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# Structure of Counter-terrorism

1. Targeted Killing, Beyond Crime and War
   1. AUMF
      1. Authorizes force against those involved in 9/11
   2. Youngstown
      1. Where the president is acting pursuant to an express or implied authorization of Congress - broadest powers, limited only by the Constitution (all that he possesses in his own right plus all that Congress can delegate).
      2. Where the president is acting in the absence of Congressional grant or denial of authority, he has to rely on his independent powers, but there is a zone of twilight where they have concurrent authority, or in which the distribution of power is uncertain.
      3. Where the president is acting in opposition to Congress - most narrow powers, supported only by his expressly granted constitutional powers, and then still limited by any overlap Congress may have [Congress’ will is dominant in case of overlap].
   3. Executive Order 12,333: Constitution of the intelligence community
      1. Not state
      2. Not enforceable by courts
      3. Does roughly three things:
         1. Organizes the intel community
         2. Deciphers the law of intelligence as perceived by the intel community
            1. Preoccupied with protected US Persons and what you do inside America (2.3; 2.4)

Where is the law about protecting overseas foreign citizens?

It’s illegal so why surface the many ways in which the US violates the law

OR the US does not regard itself to be bound by the law of the foreign countries where it is undertaking the overseas surveillance; so the law of overseas intel is largely unregulated

NOTE also there really isn’t an international norm that regulates foreign intelligence (more focused on interventions)

US Person (USP) is a term of art that roughly corresponds to US citizen + green card holder

* 1. Other sources of law
     1. Targeted killings illegal under UN human rights law
     2. Law of war: can do against an enemy engaged in war against (not civilians)
     3. CT is war for domestic and international law purposes
  2. Hypo: Al-Awlaki (US citizen in AQ)
     1. Trial?
        1. Military commission
        2. US Court
        3. ICC
     2. Capture?
        1. Remove from battlefield
        2. Prosecute
        3. Avoid martyrdom
        4. Gain intelligence through interrogation
     3. Kill
        1. Punishment for participating in terrorist plots/preventing future attacks
  3. Legal argument for targeted killing
     1. International Legal
        1. State of armed conflict
        2. Individual as combatant
        3. AUMF
        4. Sovereignty
        5. Proportionality, necessity, discrimination
     2. Domestic legal
        1. Article II: Take Care Clause, Vesting Clause, Commander-in-Chief Clause
        2. AUMF
           1. Youngstown: Which zone are we in now w/the AUMF and President authorizing targeted killing? Maybe depends on the target:

Zone I: if it’s an individual/organization clearly covered by the statute.

Zone II: if you are talking about al-Awlaki, its less clear or because the AUMF has “run its course” after 10 years.

But possibly Zone of Twilight or possibly congressional acquiescence could mean this is implied Congressional authorization (Zone I)

Zone III:

Congress was specific in who was targeted, which *expressio unis* means that all others were not authorized.

Robust set of criminal federal statutes on terrorism means that they have spoken on the subject and targeted assassinations are not the way to make it happen.

Espression unio: because the AUMF listed some and not others, they meant to leave out the others

* + - 1. Due Process: Government can’t deprive a citizen of its liberty (life) without due process
         1. AND targeted killing doesn’t provide this constitutional due process
         2. How do courts avoid these due process claims by Al-Awlaki's father? Standing doctrine, state secrets
         3. But see Harold Koh: the intelligence gathering and analysis process and the targeting decision itself (which involved lawyers extensively) is due process
      2. EO 12,333: bans assassination

1. State of the Threat(s)
   1. Today: a more disjointed enemy with an alive ideology, but small pockets
   2. Offense: two land wars, drones, detention
   3. Defense: FBI, homegrown threats, airport security (high costs?)
   4. Erosion of international support
2. Institutional Landscape of Counterterrorism
   1. Legal authority for intelligence collection and covert actions
      1. Authority for intelligence activities
         1. 1947: legislation forming the charter for the IC: National Security Act of 1947
         2. Intelligence reform and terrorism prevention act of 2004
         3. DNI
            1. “Big boss” of intelligence
            2. 50 USC 403-1
            3. Based upon all sources available to the IC
            4. Access to all intel collected by any gov't department (federal) except as otherwise provided by law
            5. BUT money all directed to NSA/Pentagon
            6. In charge of big picture and needs to know all the details
         4. CIA
            1. 50 USC 403-4
            2. Collect intelligence, but no police, subpoena, or LE powers or internal security functions
         5. NSC
            1. Integrate domestic, foreign, and military functions
            2. Meant to make intelligence policy, though the CIA does this sometimes
         6. Presidential authority
            1. Operations Advisory Group
            2. Special coordination committee
            3. **Executive order 12,333**

All means consistent with federal law and with full consideration of the rights of US persons shall be used to collect intelligence to protect the US and its interests

AG has to approve collection if for LE, a warrant would be required

Nothing here can be construed to violate the constitution or statutes

* + - * 1. Intel Ops

Approving: President

Covert action: CIA or Armed forces during war, NSC

NSC gets info from the IC

* + - * 1. Inherent in Article II C-i-C powers (Bush admin view): wider view, doesn’t matter if AQ or how connected to AQ they are

Obama tweak: pursuant to the AUMF: harder to justify targeting the further you get from core AQ when restricted by AUMF

* + - * 1. **AUMF**
        2. *Youngstown*
  1. Relationship between intelligence and interventions
     1. In some cultures (i.e., Europe), concept of domestic intelligence as exercised by the state on its own citizens is acceptable; in the US this is problematic, though less problematic while we are “at war”
     2. The greater the intelligence collection, the more likely you are to have a successful intervention or not need to intervene
     3. Some counter-terrorism action is both intelligence and intervention
        1. Example: detention is both intervention to bring someone off the battlefield and intelligence because you detain them for interrogation to gain intelligence.

# Assessing the Threat: The Law of Intelligence

1. Types of Intelligence

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
|  |  | **USP in U.S** | **Non-USP in U.S.** | **USP Abroad** | **Non-USP Abroad** |
| **HUMINT**  **(espionage)** | **Cases** | ***Laird v. Tatum*** (humint and osint – army surveillance arm spying on political protestors) | ***Truong*** (Vietnamese citizen getting info from USP giving to someone abroad) |  |  |
| **SIGINT (signals/electronic surveillance)** | **Cases** | ***Keith*** (electronic surveillance of American citizen in U.S.)  ***Smith*** (pen register, U.S. citizen in U.S.) |  | ***In re Directives*** | ***In re Directives***  (U.S. phone company asked to provide warrantless taps of FP and agents abroad) |
| **Physical Search** |  | ***Ehrlichman*** (physical search of American citizen in U.S.) |  | ***Reid***(American citizens abroad kill husbands**)**  ***In re Terrorist Bombings*** (U.S. citizen living in Kenya) | ***Verdugo-Urquidez*** (Mexican citizen arrested/ searched abroad, given to US police) |

1. Introduction
   1. Intelligence is a process for gathering information and analyzing that information
      1. Two processes:
         1. Gathering the information
         2. Making sense of that information
   2. Types of intelligence
      1. HUMINT: “espionage”
         1. Human beings on the ground trying to recruit you to work for the U.S.
         2. Overseas collection is done by the CIA
         3. Human spies are breaking local domestic law achievement in their strategic aims.
      2. SIGINT: signals intelligence
         1. Interception of communications/electronic surveillance
         2. NSA (National Security Agency) is the main entity performing SIGINT
      3. Open Source (OSINT): newspapers, books, websites, etc. etc.
      4. Domestic Intelligence Gathering: FBI; local law enforcement
2. Constitutional Framework
   1. What kind of intelligence are we seeking?
      1. Strictly for criminal prosecution (***Smith***)
      2. Domestic intelligence information (***Katz, Keith, Ehrlichman***)
      3. Foreign intelligence information (***Truong, Verdugo, Directives, Sealed Case, East Africa, Boumediene***)

|  |  |  |
| --- | --- | --- |
|  | In the US | Outside the US |
| US Person | Fourth Amendment applies (***Keith***)  **Warrant + PC**   * Domestic: (1) for criminal cases need 4th A warrant (EXCEPT ***Smith***; ***Miller*** (no reasonable expectation for privacy info conveyed to bank teller)); domestic threats need **Title III** * Foreign: **FISA** applies if agent of foreign power   **Reasonableness**   * Domestic: 4th Amendment reasonableness (***Keith***) * Foreign: Reasonableness (***In re Directives***) | Fourth Amendment reasonableness clause, but not warrant clause (*In re Directives; In re East Africa*)  **Warrant**   * Domestic: ?? * Foreign: DOES NOT apply (***East Africa***) BUT post-FAA need to go to court prior to surveillance? (notes 10/3)   **Reasonableness**   * Domestic: 4th Amendment reasonableness * Foreign: 4th Amendment reasonableness (***East Africa***) |
| Non-US Person | Otherwise, Constitution applies based on functional sovereignty (***Boumediene***)  **Warrant + PC**   * Domestic: (1) for criminal cases need 4th A warrant; domestic threats need **Title III** * Foreign: **FISA** applies if agent of foreign power   **Reasonableness**   * Domestic: 4th Amendment reasonableness (***Keith***) * Foreign: Reasonableness (***In re Directives***)   If illegal alien, *Verdugo* may apply | No Fourth Amendment (***Verdugo***)  No Fifth Amendment due process (***Eisentrager***)   * If substantial connections to US, then some due process (*NPOI*) |

* + 1. 4A Test:
       1. Warrant Requirement:
          1. ***Keith*** (SCOTUS 1972) – doesn’t decide on FII exception Q
          2. ***Truong*** (4th Cir 1982) – FII [warrant] exception exists bc 1) warrant req would unduly frustrate Pres carrying out of foreign affairs responsibility; 2) executive has expertise re making foreign affairs surveillance decisions; 3) exec USC preeminence in foreign affairs. Limits exception to when target is FP/AFP and FII is “primary.”
          3. ***Sealed Case*** (FISCR 2002) – avoided express holding that FII exception exists
          4. ***In re Directives*** (FISCR 2008) – analogizing from special need doctrine, an FII exception exists for surveillance undertaken to collect FI for nat’l sec purposes, directed against non-USPs in U.S.

Rejects primary purpose language of *Truong*, saying the more important inquiry: does the programmatic purpose of the surveillance involve some legitimate objective outside of ordinary crime control?

FISA note – info incidentally collected on USPs when non-USPs are the target does not violate 4A

* + - * 1. FISA is an attempt to ensure that 4th amendment exception is constitutional;
      1. Reasonableness –
         1. ***In re Terrorist Bombings*** (2nd Cir 2008) – Totality of the Circumstances Test 🡪 balancing: the degree to which it intrudes on an individual’s privacy and the degree to which it is needed for the promotion of legitimate gov interests
         2. ***Sealed Case*** (FISCR 2002) – balancing: the legitimate need of the government to collect foreign intelligence information to protect against national security threats against the private rights of individuals
         3. ***In re Directives*** (FISCR 2008) – ToC, taking into account the nature of the gov intrusion and how it is implemented – balancing: government interests and individual privacy interests
  1. Fourth Amendment, National Security, and Intelligence
     1. Is there a foreign intelligence exception to the 4th amendment requirement?
     2. Fourth amendment protects people against unreasonable searches and seizures
        1. Probable cause OR
        2. Special needs
     3. Carve-outs of constitutional protections for intelligence gathering
        1. *Truong* and the foreign intel exception
        2. *Smith* and the Third-party doctrine
     4. Key legal sources
        1. **EO 12,333**: Constitution of the intelligence community
           1. Organizes Intelligence Community
           2. Defined Law of Intelligence as Perceived by Executive

Primary focus is protecting **US Persons** (citizens and green card holders) (cite: 2.3 and 2.4)

DOESN’T mention spying on international community because doesn’t perceive itself as bound by law of those countries, everyone does it. Also no international norm governing intelligence gathering

* + - 1. **4th Amendment**
         1. The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized.
         2. The Supreme Court held that warrantless searches are per se unreasonable, save a small subset of situations (***US v. Katz***)
  1. Domestic Intelligence: Warrant Requirement Applies
     1. The **4th Amendment warrant requirement applies to electronic surveillance** (***Katz***)
     2. **Title III doesn’t address** national security
        1. Title III – procedures for judicial authorization of electronic surveillance for investigation/prevention of certain types of serious crimes and in court proceedings – subject to prior court order
        2. 18 U.S.C. § 2511(3) states that nothing in Title III is intended to limit the constitutional authority of the president regarding national security surveillance
     3. *United States v. United States District Court* (*Keith*)
        1. **Facts**: US gov’t arrests persons suspected of bombing a CIA building in Ann Arbor, MI; at trial introduce tape of them obtained without a warrant
        2. **Issue:** President's power to authorize electronic surveillance through the AG without court approval because of domestic security threat
        3. **Gov’t**: Title III carved out an exception in 2511(3) that does not limit the constitutional power of the President to take measures to protect the nation as he deems necessary; also in Katz footnote
           1. In having this language in Title III, Congress recognized the President’s authority to conduct national security surveillance without prior judicial approval
           2. Youngstown: executive operating at the Zenith of Presidential power because with Art II powers and Title III exception
           3. Intelligence demands quick action by the executive and the warrant requirement will delay these efforts
           4. Secrecy concerns: risk of leaks by court employees and the need to maintain the utmost level of secrecy
           5. Institutional competency/expertise: complex, technical nature of intelligence process that touch on matters of diplomacy/foreign affairs makes intelligence gathering outside the competency of a courts to evaluate
        4. **SCOTUS**: prior judicial approval required for domestic security surveillance (4th amendment applies)
           1. Statutory authority: Congress simply didn't want to legislate in national security arena; didn't want to give President extra powers

Authority limited to foreign power subversion

* + - * 1. Constitutional authority: Presidential duty under article 2 to preserve/protect/defend constitution

Judicial check part of constitutional history on executive power

* + - * 1. Warrant requirement: applies, but not necessarily in the same way as in criminal investigation
        2. Gov't concerns of secrecy not enough to justify no warrant, either
        3. Limit: limits holding to domestic national security threats and electronic surveillance so related; does not address foreign threats
        4. Note: S.Ct. has never gone back and addressed this question of Presidential power to spy on foreigners in the US or Americans overseas; so this is constitutionally still an open question.
      1. **Legacy**
         1. How to practice intelligence under the law
         2. Rejected the idea that intelligence gathering against domestic security threats get a free pass from the 4th Amendment Warrant Clause
         3. Does the 4th amendment have a foreign intelligence exception?
    1. *United States v. Ehrlichman*
       1. **Facts**: Executive broke into doctor's office to obtain records of a patient who leaked docs to media
       2. **Gov’t**: Break-in within nat’l security exception
       3. **Holding**:
          1. 4th Amendment applicability to physical searches in national security context: maybe there are different concerns and need different standards in physical searches than in electronic surveillance. LE that ignores 4th amendment requirements will be struck down--fundamental right; this search was illegal under the 4th.
          2. The President not only lacked the authority to authorize the break-in, but did not give any specific directive that permitted break-ins in the name of national security
          3. AG as stand-in for neutral magistrate: court will be skeptical
          4. the President did not delegate to defendants the authority to authorize the break-in: President needs to SPECIFICALLY authorize any national security exception to the warrant requirement
    2. *United Stated v. Truong Dinh Hung*
       1. **Facts**: Vietnamese citizen is passing information to someone overseas who is unbeknownst to him is a FBI/CIA informant. Gov’t undertakes electronic surveillance and other searches without a warrant. Truong is getting the information from a USIA employee (Humphrey); Truong is then giving it to Krall, the informant.
       2. **Gov’t**
          1. Motivation: The motivation of the gov’t is not arrest of Truong but to find out information to fill a gap in their knowledge, but at a certain point along the way during the year of surveillance without a warrant, the motivation turns to criminal prosecution: Criminal Division of the DOJ gets involved and the motivation becomes primarily criminal investigation.
          2. President is in a better position (executive branch as a whole) to determine foreign intelligence needs, not the judiciary
          3. Separation of powers: principal responsibility of the President for foreign affairs and foreign intel surveillance
       3. **Holding**:the law of intelligence gathering should be shaped by what the government is attempting to do with the knowledge it is trying to obtain.
          1. Primary purpose test: once the primary purpose of the surveillance becomes criminal prosecution, the executive needs to get a warrant

If primary purpose gathering foreign intelligence, 4th amendment warrant not necessary

When the primary purpose becomes criminal investigation, the warrant is applicable and any information gained after July 20 is suppressed.

* + - 1. **Problems**
         1. Smart lawyers will work around this, and say always intelligence purpose
         2. Information gathering during the “spying” phase, can then be bootstrapped or leveraged to make a Title III warrant.
         3. Courts have tried to read this primary purpose test into the FISA statute
    1. *In re Directives* (also see below)
       1. In the Foreign Intelligence Court of Review
          1. FISC (Foreign Intel Surveillance Court: group of district court judges that are appointed to sit as magistrates to decide whether to grant FISA orders for the intelligence community to undertake intel gathering
          2. FISCR: Appellate tribunal composed of Art III appeals court judges that meet to decide questions of law concerning cases above the FISC
       2. **Issue**: telecom company is challenging the gov’t issuance of a directive to the telecom asking for access to the company’s technology so that the gov’t can engage in wholesale (non-individualized) warrantless surveillance of some American customers:
          1. Cat 1: US Persons living overseas whose telephones are being tapped because the gov’t is now engaging in surveillance of all calls (for example) between Karachi, Pakistan and Dallas
          2. Cat 2: US Persons in the US that are being incidentally surveilled.
       3. **Holding**
          1. There is a foreign intelligence exception to the warrant clause of the 4th amendment that resembles the “special needs” exception

If there is a purpose that goes beyond typical criminal investigation, there might be an exception to the Warrant Clause

Unifying theme of the special needs cases is prevention of future crimes (prospective); oriented towards managing some type of risk that is known to be out there (aggregate level of this gets to special needs)

* + - * 1. However, this is still subject to a reasonableness requirement: Court looks to the “totality of the circumstances analyze to balance the interests at stake

Government’s interest: national security which is paramount or “of the highest order of magnitude”

Individual privacy interests:

Targeting procedures: there is an mechanism that says why the government is targeting a specific programmatic surveillance plan

Minimization Procedures: gov’t commits to not analyzing communications that are not relevant to national security

Internal checks to ensure these surveillance programs are only being used when necessary: AG/DNI must sign off on the surveillance

These procedures serve as a type of stand-in of the neutral magistrate

* + 1. *Smith v. Maryland*
       1. **Facts**: Pen register case; do not disclose contents of calls, just numbers dialed
       2. **Issue**: does the use of pen registers trigger 4th amendment liability on the part of the government? Not content.
       3. **Holding**: No reasonable expectation of privacy regarding numbers dialed
          1. No actual expectation of privacy, and if he did, that was not legitimate
          2. Mere fact that he is calling, he has divulged the dialing information to a 3rd party; giving it to a 3rd-party defeats the reasonable expectation of privacy
       4. **Dissent**: idle to speak of assuming risks when individuals don't really have another choice; use of these in the aggregate very intrusive
       5. **Today**: email?
          1. **Inglis**: gov’t has access to envelope information
          2. *US v. Maynard (Jones)*: use of GPS to undertake constant surveillance of a suspect must get a warrant, even though physical surveillance would not require a warrant (DC Circuit)
  1. Intelligence and the Extraterritorial Constitution
     1. *Reid v. Covert*
        1. **Facts**: Several women killed their servicemen husbands while living and stationed overseas; tried overseas on US military bases under military law because the crimes were committed on the overseas bases.
        2. **Holding**: under the Constitution of the United States, the courts of law alone had the power to try civilians for their offenses against the United States—US is a creature of the constitution and its citizens abroad subject to Bill of Rights
           1. Courts martial violate Article III and 5th and 6th amendments (rights to trial by jury, grand jury indictment, and speedy and public trial)
           2. Respondents did not lose their civilian status and their right to a civilian trial because the government helped them live as members of a soldier's family.
           3. Distinguishes Insular Cases: in places with their own customs and legal traditions and therefore the application of the Bill of Rights was not applicable; these are military bases (US land)
        3. **Concurrence**: What considerations to determine what process is “due” is a totality of the circumstances analysis (where it occurs, etc.)
     2. *United States v. Verdugo-Urquidez*
        1. **Facts**: DEA agents executed a search of a Mexican citizen in Mexico without a warrant from a US court.
        2. **Holding:** the 4th amendment does not apply to the search and seizure by the US of property owned by a nonresident alien and located in a foreign country
           1. “The People” are a class of persons part of national community or who have otherwise developed a sufficient connection with this country to be considered part of that community; the Constitution protects people of this country against arbitrary action, not aliens outside US territory
        3. **Concurrence**: In effect, we shouldn’t be thinking categorically if certain Amendments apply, but instead we should be thinking in nuanced terms of practical considerations of whether a particular Constitutional protection applies overseas
           1. Example: Adherence to the warrant requirement “would be impractical and anomalous”
        4. **Dissent:** Reasonableness should still apply
           1. 4th amendment part of gov'ts power to enforce criminal law
           2. If held accountable by US law, should be treated as one of the governed
     3. *In re Terrorist Bombings of U.S. Embassies in East Africa*
        1. **Issue:** Whether and to what extent the 4th amendment's safeguards apply to overseas searches involving US citizens
        2. **Holding**: 4th amendment's warrant requirement does not govern searches conducted abroad by US officials; searches of US citizens need to only satisfy reasonableness requirement (4th amendment still applies)
           1. 4th amendment Reasonableness requirement for electronic surveillance and physical searches if for criminal prosecution = totality of the circumstances, which weighs the legitimate government interest against the intrusiveness of the search on an individual’s privacy
           2. These activities can be authorized through 12,333 and FISA
           3. Reinforces body of law beginning in Keith
           4. Constitution doesn't impose a warrant requirement here; FISA statute just builds in a level of statutory protection over and above baseline supplied by constitution
        3. **Rationales**:
           1. Nothing in history of foreign relations would require that or that other states have rules similar to the US
           2. Executive has priority on foreign soil
           3. Search reasonable on these facts: totality of the circumstances analysis (not covert, in daytime, with Kenyan authorities, with Kenyan warrant, and his wife was there. Restrained in execution and narrow in focus; spent 5 months monitoring before searching)
        4. “Silver platter” doctrine: If foreign officials conduct warrantless surveillance in flagrant violations of OWN laws, US courts not required to suppress the fruits of investigations
     4. Other sources of authority overseas
        1. NSC 10.2: authorizing CIA covert action
        2. **War Powers Resolution**
           1. Exempts covert paramilitary operations
        3. **Hughes-Ryan (1974)** and **Intelligence Oversight Ac**t (1980)
           1. Ends plausible deniability by President

1. FISA, Then and Now
   1. FISA Definitions and Mechanics
      1. Overview: FISA regulates electronic surveillance (contents of e-mails, phone calls) and other investigative techniques (i.e., searches, pen registers, etc) of:
         1. Agents of foreign powers (AFPs) and foreign powers (FPs) more or less inside the US (can be an AFP for working at an embassy)
         2. Special protections for US Persons (USPs)—can’t be be an AFP unless an alleged terrorist or traitor
      2. Two roles
         1. Gap-fills leftovers from Keith AND
         2. Statutory framework for the warrant requirement for US persons who may be agents of foreign powers
      3. **Foreign Intelligence Surveillance Act of 1978**
         1. (a) "Foreign power" means--
            1. Foreign gov’t or component (whether or not recognized)

Embassies, consulates, Palestinian delegation to UN

* + - * 1. Faction of foreign nation *not substantially composed of USPs*

UN, int’l orgs

* + - * 1. Entity openly acknowledged by foreign gov’t to be directed/controlled by said foreign gov’t

Business openly operated by foreign gov’ts

* + - * 1. Group engaged in int’l terrorism or in activities in preparation therefore

Al-Qaeda (prep van be broadly construed – e.g. madrassa, financial institutions, etc.)

CAN’T be purely domestic org otherwise 4th Amendment warrant req. applies (***Keith***)

Activities in preparation therefore can be broadly construed – e.g. madrassa, financial institutions, etc.

* + - * 1. Foreign-based political organization *not substantially composed of USPs*

Foreign political parties

* + - * 1. Entity directed or controlled by foreign gov’t

Primarily directed at foreign intel orgs in US

* + - 1. (b) "Agent of a foreign power" means—
         1. (1) any person other than a United States person, who—

(A) acts in the United States as an officer or employee of a foreign power, or as a member of a foreign power as defined in subsection (a)(4);

(B) acts for or on behalf of a foreign power which engages in clandestine intelligence activities in the United States contrary to the interests of the United States, when the circumstances of such person's presence in the United States indicate that such person may engage in such activities in the United States, or when such person knowingly aids or abets any person in the conduct of such activities or knowingly conspires with any person to engage in such activities;

(C) engages in international terrorism or activities in preparation therefore; (lone wolf provision to get those who may be independently engaged)

Targeting non-USPs who may be independently engaged in terrorist acts. For a non-USP if engaging in international terrorism or prep counts as an agent of a foreign power even if can’t show membership in group controlled by a foreign power. Lone wolf never invoked.

* + - * 1. (2) any person who—(INCLUDES US PERSONS)

(C) knowingly engages in sabotage or international terrorism, or activities that are in preparation therefor, for or on behalf of a foreign power; (need to be alleged criminal; cannot be solely on basis of 1st amendment protected activities)

(D) knowingly enters the United States under a false or fraudulent identity for or on behalf of a foreign power or, while in the United States, knowingly assumes a false or fraudulent identity for or on behalf of a foreign power

* + - 1. (e)"foreign intelligence information":
         1. (1) information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against--

(A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power;

(B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or

(C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or

* + - * 1. (2) information with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is necessary to--

(A) the national defense or the security of the United States; or

(B) the conduct of the foreign affairs of the United States.

* + - 1. (f) "Electronic surveillance" means--
         1. (1) the acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire or radio communication sent by or intended to be received by a particular, known United States person who is in the United States, if the contents are acquired by intentionally targeting that United States person, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes;
         2. (2) the acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire communication to or from a person in the United States, without the consent of any party thereto, if such acquisition occurs in the United States, but does not include the acquisition of those communications of computer trespassers that would be permissible under section 2511(2)(i) of title 18, United States Code;
         3. (3) the intentional acquisition by an electronic, mechanical, or other surveillance device of the contents of any radio communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes, and if both the sender and all intended recipients are located within the United States; or
         4. (4) the installation or use of an electronic, mechanical, or other surveillance device in the United States for monitoring to acquire information, other than from a wire or radio communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes.
    1. FISA mechanics
       1. Congress’s judgment that ensures US gov’t surveillance in the area of foreign intelligence conforms to the 4th amendment
       2. Executive branch agency applies to FISC; including affidavit establishing probable cause
       3. Domestic surveillance: see Title III
       4. Covers physical searches
       5. Can be authorized for up to 72 hours in emergencies
       6. FISA warrant: Judge will grant order if there is probable cause to believe that:
          1. Target of surveillance or search is a foreign power or agent thereof, no US person may be considered one of those on basis of activities protected by 1st amendment
          2. For electronic surveillance: facilities where used is being used or about to be used by a foreign power/agent
          3. Physical searches: premise owned, used, possessed or in transit to or from foreign power/agent
          4. AG approved
          5. Minimization procedures met (no names, minimize acquisition and retention of nonconsenting US persons)

Test: was good faith to minimize attempted?

* + - * 1. Meet 18 USC statements and certifications
        2. Not clearly erroneous
        3. If met, judge MUST issue order
        4. Cannot be solely based on 1st-amendment protected activities; but they can be part of it
      1. FISA not the source of authority, but a way of regulating this type of surveillance for foreign powers or agents thereof
      2. Probable cause under FISA ≠ criminal PC
         1. Seeking foreign intelligence information
         2. Cannot reasonably be obtained by normal investigative techniques
         3. PC that the target is a FP or agent of a FP (about the target, not about what information will come from the intelligence gathering)
    1. *US v. Rosen*
       1. **Facts**: US persons charged with violating a statute to communicate national defense information to someone not authorized to receive it
          1. Gov't got orders from FISC, under FISA, authorizing physical searches and electronic surveillance
       2. **Holding**: FISC had probable cause to believe defendants were agents of a foreign power when granting warrant.
    2. Mukasey-Kelly Letters
       1. Mukasey: If we bring more “close call” cases, the FISC will become more skeptical of all FISA applications and the relationship between the DOJ/FISC will change
          1. Reputational concern for the DOJ before the FISC. Need specific kinds of info

Info about target

Info sought

Means of acquiring

* + - * 1. AG is expressing a very real feeling inside the DOJ that tends towards caution in this area (think about the “FISA Wall”)
        2. NOTE that it is interesting that Mukasey is making this argument because is traditionally has a very strong hand on national security issues and is not a civil libertarian.
      1. NYPD Commissioner Kelly: need to bring these close cases, because we are losing out on potentially valuable intelligence because establishing PC is not clear cut; give it to the courts and let them decide these marginal cases.
         1. Possible subtext 🡪 FISC is rubber stamp, so why not just take advantage of it.
  1. FISA Wall
     1. The Wall
        1. Division between law enforcement and intelligence in DOJ: government shouldn’t be able to take advantage of the relaxed standards of the 4th Amendment for intel gathering when the primary purpose of the investigation is criminal prosecution
        2. Enforced through internal DOJ guidelines
     2. Patriot Act: changed FISA statute to get around the wall by amending “the” purpose to “a significant purpose” (puts up a statutory mini-wall that Sealed Case leaves in place)
     3. When does the government need to pivot from a FISA order to a Title III warrant?
        1. Significant purpose test
        2. Intelligence gathered under a FISA tap can be used as evidence in court
     4. *In re: Sealed Case*
        1. **Issue**: proper relationship between obtaining foreign intelligence information under FISA and what that information might be used for (up to/including criminal prosecution)
        2. Struck down the interpretation that the court can only approve FISA applications if primary purpose not toward criminal prosecution—never what FISA meant
        3. Replaced with significant purpose test: as long as gov't entertains a realistic option of dealing with a foreign agent other than through criminal prosecution, foreign intelligence collection does not need to be primary purpose
        4. Distinguishes between “ordinary crimes” or “non-foreign intel crimes” versus “foreign intel crimes”
        5. Significant purpose means that you can’t use FISA to prosecute for crimes that do not have a “nexus” foreign intelligence.
        6. But there is are also ordinary crimes that are inextricably intertwined with foreign intel crimes
  2. Terrorist Surveillance Program (TSP) and its Aftermath
     1. FISA Post-9/11🡪TSP
        1. Technology had evolved to the point that huge volumes of intelligence fell under the ambit of FISA (foreign to foreign communications pass through US
        2. Waiting for PC is waiting too long🡪in national security post-9/11, need to be proactive, not reactive
     2. TSP
        1. Executive program authorized by President (Article II powers)
        2. Subset of PSP
        3. Now part of FAA
        4. Wholesale surveillance of whole sets of communications; mined to find threats
        5. Legal concerns
           1. 4th amendment (question left open in Keith): doesn’t apply to foreign intelligence information (OLC)
           2. Sidestepping legal regime FISA created (executive bypassing legislative);

Justification: AUMF

Youngstown: ignored by OLC; existence of FISA would tend to point to lowest ebb of power

* + - * 1. Art III authority lasted for less than a year before the FISC refused to grant classic FISA orders for the TSP programs.
    1. *In Re Directives* (and the 4th amendment)
       1. **Holding**: foreign intelligence exception exists when surveillance is conducted to obtain foreign intelligence for national security purposes and is directed against foreign powers or agents of foreign powers reasonably believed to be located outside the United States
       2. Warrant requirement
          1. Special needs beyond law enforcement can waive warrant requirement
          2. Getting a warrant could hinder time-sensitive actions
       3. Reasonableness requirement
          1. Totality of the circumstances: nature of intrusion and how it is implemented
          2. AG first has to determine that probable cause exists to believe that the target is foreign
          3. Potential for error not enough to invalidate reasonableness
       4. Incidentally collected information from US persons does not violate the 4th amendment
    2. **FAA (2008)**
       1. Extended protections to US persons abroad
       2. Retroactive immunity for telecoms: had provided information at gov't request
       3. Original FISA: Surveillance of persons reasonably believed to be located outside the United States🡪FAA: basket warrants
       4. Authority moved from Article II (TSP)🡪Article III (brief approval by the FISC)🡪Article I (Congress as FAA)
          1. More constitutionally acceptable under Youngstown
       5. Differences between TSP and FAA
          1. FAA: government must seek authority from the FISC if it wants to target a US citizen overseas
          2. Incoherent result: need to go to the FISC to get authority to engage in electronic surveillance on al-Awlaki’s phone BUT do not have to go to court (or any neutral body) in order to get authority to kill him.
       6. Unclear how broad the specificity can be, but more broad than FISA
       7. Civil Libertarian “give back” under the FAA: provision that if you want to target a specific American overseas, the government must make the PC determination that the American is an AFP in a way that under the classic FISA it would not have had to go to the FISC for that authority.
       8. Constitutionality: Executive and Congress are acting in concert, but even at the President’s heightened power under Steel seizure, Congress can’t authorize the President to break the law, so 4th Amendment could still be implicated.
    3. Standing to challenge surveillance
       1. Injury in fact
          1. Concrete
          2. Actual and imminent
       2. Causal relationship between injury and challenged conduct
       3. Likelihood that injury will be redressed by a favorable decision (not too speculative)
       4. PROBLEM – in surveillance, don’t necessarily know you are spied on and what consequences it is having
    4. *Laird v. Tatum*
       1. **Facts**: Army gathering intelligence on civilian activities that “could cause public disorder” (HUMINT and OSINT)
       2. **Complaint**: Gov’t actions chilling 1st amendment speech and what they say might be used against them
       3. **Question**: do plaintiffs have standing based on this?
       4. **Holding**: Ps made no showing of injury/immediate danger of sustaining injury
          1. Subjective chill not injury in fact
       5. **Legacy:** Obviously hard to know you are being spied on until too late: at what point CAN you have standing and overcome the injury-in-fact standard?
    5. *Amnesty International USA v. Clapper*
       1. **Complaint**: FAA violates 4th amendment rights
          1. No particularity requirement
          2. Injury in fact: have to expend money to travel overseas or to meet the client in person in order to avoid the surveillance.
       2. **Standing**: P’s fear that amendments will affect them is reasonable
       3. **Holding**: Defendants had gone to actual expense to avoid surveillance, and this is a concrete enough harm to grant them STANDING
       4. **Questions left**: what is the privacy interest at stake?
    6. PSP: Internet
       1. President’s Surveillance Program (PSP) 🡪 potentially widespread vacuuming of everything that is plausibly described as “envelope information” on the internet. TSP is the nucleus of this program.
       2. Employing *Smith* (4th amendment gap) to the digital metaphor, arguably, allows the government to bring in all this information for the surveillance. Included are electronic communications and transactional records.
    7. *United States v. Maynard* (D.C. Cir) Jones (SC)
       1. DC Circuit said use of GPS to undertake constant surveillance of a suspect must get a warrant, even though physical surveillance would not require a warrant (see e..g, *Knotts*). Different because of constant monitoring – allocation of resources w/physical surveillance; here costless 24 hr surveillance
       2. So not a 3rd-party doctrine case like *Smith*; but there is something that is constitutionally different about the technology.

1. National Security Letters and Data Mining
   1. **Rule: In general, there is no expectation of privacy in transactional records (non-content) conveyed to a 3rd party**
      1. Constitutional Precedent
         1. ***Smith v. MD***: people have no legitimate expectation of privacy in the telephone numbers they dial because they voluntarily convey merely numerical information to the phone company in the normal course of business
         2. ***US v. Miller***: No legitimate expectation of privacy in financial information voluntarily conveyed to bank teller.
   2. National Security Letter: Letter traditionally issued to ISPs or other telecom companies requesting subscriber information and toll billing records.
      1. Transactions, not content
      2. Cannot disclose to any person (amended to counsel only)
      3. Authority
         1. EO 12333 and
         2. 18 USC 2709
            1. (a) – Third party duty to comply
            2. (b) - Authorizes FBI to obtain info that is “relevant to authorized investigation” to protect against int’l terrorism/counter-intelligence

So long as USPs not targeted solely for 1st Amend activity

* + - * 1. (c) – Nondisclosure requirement
      1. Later: Patriot Act
  1. **Doctrine: Government can seek the following types of information through National Security Letters without a warrant and with the protection being right to an attorney and the right to challenge letter to gov’t who then has the burden of proof NSL necessary**
     1. Information: Transactional Records
        1. Dialing
        2. Routing
        3. Addressing
        4. Signaling
        5. Business Records (2001 – Patriot Act, defended under 3rd party doctrine)
           1. Including any tangible thing
        6. Bank Information
        7. Library Records (Doe II)
        8. Records of past calls (2006)
        9. Email (2006)
  2. *Doe v. Ashcroft*
     1. Information gathering authority under the Patriot Act:
        1. Administrative subpoenas for exercising agency function
        2. Criminal subpoenas
        3. Stored electronic communications
        4. Mail
        5. Pen registers
        6. Wiretaps/electronic
        7. FISA
     2. **Holding:** FAA violates the 4th amendment rights of the telecom (operating outside of judicial oversight) (not subscribers: *Smith*)
        1. 1st amendment complaint: Subscribers’ 1st amendment rights may be violated because there is not judicial review (chilling subscribers); ISP’s 1st amendment rights are being violated by this gag order
     3. Patriot Act amended to allow disclosure to counsel and judicial review
        1. Where you as an recipient of the NSL may challenge the letter simply by notifying the government that you wish to challenge and then the burden falls to the government to seek (burden-shifting)
     4. State of the law
        1. Recipient may seek counsel and challenge the letter
        2. But the government bears the burden on showing the NSL is proper
  3. Data mining
     1. Definition: The acquisition of tons of information through various means (i.e., programs like the FAA; open source intelligence gathering) and then using technology to search through and analyze the data to look for patterns.
     2. Government view: Information is obtained according to law, 4th Amendment doesn’t apply, and the government has the ability to then analyze the information
     3. Another view: In order to afford due process, impose a legal regime not on information acquisition but use
        1. Monitoring use of data to create an access trail for internal review
        2. Make information selectively available: no one has access to all the data; only the portion relevant to their responsibilities
        3. Limit sharing of information between the agencies (another Wall)
  4. Policy: 2 Competing Arguments
     1. Typical
        1. Banal, typical request in line with Smith 4th Amendment carve-out; like and administrative or grand jury subpoena
     2. Special
        1. The government’s reliance on this device is not typical.
        2. FBI’s record shows not able to manage employment of this device – prone to abuse if FBI not following its own protocol
           1. FBI issued 19,000 NSLs in 2005
  5. Wyden-Udall-Holder letters
     1. FISA authorizing access to geolocational data?
     2. Article III authorizing part of PSP?
     3. What are the two Senators bothered about concerning FISA §215 orders
        1. Remember that the TSP formed the nucleus of the PSP program 🡪 PSP may cover things that fall outside of the traditional protections of the 4th Amendment (i.e., thing that may fall under the *Smith* exception), whereas TSP dealt with electronic surveillance which was under 4th Amendment
        2. It has been said the §215 orders for “tangible” things may refer to information that is part of the PSP material 🡪 so that §215 orders may be used to get access to geo-locational/positioning information.
           1. NOTE 🡪 highly speculative; so could end up being completely wrong
     4. These Senators are intimating that the FISC under §215 orders are authorizing access to geo-locational information
        1. There is a chance (but just speculation at this point) that part of the PSP program is being legitimized by Art III authority through FISC authorizing §215 orders.
           1. Very similar to what we saw happened in the TSP migration into the FAA.
     5. Perhaps, then, §215 orders are serving as the Art III authority to approve of a portion of the PSP program.
  6. Ideas for Achieving Privacy (other than refocusing constitutional law or creating new constitutional protections/revisiting Smith and Miller)
     1. Digital technology to audit the searching of the data which was mined.
        1. Meaning there is an immutable train on the searches that are carried out by analysts so there is a permanent record that would allow for internal review.
     2. Make the data only partially available to individual agencies and employees so no one person has access to totality of the information
        1. White House recently passed an executive order to try to do something like this
     3. Limit the sharing of information between the agencies
        1. This though would essentially recreate another “wall” that was highly criticized in the FISA context
     4. Anonymization of data?
     5. Data retention policies?
     6. Efficacy 🡪 Cost/benefit of investigative tools helps determine legality – is it worth it?

1. The NSA by Inglis
   1. SIGINT
      1. Will touch US persons—so, minimization
      2. Cannot use SIGINT to get PC for a FISA order
         1. Can use OSINT and HUMINT
   2. If it isn’t written down that you can, then you can’t
   3. Checks and balances
      1. Inspector General
      2. General Counsel
      3. Auditing
      4. Minimization
   4. At the meta-data level (i.e., envelope information) the NSA does have the authority to do mass wholesale acquisition.
      1. Metadata:
         1. Where the communication takes place (i.e., IP address, domain)
         2. To/from/CC/BCC
         3. NOT subject line (courts say this is content)
2. Checkpoint Searches, Physical Surveillance, Profiling
   1. *US v. Arnold*
      1. **Issue:** can TSA examine laptop contents at the border without reasonable suspicion?
      2. **Holding:**at the border, intrusiveness is not the right analysis: right to protect territorial integrity greater
         1. Reasonable suspicion is not needed for customs officials to search a laptop or other personal electronic storage devices at the border.
         2. Supreme Court has left open the question of “ ‘whether, and under what circumstances, a border search might be deemed ‘unreasonable’ because of the particularly offensive manner in which it is carried out.'
   2. Airport searches generally
      1. Booting up laptop: okay to show not a bomb
      2. Laptop contents search: only justifiable at the border
   3. Special needs analysis (subway context)
      1. Balancing test: weight of gov't interest, nature of privacy interest imposed on, and character of intrusion, and efficacy of search in advancing gov't interest
   4. *Farag v. US*
      1. **Facts**: Arab men switching seats; speaking a mixture of Arabic and English; checking watch; deleting cell phone numbers upon landing; electing to sit in a middle seat
      2. **Issue**: was there probable cause to arrest these two “suspicious” Arab men?
      3. **Holding**: Tacking together benign circumstances to create a great number does not make PC
         1. Need Reasonable Suspicion before you can take race into account
   5. Racial profiling generally
      1. Okay: to use racial statistics at the border
      2. Unresolved: Using it to target a population for surveillance might seem reasonable
      3. Impermissible: at the individual level
   6. *MacWade v. Kelly*
      1. **Issue**: do random subway searches of passengers entering violate the 4th and 14th amendments?
      2. **Test**: Search must serve as its immediate purpose an objective distinct from criminal investigation evidence gathering
         1. Then, balance above considerations:
            1. Weight/immediacy of gov't interest (of the highest degree: preventing terrorist attack)
            2. Nature of privacy interest alleged (riders certainly have a privacy interest in their bags, but doesn’t overcome the government’s need to protect)
            3. Character of intrusion imposed (random, can walk away, limited only to the extent necessary to determine whether there is an explosive device, never arrested anyone)
            4. Efficacy of the search in advancing the interest (deterrence—there was never an attack?)
      3. Not really a surveillance program
3. Re-Emergence of Domestic Intelligence
   1. Domestic Intelligence: no law for pure foreign intelligence
   2. Timeline
      1. 1910s: FBI does domestic intel and law enforcement
      2. 1924: FBI begins to move away from domestic intel
      3. WWII through Vietnam: massive spying on domestic organizations (“Cold War necessity”)
      4. 1970s
         1. Church investigation: exposes the “dirty laundry” by the FBI and other intel agencies
         2. “Levi Guidelines”: AG guidelines internal to FBI: no more domestic intelligence
            1. Predication: under the Levi Guidelines you couldn’t investigate (even put human sources out in the field) unless you had a predicate of criminal wrongdoing.
      5. 1978: FISA
      6. 2008: FAA
         1. FISA allows suspicionless surveillance through FAA
         2. Remove criminal suspicion predication
   3. *Fazaga* Complaint
      1. Domain management: FBI going into the field to analyze and determine where/what the threat may be—collect intelligence from the field to do this
      2. **Complaint**: 1st amendment concerns (spying on Muslim community without suspicion)
         1. Creates mistrust in the community
         2. Discourages people from reporting real threats
         3. Entrapment issues

# Detention, Interrogation, and Rendition

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **Case** | **Year** | **Authority** | **Enemy Combatant?** | **Timing** | **USP?** | **Forum for Det/Trial** |
| ***Milligan*** | 1866  (Civil War) |  | No  Just confederacy sympathizer | After civil war, announcement war is over  (diff Quirin) | Yes | Military Tribunal |
| ***Quirin*** | 1942 (WWII) | Laws of War | Yes  Took off uniforms | Beginning of US involvement in WWII  (diff Milligan) | Yes, 1 of 8 (American ID doesn’t affect ability to detain) | Military Tribunal;  Habeas to SC upheld |
| ***Eisentrager*** | 1950 |  |  |  | No |  |
| **NDA** | 1971 | Relied-on by Hamdi dissent to say no authority to detain | | | | |
| **AUMF** | 2001 | Relied on as detention authority (Hamdi, al-Marri) | | | | |
| ***Rasul*** | 2004 |  |  |  |  |  |
| ***Hamdi*** | 2004 |  |  | Beginning-ish of war  (diff Boum) | Yes |  |
| **CSRT** | 2004 | Response to Hamdi detention due process concerns | | | | |
| **DTA** | 2005 |  | | | | |
| ***Padilla*** | 2005 |  |  |  | Yes |  |
| ***Hamdan*** | 2006 |  |  |  | No |  |
| ***Al-Marri***  ***(4th Cir)*** | 2008 |  |  |  | Yes |  |
| ***Boumediene*** | 2008 |  |  | 7 yrs after 9/11  (diff Hamdi) | No |  |
| ***Parhat*** | 2008 |  |  |  |  |  |
| ***Al-Maqalah*** | 2010 |  |  |  |  |  |
| ***Al-Bihani*** | 2010 |  |  |  | No |  |
| ***Ghailani*** | 2010 |  |  |  | No |  |

1. Detention and Due Process
   1. Law of intelligence v. the law of interventions implicates different constitutional provisions, different institutions, different statutory laws, and different issues.
   2. *Ex Parte Milligan*
      1. **Background:** habeas corpus suspended during the Civil War by the President; Milligan, sympathizer (but not enemy combatant) arrested and detained. State not an active zone of hostilities and end of civil war hostilities.
      2. **Timing:** end of the war
      3. **Issue:** Did a military commission have jurisdiction to try and sentence D?
      4. **Holding:** President has the authority to suspend the writ of habeas corpus, but unless the civil courts are actually closed, they are perfectly competent to try this case, and should-no right to detain a US citizen indefinitely
         1. Even if Congress had approved and at Y1, still not authority to void the Constitution
         2. If there is a real prospect of getting justice in some other way than a military tribunal, then denial of that option is unconstitutional.
      5. **Concurrence:** with congressional authorization, detention and military trial would have been okay
      6. **Side issue:** Suspension itself does not provide legal authority to arrest or detain; just mean executive doesn't have to justify these things
   3. *Ex Parte Quirin*
      1. **Background**: German spies caught in plainclothes (losing legal combatant status while doing so) on US soil during WWII (beginning of US involvement)
      2. **Holding**: because being charged with violating laws of war and because Congress did not mean to extend 5th and 6th amendments to trial by military commission, proper to try them by military commission
      3. **Rationale**: Articles of War (code of military justice) positive grant of authority to establish a military commission (not pure Article II power)
         1. US citizenship not relevant: The fact that you are an American does not absolve you from the fact that you will be criminally liable for being (1) an enemy; and (2) who is in violation of the laws of war
   4. As the war on terror continues on, we see Court moving from a Quirin point of view to a more Milligan approach, in part because of timing (beginning to middle/end of conflict)
   5. *Hamdi v. Rumsfeld*
      1. **Background**: Hamdi, a US citizen, captured on the battlefield in Afghanistan, moved to GTMO, then held on a military brig on SC as an enemy combatant (to insulate GTMO from habeas petitions)
      2. **Detention authority**
         1. Sidesteps the Art II question of whether the President has the inherent authority to detain Hamdi
         2. AUMF authorizes the detention of Hamdi because detention is a fundamental incident of waging a war (act of congress allowing detention of a US citizen)
         3. Who can be detained? Limited category of individuals who are “part of or supporting forces hostile to the US or coalition partners” in Afghanistan who are “engaging in an armed conflict against the U.S.”
      3. **Due Process in determination of status as enemy combatant?**
         1. Due process is necessary for an American citizen, but not to the extent of a full criminal trial.
         2. Balancing between:
            1. Private interest affected (Hamdi's): risk of erroneous deprivation, interest in life and liberty AND
            2. Gov't's asserted interest and burdens gov't would face in providing greater process (*Mathews v. Eldridge*)
         3. Citizen-detainee seeking to challenge status must receive:
            1. Notice of factual basis for classification
            2. Fair opportunity to rebut
            3. Before neutral decisionmaker (military tribunal satisfies)
            4. Hearsay admissible
         4. Youngstown: Non-detention act or AUMF giving executive power to detain?
      4. **Souter Concurrence (looks like Milligan concurrence) on detention**: Y3: Congress has specifically forbidden detention of people like Hamdi
         1. AUMF does not authorize detention in a case like Hamdi because the Non-Detention Act (NDA) passed post-*Korematsu*
         2. Whatever the AUMF does or doesn’t do, it can’t be a “clear statement” from Congress to override the NDA.
         3. Cannot detain AMERICANS.
      5. **O’Connor Concurrence** (looks like Quirin opinion)
         1. Is the detainee the sort of person who satisfies the criteria established by Congress (AUMF) and the president?
         2. US citizenship does not extinguish detention authority
         3. Due Process is a “sorting mechanism” to make sure that the detained person is in fact an enemy combatant.
      6. **Dissent on detention**: Gov't has two choices to deal with US citizens: suspend the writ of habeas corpus and detain or try in criminal court. That is it.
      7. **Scope**:
         1. Can gov’t hold Hamdi forever? No.
         2. What if Hamdi was captured off the battlefield: No.
         3. **Rationale**: Congress has authorized the detention of combatants captured during the war in Afghanistan, can hold them during the span of the war in Afghanistan
         4. Where the alien is
            1. In the US: some rights
            2. Outside the US: no constitutional rights
            3. Hamdi limited in scope to US citizens fighting on foreign battlefield against US citizens
         5. Win for gov’t: court approved detention with just a few minor adjustments.
         6. Loss for gov’t: court intervening during war and infringing on what might have been executive power.
         7. Win for Congress: more active in detention arena.
         8. Win for court: Court has grabbed more power for themselves in the management of national security
   6. *Padilla v. Hanft*
      1. **Issue**: executive seized US citizen on US soil—arrested in O’Hare when returning from Pakistan. Held in brig in SC for 1.5 years.
      2. **4th circuit**: rules against habeas petition
      3. Eventually, released by Bush to avoid SCOTUS ruling
   7. *Al-Marri v. Pucciarelli*
      1. **Facts**: lawful resident alien arrested for credit card fraud and lying to the FBI
      2. **Holding**: authority to detain militarily, but due process standards not met (AUMF expanding the battlefield to the US)
      3. Motz: somewhat Milligan-esque; should be prosecuted
      4. Traxler and Wilkinson
         1. President can detain al-Qaeda captured on U.S. soil, even if originally held in civilian prison
         2. Moving away from *Hamdi*
            1. Not bound by any particular theater of war, nor any particular time frame for war – “War on Terror”; claims indicated in Hamdi DESPITE O’Connor careful opinion not reaching detention in U.S. soil
         3. Wilkinson – practical difficulties of prosecution
            1. Concerns about intelligence:

Detention linked to secret intelligence info

Detention as a *tool* to obtain intelligence

* + 1. After Hamdi: Probably would need more process, as he is closer (evidence not in Afghanistan) and picked up further from the battlefield (risk of erroneous deprivation is better)
  1. Post-*Hamdi*
     1. CSRTs: detention with Hamdi’s DP considerations
        1. Available to all GITMO detainees, USPs and non-USPs
        2. No lawyer – instead “personal representative”
        3. No judge – 3 “neutral commissioned officers”
        4. No prosecutor but very similar – “recorder”
     2. Get a “personal representative”
     3. Tribunal is composed to three neutral commissioned officers
     4. “Recorder”: something like a prosecutor
     5. Rebuttal presumption in favor of the government’s evidence.
     6. Reviewable by DC Circuit
  2. Detainee Treatment Act (2005)
     1. CSRT decision reviewable by DC Circuit, but only info on file in the CSRT
        1. DC Circuit can find gov’t burden not met and detainee released
     2. NO HABEAS
        1. First under DTA, then under MCA
        2. Also gov’t interp of Eisentrager

1. Access to the Courts: Theory and Practice
   1. *Johnson v. Eisentrager*
      1. **Facts**: post-WWII, German soldiers fighting after Germany had already surrendered, never present on US soil, habeas petition.
      2. **Issue**: should they be tried in civilian or military courts?
      3. **Holding**: Constitution does not grant aliens this right. Federal courts will not be open to detainees who have been tried by US military tribunals abroad
      4. **Problems**: once it happens once, habeas would be available for enemy aliens in times of war and peace
      5. **Legacy**: government assumed then that Gitmo would be off limits to habeas review by federal courts.
   2. *Boumediene v. Bush*
      1. **Background**: shift from managing national security by indirection, meaning leaving the decisions of what is in and out to the political directions, to actively managing national security law
      2. **Precedent**
         1. Hamdi: AUMF
         2. Quirin: Articles of War
         3. Milligan
         4. Eisentrager: should be no habeas rights for GTMO
      3. **Facts**: aliens detained at Guantanamo after being captured in Afghanistan or elsewhere abroad and designated enemy combatants by CSRTs.
      4. **Issue**: constitutional habeas due to non-US citizens captured overseas? Executive is engaging in detention, an area of law that the Courts have traditionally had a very active role?
      5. **Factors**:
         1. Citizenship and status of detainee and adequacy of process through which that was determined (in dispute)
         2. Nature of the sites where apprehension and detention took place (outside the US)
         3. Practical obstacles inherent in resolving prisoner's entitlement to the writ (none)
      6. **Holdings**:
         1. Move from Eisentrager: sovereignty should be standing in for a functional inquiry into the ability to exercise control (American presence in GTMO different than in Germany)
         2. Executive cannot circumvent the Constitution by using GTMO as a technicality.
         3. Moves away from Hamdi’s DP holding: this process now inadequate for non-citizen detainees (rationale: time—Kennedy sees not many detainees have been giving an opportunity to have meaningful review, that was beginning, now in the middle have to reevaluate)
         4. No way to construe the DTA to allow what is constitutionally required: opportunity for detainee to present exculpatory evidence—sec. 7 violates Article I section 9 of the Constitution.
      7. Did not just say MCA suspended the writ: under Constitution, only under invasion or rebellion, and politically extraordinary
   3. *Al-Bihani v. Gates*
      1. **Facts**: AB was cook for the Taliban, carried a weapon, never fired it
      2. **Holding:** Meets “part of” and “in support of” prongs of MCA
         1. International law has no bearing on the AUMF’s authority
2. Future of Detention
   1. Congress tried to block funding to transfer detainees out of Gitmo
   2. Ike Skelton acts forbids trying Gitmo detainees in crim courts
   3. Post-Boumediene
      1. GTMO not closed
      2. New detainees not brought to GTMO
      3. *Al-Maqalah* (D.C. Cir. 2010): the writ does not extend to Bahgram air force base
      4. Been in an AQ guesthouse or training camp? Can be rightly detained properly under the AUMF because you are a member of AQ.
      5. Presumption in favor if the gov’t (similar to Hamdi)
         1. Preponderance of the evidence standard 🡪 same as military tribunal
            1. Same as burden shifting
         2. No need for factual review
         3. Hearsay
   4. Detention processes
      1. How to choose? Not detaining a suspect because Art III criminal courts or Military commission have determined that he/she has committed a crime; instead you detain the terrorist because you have determined he is a member of an organization that qualifies under the AUMF and have afforded him habeas review of that determination.
      2. **CSRTs**: “package for rights” that is constitutionally sufficient to be substituted for Habeas right (*Boumediene*)
         1. **Appeal:** DC Circuit Court of Appeals
      3. **Habeas**: one step up from CSRTs, going into a federal district court in DC and in the first instance you are getting a neutral, Art III judge to determine if the evidence is sufficient to detain you.
         1. **Appeal:** DC Circuit Court of Appeals
      4. **Military** **Commissions**: immediate aftermath of 9/11, Bush thought that it would be necessary to start employing military commissions to try suspected terrorists because his intuitions were that Art III criminal courts was not the appropriate venue.
      5. **Article III criminal trials** (*Ghailani*)
      6. **Indefinite detention**: once you’ve gotten Habeas denied it is permissible to detain the person for the duration of the conflict without having to prove either to a military commission or Art III criminal trial that the individual is culpable, under law of war (*Boumediene*)
      7. How to choose?
         1. Lots of untainted evidence: Article III court
         2. OK evidence but prefer some backup: Military commission
         3. Nothing: indefinite detention
3. Interrogation: Torture, Law, and Lawyers
   1. Torture statutes
      1. Convention against torture (CAT): no exceptions, prohibition on anything intended to inflict severe pain or threat of such
         1. US took a reservation to Art 16, which said that it interpreted Art 16 insofar as that this coalesced with things that would violation 5th, 8th and 14th Amendments 🡪 created a loophole that would exclude anything that is going on overseas (in the view of the OLC)
         2. 8th Amendment 🡪 only kicks in where what we are talking about is punishment by official action that follows on after a conviction (harsh interrogation techniques which were not a form of punishment but part of an intelligence gathering regime)
         3. 5th Amendment: Bush Admin argued that the (substantive) due process rights of the 5th (and 14th Amendment) did not apply extraterritorial to non-Americans.
         4. 14th Amendment: only applies to state governments, not federal government
      2. Torture Act (18 USC 2340): incorporated CAT’s prohibition against torture
         1. Requires specific intent AND
         2. Enduring pain
         3. Bybee memo interpretations
            1. Physical pain – intensity akin to pain accompanying “serious physical injury”

“Serious physical injury” – close to organ failure or death (from Medicare statute)

Severe beatings and burning would count

* + - * 1. Mental pain – “**prolonged mental harm**” caused by or resulting from a “predicate act”

Predicate acts:

**Intentional infliction** or threatened infliction of severe physical pain or suffering (**SPECIFIC INTENT**)

Mind-altering substance or procedures calculated to “disrupt profoundly” the senses or personality

Threat of imminent death

Note **“prolonged**” 🡪 waterboarding is only an *acute* feeling of drowning

Threat of any of the preceding acts done to another person

* + 1. War Crimes Act (incorporate Geneva Conventions into US law)
       1. Provides criminal sanctions for grave breaches of the Geneva convention and Common Article III
       2. Geneva conventions do not apply to AQ: as a terrorist organization–and not a nation state–could not be considered as a party to the Geneva conventions
       3. Geneva conventions do not apply to Taliban: in principle they could claim the protections of Geneva because Afghanistan was as contracting party, but because the Taliban violated the laws of war (by not wearing uniforms) they forfeited their protections under Geneva.
       4. Common Article 3: Included non-international armed conflict; Bush admin says does not apply; Court in *Hamdan* says it does
    2. Detainee Treatment Act (DTA): Prohibition on punishment, not geographically limited, not superseded by anything that repeals it
       1. McCain Amendment (designed to close 5th A extraterritoriality loop-hole in CAT): Prohibited cruel, inhumane or degrading treatment used against any “individual in the custody or physical control of the US Gov’t, regardless of nationality or physical location”
       2. Bush signing statement: President was not going to enforce the McCain Amendment because it placed an unconstitutional restraint on inherent Presidential power.
    3. Army Field Manual: most restrictive view of interrogation tactics
       1. Bush, after *Hamdan*, continued to sustain the type of argument in the signing statements by refusing to apply the AFM to the CIA.
    4. Military Commission Act (MCA): fewer prohibitions
    5. Yoo memo
       1. Meaning of “severe pain” by reference to “organ failure or death” as was used in a health benefits statute.
       2. Lack of extensive use of sources and no reliance on foreign sources when the issues at stake come from international treaties
       3. President as client and taking his side, not a neutral memo
    6. Mukasey: what we did worked
    7. Unclear: Rendition (even though the CIA overseas may be prohibited from using any conduct that would be prohibited by the AFM, not necessarily the case that CIA that is operating in close connection with another government than the foreign counterparts would also be bound)
    8. **Turning Point: Hamdan (2006)**
       1. Held that the war on terror fit under banner of international armed conflict (NIAC) thus GC Common Article III applies. (category usually used for civil wars)
          1. That means that criminal liability under the WCA also applies
          2. FINALLY black sites close; end of foundational torture regime
       2. This in context of push-back against
          1. Bush signing statement (2005) AND
          2. Bybee torture memo interpreting the Torture Act made public
    9. Sanctions
       1. Alien Tort Statute – 28 U.S.C. 1350
          1. United States hasn’t waived sovereign immunity
          2. But perhaps against individual interrogators?
       2. Torture Victims Protection Act – 28 U.S.C. 1350 note
          1. Civil remedy for all people who are victims of torture or extrajudicial killing
          2. Only protects against acts by foreign nations “under color of law” - *Arar v. Ashcroft*

Doesn’t apply to extraordinary rendition because *Americans* did not act under *Syrian* law

* + - * 1. *Iqbal* creates a heightened pleading standard 🡪 particularized facts about individuals personally involved in violation
  1. Why torture?
     1. Little information on enemy
     2. Traditional intelligence techniques don’t work with this type of enemy
     3. Retribution post-9/11
     4. This is how we got bin Laden
  2. Why not torture?
     1. Spawns terrorists in retribution
     2. Harms American credibility
     3. If the justification of the regime is to protect America, but isn’t the fact that we don’t torture one of the reasons that America is worth protecting
     4. Can produce bad intelligence (McCain)
     5. Same results may have been achieved without using techniques (Ali Sufan)
        1. McCain says that Panetta (CIA Director) told him that al-Qaeda courier that led U.S. to bin Laden was a detainee that reportedly was not tortured
  3. *US v. Ghailani*
     1. **Facts**: defendant moved to dismiss the case on ground that what he said elicited by torture enough that he is the fruit of the torture and the case should be dismissed
     2. **Holding**: defendant himself not suppressible fruit
  4. *Ghailani II*
     1. **Evidence**: witness testimony from KSM attained by torture
     2. **Holding**: gov’t did not prove attenuatedness, would violate 5th amendment to use even if obtained for intelligence purposes

1. Rendition and State Secrets
   1. Glomar principle: when the government says even confirming or denying the existence of certain records could endanger national security (can look at series of responses and create a pattern)
      1. Specific surveillance or informants that you need to protect
      2. Location of some weapons system/defense capabilities
   2. *ACLU v. DOJ*
      1. Public reporting on drone strikes is so specific that the only way they could be reporting with such details is if the CIA itself is the source.
      2. Glomar instead of FOIA: Want to push has hard as possible to reveal as little as possible (maybe for precedent)
      3. **Holding**: Glomar response upheld
         1. ACLU Rationale
            1. The Gov’t has intentionally leaked info when suits them

Response: Leak with no acknowledgement might be better than nothing and if leak leads to no Glomar, might stop leaking. Allowing leak to defeat Glomar may also give too much power to leaker

Is there an in between? Official acknowledgment when Panettta statements on the record but not unnamed leak?

What about accepting Rizzo statement even though he was retired?

* + - 1. Gov’t Rationale
         1. Don’t want formal acknowledgement in cases like al-Awlaki even though could have just admitted it and withheld docs under FOIA exception 1 and 3
         2. Foreign diplomacy; acknowledgement might halt some oversees cooperation
    1. CIA impunity overseas
  1. Definition: 2 types of applications of state secrets doctrine
     1. **Totten: Total bar**; total bar on adjudication of claims premised on state secrets
        1. Has evolved into principle that where the subject matter of the lawsuit is a state secret, the action must be dismissed without reaching the question of evidence
     2. **Reynolds: Partial bar**; excludes privileged info from case and may result in dismissal
        1. Can be dismissed when apparent that the case cannot proceed without privileged evidence or that litigating the case to a judgment on merits would present an unacceptable risk of disclosing state secrets.
  2. *Mohamed v. Jeppesen Dataplan, Inc.*(9th Cir.)
     1. **Facts**: Ps claim Jeppesen provided flight planning and logistical support info to where the Ps were allegedly tortured and held
     2. **Claims**: forced disappearance and torture
     3. **Issue**: can state secrets operate as a complete bar to litigation?
     4. **Reynolds test**
        1. Have procedural requirements for invoking state secrets privilege been satisfied?
        2. Interdependent determination if information is privileged
        3. How should the matter proceed in light of the resulting privilege claim
           1. If can't prove prima facie without restricted evidence, case must be dismissed
     5. **Plaintiffs**: documents in the public record that showed the existence of program
     6. **Holding**: even if you could prove your case on public documents, allowing the case to go forward would still put state secrets at too much risk of exposure. Dismissed under Reynolds.
     7. **Competing interests:** separation of powers, state secrets v. forum for justice, liability insulation v. right to remedy
  3. Holder Declaration
     1. Subjects of surveillance and reasons why being surveilled can harm national security
     2. That is why we have Glomar: information the unauthorized disclosure of which reasonably could be expected to cause significant harm to the national defense or foreign relations of the US
  4. FOIA: When “information has been ‘officially acknowledged,’ its disclosure may be compelled even over an agency’s otherwise valid exemption claim.”
     1. “(1) the information requested must be as specific as the information previously released;
     2. (2) the information requested must match the information previously disclosed; and
     3. (3) the information requested must already have been made public through an official and documented disclosure.”
  5. Information can be properly classified under Executive Order 13526 if four requirements are met:
     1. (1) an original classification authority classifies the information;
     2. (2) the United States Government owns, produces, or controls the information;
     3. (3) the information falls within one or more of eight protected categories listed in section 1.4 of the Executive Order; and
     4. (4) the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in a specified level of damage to the national security, and the original classification authority is able to identify or describe the damage.

# Counter-Terrorism and Criminal Justice

1. Law Enforcement as an Instrument of Counter-Terrorism
   1. David Kris
      1. We are at war, goal is to win at any cost; to win the war, we need to use *all* available tools that are consistent with the law and our values, selecting in any case the tool that is best under the circumstances.
      2. Criminal justice one of these tools
      3. LE and Article III can:
         1. Disrupt plots (especially material support)
            1. Also FISA/e-surveillance
         2. Incapacitate terrorists: if on trial, not on the battlefield
         3. Source of intelligence (with restriction of *Miranda*)
            1. FISA/e-surveillance v. 4th Amendment surveillance (***Katz***)

Response: Interrogation hindered by Miranda

Response: Defendants usually waive and there is also a public safety exception (***Quarles***); also argue that lawyer presence may encourage revealing information

* + 1. Problems
       1. Assumes agencies share information and cooperate
       2. Decisions affect very future case, not just national-security related
       3. Assumes not a totally different category; not a tool or a weapon like a drone strike
       4. Acts as if criminal justice is results oriented not process oriented (which is what it is traditionally seen as)
       5. Sets bad precedent for other types of criminal cases – doesn’t set national security precedent, sets criminal precedent
  1. Criminal justice as a tool
     1. Pretextual prosecutions (*al-Marri*)
     2. Treason
     3. Material Support statutes
        1. 18 USC 2339A: providing material support to terrorists
           1. Knowing
           2. Better than conspiracy: don’t need agreement or overt act
           3. Can do with gov’t agent
           4. Everything but medical support and religious items
        2. 18 USC 2339B
           1. Designation as FTO
           2. Individual that gives support to FTO liable
           3. If you know the organization is an FTO: liable
           4. If you know they are the type of organization that would be likely to be a FTO: liable.
           5. Intent to provide material support in the intent of achieving the terrorist objectives of the FTO: not required.

|  |  |  |
| --- | --- | --- |
| **Statute** | **Case** | **Rule** |
| **FTO**  **Terrorism 22 USC § 2645f(d)(2) (2006)**  **Terrorist Activity: 8 USC § 1182(a)(3)(B)(iii) (2006)** | |  |
| **Material Support § 2339A (individual) or § 2339B (FTO)** | ***Humanitarian Law Project*** (SC 2010) | § 2339B “foreignness” allows extraterritorial application |
| **Extraterritorial Criminal Jurisdiction** | ***United States v. Bin Laden*** (S.D.N.Y. 2000) |  |
| **Classified Information Procedures Act (CIPA)** | ***United States v. Lee*** (D. New Mexico 2000) | NB: Consider application to Moussoui |
| ***United States v. Abu Ali*** (4th Cir. 2008)  Same 3 judges as ***al-Marri*** decision (p.1027, ¶ 4 references al-Marri disagreement) | Unclassified doc given to D, but classified given to jury. Abu Ali and lead trial counsel were unable to attend CIPA hearing where gov’t was discussing classified info.  Rule 1: Not disclosing same version to jury and Abu Ali was contrary to Confrontation Clause, but this error was harmless.  Rule 2: But allowing just 1 cleared attorney to attend the CIPA meeting was fine. |
| **S 1867/HR 6523 – National Defense Authorization Act** | | Current bi-partisan legis. Prohibits placing Gitmo detainees in criminal justice system and trying detainees already in US. Bars the us of funds to transfer Gitmo detainees into US and to use certain funds to transfer detainees to the custody or effective control of foreign countries unless specific criteria met   * Statement of admin policy = veto threat * Removes criminal justice as tool * Military custodial requirement opens unanswered questions (Padilla, al-Marri)   Policy – is this rebuilding the wall between criminal justice and national security from Truong? |

* 1. Member of AQAP: tools to use?
     1. Mere membership would make you vulnerable for detention/drone strikes
     2. *Humanitarian Law Project*🡪mere membership is not enough to make you culpable under 2339B
     3. Government’s ability to target for (classic) FISA surveillance
        1. USP versus non-USP: if you are a USP, the gov’t cannot rest its surveillance authority solely on protected 1st Amendment activity and therefore could not trigger FISA authority
        2. Non-USP: don’t get the same 1st Amendment protections
  2. National Defense Authorization: president threatens to veto
     1. Less flexibility for the Executive on detainee policy: removes the criminal justice system as a “tool” in detention.
     2. Military custodial requirement for detention within the U.S. opens up unanswered legal questions (*see e.g., Padilla*, *al-Marri*)
     3. Military v. criminal justice: want to keep all tools available
  3. What to charge?
     1. Material support
     2. Other
  4. When to charge?
     1. Gather intelligence
     2. Stop sooner and less risk of an attack
  5. Contexts
     1. **Political**
        1. Context: Political right has decided that affording potential terrorists access to criminal justice system is a privilege that should not be offered. Think that giving criminal prosecution undermines war framework
        2. Action:
           1. **HR 6523**

Congressional bill blocking funding to more GITMO detainees to U.S. for criminal trial

Signing Statement: Obama chastised Congress for limitation

* + - * 1. New bill proposed by Senate Armed Forces Committee on Nov 15, 2011 requiring detainees to be tried outside of the criminal justice system
    1. **Pragmatic**
       1. Idea: Art III criminal prosecution is one tool against terrorism and we should use all tools at our disposal. Get away from political conversations and speak pragmatically. (**Kris**)
          1. Choices

Detention (**CSRT or Habeas**)

Drones

Military Commissions

Article III Criminal Prosecution

1. Substantive Criminal Law
   1. **Types**
      1. **Pretext**
         1. Not nec charging w/terrorism but ordinary crimes to remove from battlefield
         2. Hezbollah charges re: cigarettes; what you see may not what is motivating the gov’t
      2. **Treason**
         1. Only criminal charge outlines in the Constitution but not utilized really (***Rahman***)
      3. **Material Support** (where the action is) – relied on heavily since it was rewritten in 2002
   2. *Holder v. Humanitarian Law Project*
      1. **Facts**: Relief organizations that support two FTOs (that engage in humanitarian AND terrorist work) challenging statute that forbids proving those FTOs with “training” in the form of legal training to petition the UN for relief, etc. Plaintiffs claim they only want to support lawful acts of designated FTOs
      2. **Claims and holdings**:
         1. Violates due process because these terms are impermissibly vague
            1. Williams: if a citizen of ordinary intelligence with fair notice doesn't know what it means doesn't comport with due process
            2. Fails: statutory terms clear here in application to P's proposed conduct
         2. Violate freedom of speech under 1st amendment
            1. No--just things NOT speech--material support
            2. Rationale: If you confer on an FTO knowledge of how to petition groups like the UN, these groups will gain legitimacy and be regarded as a politically viable group.
            3. Support is fungible (particularly when it is money) and therefore any support devoted to innocent endeavors by an FTO could be used (or enable other funds) to be used for the terrorist activities.
         3. Violated first amendment freedom of association
            1. Congress allowed to forbid training, even if in legal techniques
            2. Relief could include monetary aid which then is used for bad things
            3. Not to say all future claims won't show statute doesn't pass1st muster, but this doesn't
      3. **Dissent**
         1. Does prohibiting the aforementioned activities serve gov't interest in combating terrorism? Probably not
         2. Serious constitutional doubt of statute: prohibiting activities that should by OK under the 1st amendment
   3. *United States v. Bin Laden*
      1. Five ways law can reach outside territory:
         1. Objective territorial principle
            1. If conduct outside teritory but effect within
         2. Protective principle
            1. If conduct directed at its own state security
         3. Nationality principle
            1. With respect to its own nationals outside its state
         4. Passive personality principle
            1. If victim of act its national
         5. Universality principle
            1. Recognized by community of nations as universal concern
      2. **Issue 1**: Jurisdiction for crimes committed outside the US?
         1. **Holding 1**:
            1. It is well established that Congress has the power to regulate conduct performed outside the US.
            2. Criminal statutes that protect the right of Government to defend itself are excepted from normal requirements that extraterritorial coverage should be found not to apply extraterritorially only if the statute itself or legislative history indicates there is no extraterritorial coverage.
            3. Under IL, 5 principles of jurisdiction to regulate extraterritorial conduct:

Objective principle: Object if conduct is to be within territory

Protective principle: Conduct by non-nationals against security of state.

Nationality principle: Can regulate conduct of all nationals

Passive personality principle: Victim of the act was a national

Universality principle: acts of universal concern. Genocide, piracy, and some terrorism.

* + - * 1. Result: Congress intended the reach of the statute to apply extraterritorially regardless of nationality of perpetrator.
    1. **Issue 2**: Are there Constitutional limits on additional crimes Congress can define outside of the US?
       1. **Holding 2**: Constitution allows Congress to define law of nations. Additionally SCOTUS says that with regards to foreign affairs legislation, external soveriengty does not depend on the Constitution.
    2. **Issue 3**: The exercise of jurisdiction here is not reasonable under international law
       1. **Holding 3**: Universality principle extends beyond one’s own nationals and terrorism is increasingly seen as a universal crime.
  1. Extraterritoriality
     1. Congress has the constitutional authority to extend the US criminal code extraterritorially; limits are due process, where Congress has explicitly said so AND where the ideal of “foreignness” is built into the statute by its nature.
     2. International law
  2. Law enforcement also encompasses lesser mechanisms that may not result in bringing to bear the full range of criminal procedures.
  3. Hypo: intelligence surveillance of target Rascoff yields information suggesting Rascoff may be of concern to national security, officer knocks on Rascoff’s door and informing him that law enforcement is aware of Rascoff’s potentially problematic activities and associations.
     1. This is not a formal encounter linked to a pending prosecution and so forth; so what is it?
        1. Veiled threat?
        2. Preventive action?
        3. ‘Chilling’ of activity that might be legally protected, strictly speaking?
     2. 1st-amendment-protected activity versus building bomb
     3. Official act versus off duty
     4. What is the cognizable legal harm at this point?
     5. Control of information versus secrecy

1. Criminal Process and Secrecy
   1. CIPA
      1. **Greymailing**: gov’t is prosecuting an individual; and the defendant says that in order to properly defend himself he must disclose classified information
      2. Applies only to criminal trials
      3. Procedure:
         1. Gives the judge a role in managing/striking the right balance between giving the jury a substitute of the information needed to make the difference without exposure of classified information
            1. If substitute not adequate, Gov’t must chose to either:
            2. Allow the classified information into the trial; OR
            3. Drop the charge/case.
         2. Accelerates the timeline for consideration of these issues to come up in pre-trial proceedings
   2. *US v. Moussaoui*
      1. **Claim**: in order to mount his defense he needs to be able to depose KSM who will then be able to show that he was not in fact an instrumental planner of 9/11.
      2. **Holding**: government's rightful exercise of its prerogative to protect national security interests by refusing to produce the witnesses warranted use of written summaries of the witness' statements made over the course of several months in lieu of their deposition testimony.
   3. *United States v. Lee*
      1. **Issue**: does the Classified Information Procedures Act violate privilege against self-incrimination, the 6th amendment right to confront, and due process?
      2. **Holding**: No, just general disclosure of what classified info expect to use at trial, not what will cross on, and not one sided burden on defense.
         1. Issue 1: Does CIPA violate 5th Amendment right against self-incrimination
            1. Holding 1: CIPA does not require D to specify whether or not he will testify or the content of testimony; only a general disclosure as to what classified info might be implicated. Other requirements, like the insanity defense, are similar
         2. Issue 2: Does CIPA violate 6th Amendment confrontation clause by requiring pre-trial disclosure of what questions will be made to government witnesses in regards to classified info.
            1. Holding 2: CC does not guarantee right to undiminished surprise with regard to cross-examination of government witness.
         3. Issue 3: Does CIPA violate DP, one-sided burden on DP to disclose classified info
            1. Holding 3: CIPA is not one-sided. CIPA requires gov’t to disclose and give notice as well.
   4. *United State v. Abu Ali*
      1. **Facts**: D affiliated with AQ in Saudi Arabia
      2. **Holding**: District court violation of defendant's Sixth Amendment right to confront evidence against him by submitting unredacted versions of classified documents, instead of redacted substitute versions, to jury as evidence at trial, was harmless beyond reasonable doubt.
      3. Redaction of information itself is not a violation of CIPA; but when the prosecution only provides the redacted version to the defense, but the jury was given access to the unredacted version. (wrong, but harmless error)

# Counter-Terrorism by Indirection

1. The Financial Tools of Counter-Terrorism
   1. Functions of Treasury sanctions
      1. Prevention (freezing funds)
      2. Deterrence
      3. Exert enough pressure to bankrupt
      4. Valuable intelligence
      5. Counter: can probably survive without funds/limited funds; ideology still exists
   2. *Kindhearts v. Geithner*
      1. **Facts:** Alleged material support to Hamas (SDGT), charged under Trading with the Enemy Act, assets frozen and property seized while investigation pending that might result in SDGT designation.
      2. **Issue:** Is asset-blocking a seizure subject to the 4th amendment?
         1. No indication that there was sufficient Fourth Amendment protection for the *ongoing* *seizure* *of the funds*, *pending investigation*.
      3. **Law**
         1. IEEPA – empowers executive to declare national emergencies that may require, among other interventions, financial regulation.
         2. E.O. 13,224 – the executive exercise of this authority to declare an emergency, and charging Treasury Secretary with sanctioning individuals and organizations that support terrorism.
         3. OFAC, within Treasury, is charged with designating and regulating SDGTs.
         4. Patriot Act: executive can block assets pending investigation
      4. **Holding**: the fact that other courts dealing with related issues and similar cases have *not* grappled directly with the Fourth Amendment issues – *i.e.* the potential applicability of the warrant requirement to pre-designation seizures – does not mean that the Fourth Amendment doesn’t apply in these cases.
         1. Rejects gov’t argument that at highest Youngstown power: neither branch has the authority to circumvent the constitutional mandate of the Fourth Amendment (and *Keith* didn’t provide broad national security exception either)
         2. Question of *authority* is not sufficient to answer the question of *legality*. (like *Hamdi*)
      5. Not special needs: traditional special needs cases are based on non-individuated suspicion, outside the bounds of traditional law enforcement goals; here, individualized suspicion of Kindhearts.
      6. **Test**:
         1. Is authority present?
            1. **IEEPA**: International Emergency Economic Powers Act (IEEPA): Congress gives the President the power to block and freeze assets

IEEPA was amended by the Patriot Act, which allowed the president to confiscate the property of “any foreign person, foreign organization, or foreign country that he determines has planned, authorized, aided or engaged in hostilities or attacks against the US”

* + - * 1. **EO 13,224** (Bush, 2001): Enacting IEEPA and ICSFT, giving the treasury power to designate additional Specially Designated Global Terrorist Group (SDGT)
      1. Is authority being used properly (is there due process)?
         1. NO, no PC, no warrant, yet first time challenge of this nature is brought (mostly foreign assets so no 4th amendment – Verdugo)

4th Amendment warrant exception? No

No special need

Yes outside of normal law enforcement but suspicion too particularized

No applicable Keith exception

Keith possible exception is JUST foreign intelligence, this is not.

* + - 1. If this does apply to a category of people, is the person at issue a member of it?
  1. *Kadi v. Council of the European Union* (intervention)
     1. **Facts**: Saudi Arabian resident with his financial resources and funds located in Europe accused of supporting terrorism, challenging lawfulness of regulation that freezes his financial resources
     2. **Law**: security council regulation asking states to freeze funds associated with bin Laden and AQ
     3. **Claim**: violation of his rights of legal due process – he has no way to challenge his designation as a supporter of terrorism.
     4. **Issue:** may the determinations of the UN Security Council be reviewed the ‘municipal’ level, by the European Community?
     5. **Holding:** Yes, can review decisions, and yes, Kadi was deprived of property without due process.
     6. Reminiscent of *Boumediene*, had there been a genuine and effective mechanism of judicial control by an independent tribunal at the level of the United Nations, then this might have released the Community from the obligation to provide for judicial control of implementing measures that apply within the Community legal order. However, no such mechanism currently exists.

1. Law of Counter-Radicalization
   1. Spectrum
      1. Counter-radicalization
      2. Countering (MacWade, airports)
      3. OFAC
      4. Criminal justice; material support
      5. Military commissions
      6. Law of war detention
      7. Drones
   2. Soft power
   3. De-radicalization: Can the US gov’t, consistent with the Establishment Clause 1st Amendment, create overseas counter-radicalization programs?
      1. Individuals in the custody of the state reformed through official programs (Saudi (give-out edited Qur’ans), considered in Yemen).
      2. Question comes down to whether the *Verdugo* precedent carries implications for the extension of the 1st Amendment overseas and if 1st amendment blocks this domestically.
   4. Counter-radicalization: Strategic outreach oversees and in US addressing ideology.
      1. US much more involved in this domestically over the past few years
   5. What it is doing: strategic outreach and communication with Muslims overseas
      1. Engaging in Muslim communities and trying to engage leadership and community organization in this counter-radicalization
         1. Picking out preferred organizations that espouse a form of Islam the USG likes
      2. Entrenchment: changes within the gov’t to accommodate these counter-rad goals
      3. Staking out positions very publicly on aspects of Islam (what is jihad)
      4. Empowering those close to the line, but problematic when thi shifts to intelligence gathering
   6. Preventing radicalization
      1. Challenging extremist ideas
      2. Intervening to stop joining groups
      3. While preserving freedom of speech
      4. Proscription: curtail radicalizing activity
      5. Offenses for literature intended to stir up hatred
   7. Problems
      1. Counterproductive
         1. Can do more harm. Do we really want Inglis leading this??
      2. Lack of shared values
         1. Want to talk to people close to line; dealing with a group with a lot of problematic values; gov’t spending resources talking to them
      3. Racial Profiling
         1. Assumes a community is uniquely vulnerable to radicalization and that the gov’t needs to inoculate them
         2. Like RP in intel context – where gov’t focusing resources
      4. Shaping understanding and internal definitions of religion
         1. “Islam is a religion of peace”
         2. Boost some voices over others

**National Security beyond the State**

1. Controlling National Security Information
   1. Espionage Act: § 793 Gathering, Transmitting, or Losing Defense Information **(applies to info transmitted in oral as well as tangible form – *Rosen*; applied to those with official positions in the gov’t as well as outside of the gov’t – *Rosen*)**
      1. **(a):** whoever, for the **purpose of obtaining info respecting the national defense with intent or reason to believe** that the info is to be usedto the injury of the US or the advantage of any foreign nation, obtains info concerning [any defense facility or property]
      2. **(b):** whoever, for the above purpose and intent copies, takes, makes or obtains or attempts to copy, make or obtain any sketch, photo, photo negative, blueprint, plan, map, model, instrument, etc
      3. **(c):** whoever, for purpose above, receives or attempts to receive or obtain from any person or from any source, any document connected with national defense, knowing or having reason to believe, at the time he receives or obtains, that it has been or will be taken, made, etc, contrary to the provisions in this chapter.
      4. **(d):** whoever, lawfully having possession of, access, to control over, or being entrusted with any document or info relating to national defense which info the possessor has reason to believe could be used to injure US or advantage foreign nations, **willfully communicates, delivers, transmits, or causes to be communicated, etc, to any person not entitled to receive it, or willfully retains it and fails to deliver it on demand to a US employee/officer.**
      5. **(e):** same as above except provides punishment for one having “unauthorized” possession of sensitive materials
      6. **(f):** Shall be fined, imprisoned or both.
   2. § 794 Gathering or Delivering Defense Info to Aid Foreign Gov’t
   3. § 798 Disclosure of Classified Info
   4. Public Money, Property or Records, 18 U.S.C. §641 (2006)
   5. *US v. Rosen* (ED VA)
      1. **Facts:** Two employees for pro-Israel lobby (AIPAC) in DC are being prosecuted for the violations of the espionage act, received confidential information from a US government official and then passed the information along to Israeli officials and the media (but private citizens, not gov’t officials)
      2. **Charges:** conspiracy to transmit information related to national defense to those not entitled to receive it under the Espionage Act § 793(g) – conspiracy;
      3. **Holding**: Espionage Act upheld as constitutional as applied to non-officials transmitting oral information that they KNOW is potentially harmful to U.S.
      4. Defendants raise 3 constitutional challenges:
         1. Statute is unconstitutionally vague under Due Process Clause of the Fifth Amendment
         2. Abridges their First Amendment rights to free speech and to petition the government;
            1. Court: First Amendment rights are not limitless: national security is really important and must be balanced against the first amendment claim
         3. Abridges the First Amendment rights of others because facially overly broad
            1. After Rosen, unclear if media may be on the hook
      5. **Test**:
         1. First, an assessment of the competing societal interests
            1. Defendants: Significant, implicate core values 1st amendment designed to protect
            2. Gov’t: Not just gov’t secrets but NDI, no matter value of an informed public, may be restricted in service of nation’s security
         2. Second, violation depends on whether narrowly tailored to instances in which need for secrecy is legitimate
            1. Relationship of gov’t to person whose First Amendment rights are implicated:

Those w/official gov’t positions and those outside the gov’t

* + - * 1. Must be info person KNOWS, if disclosed, is potentially harmful to the U.S.
    1. Alternatively, D argues statute applies only to transmission of tangible things
       1. REJECTS – applies to info in oral form
  1. *NYT v. US*
     1. **Facts**: gov’t wants to stop NYT from publishing history of US Decision-Making Process on Vietnam
     2. **Holding**: Prior restraints of expression has presumption against constitutional validity; burden for enjoining publication is very high, and gov't has not met that burden
        1. **When this might be met**: immediate or ongoing secret mission
     3. **Gov't argument**: executive power to protect the nation from presidential power over foreign affairs and C-i-C power
        1. No: this would destroy 1st amendment and would wipe out security gov't hopes to keep secure
     4. **Black Concurrence**: violates 1st amendment; duty of press to watch gov't, not be censored by it
     5. **Brennan concurrence**: First amendment tolerates absolutely no prior judicial restraints
        1. Whereabouts of ship at sea🡪immediate and irreparable harm
     6. **Stewart concurrence**: this is the check on executive power in this realm
     7. **White concurrence**: gov't has not satisfied heavy burden, at least in absence of express congressional consent
     8. **Marshall concurrence**: constitution did not provide for gov't by injunction
     9. **Burger dissent**: exceptions to the First, which might have been flushed out if this had gone through full criminal trial
     10. **Harlan dissent**: separation of powers says judiciary should review to make sure in the realm of the executive and would in fact irreparably injure national security; not for judiciary to go beyond this inquiry

1. Private Enforcement
   1. Antiterrorism Act of 1990 – 18 U.S.C. § 2333
      1. 2333(a) authorizes damages against people who kill Americans through “international terrorism”
   2. How do we sue peripheral supporters? – Two Approaches - *Boim III*
      1. Posner Approach
         1. Statutory silence on secondary liability means must be primary liability
         2. Chain of statute linking:
            1. 2333(1) defines “int’l terrorism” as:

“Violent acts” OR “acts dangerous to human life”; AND

giving money = dangerous to human life

In violation of U.S. criminal law

* + - * 1. Violation = 2339(A) – material support statute

Through material support of a “terrorist crime”

E.g. 2332 – killing any American outside U.S.

* + - 1. Primary liability through character of secondary liability
         1. **Scienter**? – treble damages 🡪 some intentional misconduct

**Knowing or recklessness (deliberate indifference)** that org engages in int’l terrorism

* + - * 1. **Causation** – very relaxed standard:

Fungibility of money 🡪 supporting charitable activities doesn’t work

Social welfare reinforces terrorist activities

* + 1. Rovner approach (and U.S. gov’t)
       1. Find secondary liability of aiding & abetting
       2. Higher standard of **intent** & **closer causal nexus** required
          1. RST 876

Tortious act in concert w/ another pursuant to common design

Give substantial assistance or encouragement the helps accomplish tortious result

* 1. *Boim v. Holy Land Foundation for Relief and Development*
     1. **Facts**: Kid killed by members of Hamas; sued foundations allegedly supporting Hamas
     2. **Law**: 2333: statute that gives rise to civil liability for material support/sponsorship
        1. To give money to an organization that commits terrorist acts is not intentional misconduct unless one either knows that the organization engages in such acts or is deliberately indifferent to whether it does or not, meaning that one knows there is a substantial probability that the organization engages in terrorism but one does not care.
        2. Definitions: international terrorism includes act dangerous to human life
        3. Like giving a loaded gun to a child: itself not violent, but with risk it entails (funding terrorism)
     3. Standard of causation?
        1. Significantly enhancing the risk of terrorist acts
        2. if you give money to an organization that you know to be engaged in terrorism, the fact that you earmark it for the organization’s nonterrorist activities does not get you off the liability hook
        3. There can be no tort liability without a causal link between the defendant’s act and the plaintiff’s injury
  2. *Gates v. Syrian Arab Republic*
     1. Can the Syrian Arab Republic be held liable for money damages to the families of the two men pursuant to the Foreign Sovereign Immunities Act?
     2. Jurisdiction over Syria proper under FSIA
     3. Rewarded estates with humongous amounts for pain and suffering and punitive damages (200,000,000 total)
  3. FSIA (Foreign Sovereign Immunity Act)
     1. Foreign governments are generally immune
     2. Exceptions: e.g., Market participant; terrorism exception (in play here for Syria)
     3. Terrorism Exception 
        1. FSIA grants an immunity for state sponsors of terrorism
        2. Explicit federal cause of action
        3. Only foreign governments who have been officially labeled as state sponsors of terrorism are eligible for the terrorism waiver under the FSIA
  4. Alien Tort Statute – 28 U.S.C. 1350
     1. Gives original jdx in federal court for actions brought by **aliens for** violations of “law of nations” or U.S. treaty
        1. SCOTUS reads “law of nations” to include torts from 189 and those resting on “int’l norms accepted around world and defined w/ specificity”
           1. Punts on what “int’l norms” are
  5. Torture Victim Prevention Act – 28 U.S.C. 1350
     1. Difficult to apply to terrorism - *In re 9/11*
     2. Only applies to individuals, not orgs
     3. And only to those acting **under color of law**

# Jurisprudence

1. Five ideas for what Law is in national security
   1. **Oppositional Model**: law is a check on national security
      1. More law = less security?
      2. Right to be free from surveillance and right to test gov’t arguments in front of neutral decisionmaker
      3. On other hand, AUMF and FAA are laws that legitimize security
      4. Proceduralizing rights (challenging determinations)
   2. **Integrated Approach**: regards the project of national security to be much more closely intertwined with the project of law.
      1. Law helps make CT better
      2. Oversight keeps intel community working towards good policy
      3. Counter-rad
      4. Law enforcement as an instrument of war
   3. **Institutions**: can’t really think about these issues divorced from the institutions
      1. CSRTs and courts: how each institution offers much different rights, procedures and protections
      2. NGOs: ACLU’s role in shaping these issues; what it means to “win” and “lose” in the courts (in the long run)
      3. Congress
      4. Media
      5. Culture: the culture of the institutions of national security. (particularly, Ingles statement that law is central to what the NSA does). FISC may not be only mechanism of oversight if law part of culture
      6. Inspector generals
   4. **Law is the Goal of National Security**: opposite of the lawfare model
      1. National security in the service of enriching and protecting the rule of law: we are in this fight for a reason; we are in the game to not just to protect from attacks but to protect the rule of law.
      2. Justice: the idea of justice in relation to national security
         1. Think: Obama declaring that justice had been achieved with the killing of Bin Laden.
         2. Juxtapose this against the David Kris criminal justice model
            1. Incapacitation (Ghailani)
            2. Our courts are achieving national security
            3. Our troops are achieving justice.
   5. **Law and Sovereignty:** two views
      1. There is no gap between the rule of law and sovereignty of the state.
         1. Rule of law occupies the entirety of the state’s sovereignty
      2. Rule of law does not exhaust the limits of the state’s sovereignty
         1. So there are things that the state does (or has to do) that is beyond the reach of law.
         2. Example: covert action. (maybe); torture (maybe according to Paul Kahn)
      3. President above the law v. president shapes the law