitutional writ for aliens.
      - Constitution allows suspension in times of invasion or rebelling; no finding that we’re win one of those.
    - But: US citizens traveling abroad could be held by countries that treat our citizens the same way we treat theirs
  - Prior history:
    - DTA prevented habeas for Guantanamo detainees
      - Congress’s attempt to get rid of the lawyers representing detainees
      - Hamdan: DTA didn’t apply to already pending case
    - Rasul had allowed habeas for Guantanamo detainees
      - Statutory writ extends to all persons in US power but there’s a presumption against extraterritorial application of any statute; US exercises “complete jurisdiction and control” over Guantanamo and US has indefinite lease so Cuba doesn’t control it
      - Habeas statutes reaches custodian, so it’s irrelevant whether detainee is an alien
- Ct didn’t reach constitutional writ
- Kennedy Concur: there’s a constitutional writ, not statutory writ
  - US has control
- Scalia Dissent: there must be “ultimate control”
  - Al Odah, DC Cir: No habeas for Guantanamo detainees
    - US controls Guantanamo but perpetual lease shows Cuba owns it
    - Even though no court anywhere has jurisdiction

- No habeas for aliens held outside US (Eisenträger: no habeas writ for Germans held by US in Germany and who were never in US)
  - writ doesn’t extend outside US
    - would drain military transporting prisoners back to US and cause morale problems to call officers back to US
  - holding: Constitution does 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 US
  - Also, they were admitted enemies of a foreign gov at war with US
  - Black Dissent: artificial distinction about where crimes are being committed & where he’s being held
    - Creates incentive for gov to hold people elsewhere, thus erasing their legal protection.
    - Presumption should be for habeas unless there are overriding problems.

- aliens in US
  - MCA: no habeas for aliens detained by US who are properly detained as enemy combatants or are awaiting such determination
  - Eisenträger: they get constitutional Habeas
    - permitting their presence in the country implied protection

- CSRT
  - Determine if detainees continue to be unlawful combatants
  - Determination by CSRT or another competent tribunal established under the authority of the President or the Secretary of Defense that a person is an unlawful enemy combatant is dispositive for purposes of jurisdiction for trial by military commission under this chapter (MCA 948d(c))
  - No right to counsel
    - Detainee gets a personal representative (an officer), but not a lawyer.
    - No access to classified info
  - No presumption of innocence
    - Presumption is for gov; detainee can’t really prove otherwise
    - Tribunal determines if they continue to be unlawful combatants
  - Based on Army Reg & Geneva requirement for determining if detainee is a POW
MILITARY COMMISSIONS ACT OF 2006

- Advantages: better evidence standards for gov, national security problems

  - MCA Authority
    - new statutory basis of authorization, giving president more authority than AUMF, and reversing Hamdan
      - Quirin: Congressional authorization for military commissions, but it's not a sweeping mandate for whenever the prez deems them necessary
        - Allowed commissions to try Nazi saboteurs captured on US soil during war
        - High watermark of military power to try enemy combatants for war crimes
      - Hamdan: AUMF & UCMJ didn't give statutory authority
        - AUMF doesn't encompass trying them by military commissions (even though it justified detention of people in Guantanamo in Hamdi).
          - Here, it's different because this isn't in the theater of war; it's a detention facility removed from the battle front. AUMF doesn't seem to encompass trial by military commission.
    - UCMJ doesn't preclude military commissions
      - rather, it says provisions of the code should not be construed as depriving military commissions of concurrent jurisdiction. But SC says this doesn't authorize military commissions, it just preserves whatever power there might be, with express condition that prez follow law of war. UCMJ is used to say that military commissions aren't authorized by Congress
    - DTA didn't authorize commissions, nor remove SC's jurisdiction.

  - MCA gives prez authority to
    - try "any alien unlawful enemy combatant"
    - for offenses under this chapter or of the law of war
    - when committed by alien unlawful enemy combatants
    - at any time (before, on, or after 9/11) (948).

  - Judicial construction of UCMJ for court martials isn't binding on military commissions.
  - Lawful enemy combatants can't be tried by military commission, only court-martial
  - CSRT or another competent tribunal determines if you're an unlawful enemy combatant (948d)
    - Determination is dispositive for purposes of jurisdiction
    - Regardless of date of determination (before, on, or after MCA's enactment)
  - Geneva (948b)
    - Commissions are regularly constituted courts, for purposes of Geneva Common Art 3
• Grave breaches lead to penal sanctions, as required (MCA § 6)
  • No one subject to a military commission can invoke Geneva as a source of rights
    • Hamdan: military commissions violate GC
  • No foreign/international source of law can be a source for US courts in how to interpret these provisions (MCA § 6)

• Persons triable by commission:
  o Alien unlawful enemy combatants (948c)
    • Even someone picked up within US
    • Regardless of whether detained on US soil or under US control
      • doesn’t just apply to people at Guantanamo.
    • by decision of CSRT or comparable tribunal
  o doesn’t apply to US citizens
    • Hamdi: Citizen can be held in US as unlawful combatant, as long as is reasonably necessary (vague and unspecified standard), but must be given habeas right
    • However, 948a’s description of unlawful enemy combatants doesn’t specify aliens, so maybe citizens can be held
  o Neither MCA nor presidential authorization purport to try citizens by military tribunal, so the Milligan v Quirin issue is unresolved.
    • They don’t want citizens to be nervous about this issue; citizens vote, aliens don’t.
    • Milligan: can’t try citizens in military tribunals unless civilian courts aren’t available for various specified reasons
      • Padilla: Milligan prohibited US citizen from being tried by military tribunal while civilian courts were open but Quirin & Hamdi clarify that Milligan doesn’t apply to enemy combatants
    • But Quirin allowed military tribunals to try saboteurs, including 2 US citizens

• Offenses triable by military commissions
  o Includes principals (including aiding & abetting) (950q) & accessories after fact (950r) & attempts (950t) & solicitations (950u)
  o Conspiracy to commit these offenses is included
    • Hamdan: conspiracy doesn’t count.
      • Thomas dissent: conspiracy to kill all these people is surely a war crime.
  o Crimes triable (950v)
    • Murder of protected persons (taking no part in hostilities, including sick and detained)
    • Attacking civilians, civilian objects, protected property, pillaging, denying quarter, taking hostages, using poison or a similar weapon, using protected persons or property as a shield, torture, cruel or inhuman treatment, intentionally causing serious bodily injury or murder or destruction of
property in violation of law of war, treachery or perfidy, improperly using a flag of truce or distinctive emblem, intentionally mistreating a dead body, rape, sexual assault, hijacking, terrorism, providing material support for terrorism, spying, and conspiracy of one of the above substantive offenses & any overt act in furtherance

- rape and sexual assault are not defined in terms of protected persons. This is because not all killing is murder and so it's not all triable by military commission. Raping a soldier is triable but shooting him isn't.
  - EG Capture someone & detain them at Guantanamo, where they steal property. Theft could be punishable through court martial.
  - US citizen who commits murder could be court martialed even if not tried by tribunal.

- Combatant immunity for killings during war

- UCMJ includes many things that are triable by court martial but aren't listed in MCA. For eg, AWOL & theft & conduct unbecoming are not triable by military commissions. Hamdan was accused of conspiracy to fly planes into WTC. Does flying planes into WTC violate law of war?
  - Hamdan: commissions could only try violations of laws of war

- MCA Procedure, Trial and Appellate
  - Each commission has a military judge and trial and defense counsel
    - Can’t have previously played another role
    - Commission has at least 5 members (948m)
  - Torture evidence prohibited (948r)
    - But if degree of coercion is disputed, torture evidence is admissible if
      - totality of the circumstances renders the statement reliable & possessing sufficient probative value; and
      - interests of justice would best be served by admission; and
      - interrogation methods used to obtain the statement do not amount to cruel, inhuman, or degrading treatment prohibited by DTA (only for post-DTA statements)
  - Evidence (949a)
    - SecDef can make procedures and rules
    - D can be present
      - except when excluded under 949d: D persists in conduct that justifies exclude to protect physical safety or prevent disruption of proceedings
    - D can present evidence and cross witnesses
    - Evidence admissible if it would have probative value to a reasonable person
    - Can’t be excluded due to lack of search warrant
    - Statement by D can’t be excluded if it meets 948r (TORTURE, SUPRA)
    - Authenticity if judge has sufficient basis that the evidence is what it’s claimed to be
    - Hearsay is admissible if there’s “fair opportunity to meet the facts”: unless opposing party shows it’s unreliable or lacking probative value
      - subject to the requirements and limitations applicable to the disclosure of classified information
- D's right to self-representation may be restricted if he doesn't conform
  - Cannot coerce or improperly influence military commission, counsel, or judge (949b)
    - Does that mean they're independent?
  - Trial counsel prosecutes, defense counsel represents D (949c)
    - D can be represented by civilian counsel
  - Proceedings can be closed to public upon a specific finding that it's necessary to protect national security, including intelligence or law enforcement sources, methods, or activities, or to ensure physical safety (949d)
    - Exclusion of D supra
    - To protect classified information, judge may authorize deleting specific information, substituting, or a substitution of statement of relevant facts
      - Also applies to discovery (949j)
- Commission members and judge may be challenged for cause & 1 peremptory strike per side (949f)
- No double jeopardy: can't be tried twice by a military commission for same offense (949h)
- D has reasonable opportunity to obtain witnesses & compel production of evidence (949j)
  - Similar to normal federal courts
  - Runs to any place US has jurisdiction
  - Must disclose exculpatory evidence
- D is presumed innocent, guilt must be beyond a reasonable doubt (949i)
- Conviction requires 2/3 vote or ¾ for sentence >10 years or unanimity (and 12 member commission) for death sentence (949m)
  - Prez must approve death sentence (950i)
- No cruel or unusual punishment (949s)
- Convening authority reviews decision; may not reverse a not guilty finding nor increase sentence (950b)
- Appeals (950g)
  - Automatic appeal to Court of Military Commission Review (950c)
    - Appeal can be waived except for death sentences
  - DC Cir has exclusive appellate jurisdiction
    - After all other appeals
    - Only may review matters of law
- SC may review
  - DoD must promulgate a manual to implement procedures more detailed than provided in the statute (950w)
- Geneva conventions
  - Cannot invoke Geneva in habeas or civil actions (MCA § 5)
  - Prez can interpret the meaning and application Geneva and promulgate higher standards and administrative regulations for violations of treaty obligations (MCA § 6)
- Habeas
  - Courts lack jurisdiction for writs of habeas corpus filed by an alien detained by the US who has been determined to have been properly detained as an enemy combatant or is awaiting such determination (MCA § 7)
- Nor can they hear any other action against US relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of such an alien (MCA § 7)
- applies to all cases, without exception, pending on or after enactment of MCA which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained since 9/11 (MCA § 7)

HAMDAN
- Hamdan was premised on reinforcing democracy.
  - This case has very little overarching rhetoric & theory about constitutional framework. There's an underlying concern for rights, both constitutional and treaty & international law rights. Those principles could have been the core of Hamdan but are instead mostly background.
- Holding: the military commission convened to try Hamdan lacks power to proceed because its structure and procedures violate both the UCMJ and the Geneva Conventions.
- SC has authority to decide this case despite Detainee Treatment Act
- No authority for commissions
  - Quirin: Congressional authorization for military commissions, but it's not a sweeping mandate for whenever the prez deems them necessary
    - Allowed commissions to try Nazi saboteurs captured on US soil during war
    - High watermark of military power to try enemy combatants for war crimes
  - AUMF activated prez's war powers, which include authority to convene military commissions in appropriate circumstances. But AUMF doesn't expand or alter the authorization for military commissions set forth in UCMJ.
  - DTA doesn't authorize the commission.
  - Together, the UCMJ, the AUMF, and the DTA at most acknowledge a general Presidential authority to convene military commissions in circumstances where justified under the "Constitution and laws," including the law of war.
    - Absent a more specific congressional authorization, the task of this Court is, as it was in Quirin, to decide whether Hamdan's military commission is so justified.
- Military commissions limited to offenses cognizable during time of war
  - role is primarily a factfinding one: to determine, typically on the battlefield itself, whether the defendant has violated the law of war.
- Conditions for military commission:
  - Assume jurisdiction only of offenses committed within the theatre of war
  - Offense charged must have been committed within the period of the war.
    - Here, all the acts occurred before the war
  - May try only individuals of the enemy's army who have been guilty of illegitimate warfare or other offenses in violation of the laws of war and members of one's own army who, in time of war, become chargeable with crimes or offenses not cognizable, or triable, by the criminal courts or under the Articles of war
  - Law-of-war commission has jurisdiction to try only two kinds of offense: Violations of the laws and usages of war cognizable by military tribunals only, and breaches of military orders or regulations for which offenders are not legally triable by court-martial under the Articles of war.

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Hamdan’s commission lacks jurisdiction to try him unless the charge properly sets forth, not only the details of the act charged, but the circumstances conferring jurisdiction.

Neither D’s conspiracy or any overt acts occurred in a theater of war or after 9/11

None of the overt acts violate the law of war.
  - At a minimum, Government must make substantial showing that the crime is an offense against the law of war.
    - Conspiracy has rarely if ever been tried as such in this country by any law-of-war military commission not exercising some other form of jurisdiction, it’s in neither Geneva or Hague
    - *Quirin* emphasized completion of offense, supporting view that conspiracy isn’t war crime

Commissions require military necessity (in absence of specific congressional authorization)
  - Any urgent need for imposition or execution of judgment is utterly belied by the record; D was arrested in 2001 not charged until 2004.
  - These aren’t circumstances in which a military commission established by exec order under UCMJ may lawfully try a person and subject him to punishment

Commission lacks power to proceed
  - UCMJ conditions prez’s use of military commissions on compliance with American common law of war & with rest of UCMJ
  - Procedures allow D and his civilian counsel to be excluded from, and precluded from ever learning what evidence was presented during, any part of the proceeding that either the Appointing Authority or the presiding officer decides to “close.” Military defense counsel may attend but is prohibited from revealing what happened.
  - Standard for evidence to be admissible is too broad, including hearsay & that obtained through coercion
  - UCMJ prohibits court-martials & military commissions from being contrary to or inconsistent with the UCMJ, and rules for military commissions must be same as for courts-martials unless such uniformity proves impracticable.
  - “Practicability” determination the President has made is insufficient to justify variances from the procedures governing courts-martial.
    - Although court defers to prez’s determination that standard rules are inapplicable to D’s tribunal, there was no similar determination for court-martials

The procedures also violate Geneva
  - Even if D was captured in war w/ Al Qaeda, which isn’t a HCP, Common Art 3 protects people who aren’t taking part in the fighting, including if they are detained. One protection requires *judgment* “by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples,” including ordinary military courts, not special tribunals.
  - MCA: Geneva doesn’t apply
• Breyer +3 concurrence: Congress has denied the President the legislative authority to create military commissions of the kind at issue here. Nothing prevents the President from returning to Congress to seek the authority he believes necessary.

• Kennedy concurrence: Separation of powers concerns, which is why military commissions must be established properly, as per Youngstown. This military commission is unauthorized under the UCMJ
  
  o UCMJ requires military courts to follow federal court rules as much as prez considers practicable; may not be contrary or inconsistent with UCMJ; insofar as practicable, rules must be same for military commissions & court martial unless such uniformity is impracticable
  
  o circumstances of Hamdan’s trial present no exigency requiring special speed or precluding careful consideration of evidence.
    ▪ regardless of the outcome of the criminal proceedings at issue, the Government claims authority to continue to detain him based on his status as an enemy combatant.
    ▪ Gov made no demonstration of practical need for these special rules and procedures, either in this particular case or as to the military commissions in general; nor is any such need self-evident

• Thomas dissent: Court lacks jurisdiction to hear this claim
  
  o well-established duty to respect the Executive’s judgment in matters of military operations and foreign affairs.
  
  o Congress can’t anticipate and legislate w/ regard to every possible action Prez might need to take; its failure to do so doesn’t imply disapproval
  
  o President’s decision to try Hamdan before a military commission for his involvement with al Qaeda is entitled to a heavy measure of deference.
    ▪ Congress has authorized prez to use all necessary and appropriate force
    ▪ authorization for military commissions derives from UCMJ & from the more recent, and broader, authorization contained in the AUMF.
    ▪ Military and foreign policy judgments "are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil, not by the judiciary.
  
  o D has committed 2 violations: membership in a war-criminal enterprise and conspiracy to commit war crimes.