**Law of Intelligence**

1. Sources of Authority
   1. Constitution
      1. Fourth Amendment
      2. Fourteenth Amendment
      3. Establishment Clause
      4. Article I
      5. Article II
      6. Article III
   2. Executive
      1. National Security Act (1947)
      2. Intelligence Reform and Terrorism Prevention Act (2004)
      3. Agency Charters
         1. DNI: Access to all intel collected by any gov't department (federal) except as otherwise provided by law
         2. CIA: authority to collect intelligence, but no police, subpoena, or LE powers or internal security functions
         3. NSC: Integrate domestic, foreign, and military functions
      4. AUMF (2001)
      5. Article II powers
         1. Take Care Clause
         2. Vesting Clause
         3. Commander in Chief Clause
      6. E.O. 12,333
         1. Authority to use “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”
      7. FISA/FAA
   3. Legislative
      1. Article I
      2. Criminal Statutes
      3. AUMF
      4. FISA/FAA
   4. Judicial
      1. Article III
      2. Marbury and Judicial Review
      3. Youngstown Review
   5. International
      1. Law of war
      2. Geneva Conventions
      3. UN Human Rights law
      4. Sovereignty
2. Types of Intelligence
   1. Where is it being done?
      1. Domestic: FBI
      2. International: CIA, NSA
   2. What are they doing?
      1. HUMINT
         1. Covert/illegal (breaking domestic law of other nations)
         2. Overt/legal
      2. OSINT
      3. SIGNIT: anything that passes through a wire (mostly NSA)
      4. Covert actions
      5. Targeted killings
3. Mechanisms
   1. Criminal trial
   2. Military Commissions
   3. CSRTs
4. Due Process

**Surveillance**

1. First: does something authorize this?
   1. Generally, authority to surveil for national security interests: Commander in Chief
   2. For FISA: Article II (TSP)🡪Article III (brief approval by the FISC)🡪Article I (FAA)
   3. Youngstown: 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 with 4th Amendment limit.
   4. TSP
   5. Patriot Act: authorizes surveillance any place activities may be occuring
2. How to regulate the authority
   1. Title III: Enacted by Congress to regulate domestic electronic surveillance
   2. FISA: enacted by Congress to empower executive surveillance in the realm of foreign intelligence conforms to the 4th Amendment
      1. Electronic
      2. Physical
      3. Emergency: 72 hours pre-warrant
   3. Is the authority constitutional?
3. Due Process
   1. Is it on US soil?
      1. Yes: see below
      2. No:
         1. US Person:
            1. Reasonableness (*East Africa*)
         2. Non-US Person: No 4th amendment protection (*Verdugo-Urquidez*)
            1. Practical consideration: how to issue a warrant?
         3. “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
   2. On US soil: Fourth Amendment protects people against unreasonable searches and seizures
      1. Is there probable cause?
         1. Criminal:
         2. FISA: PC that the target is a FP or agent of a FP
      2. If not, is there a special need?
         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
      3. Is it a physical search? Fourth Amendment governs (*Ehrlichman*)
      4. Who is the person?
         1. US Person: US person on US soil, 4th amendment governs (*Keith*)
         2. **Exceptions:**
            1. Agent of a foreign power under FISA definition?
            2. US Person, but agents of foreign power? Because knowingly engaging in intelligence gathering for a foreign power (*Rosen*)
            3. Unconnected to the US
            4. US Person or Non-US Person doing qualifying activities under the statute (terrorism or sabotage)
      5. Is it “electronic surveillance” under FISA?
         1. Exception to 4th amendment’s reasonableness requirement
      6. Wholesale or retail?
   3. Purpose
      1. Criminal Investigation
      2. Intelligence Collection (significant purpose)
      3. “Nexus” to foreign intelligence (*Sealed Case* and FAA)
         1. If no nexus, Title III or 4th (but try to get to a nexus).
      4. Pretextual? Okay, so long as not clearly pretextual.
   4. Are gov’t and individual privacy interests being balanced? (*Directives*)
      1. Gov’t interest: national security (paramount)
      2. Individual interest: interest in privacy offset by targeting (narrowest set of people), minimization (interceptions relevant to national security), internal checks (AG/DNI oversight as neutral magistrate)
      3. Similar to special needs balancing test
   5. Neutral magistrate?
      1. FISA court
      2. AG/DNI
   6. FISA: Order SHALL be issued if: 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, approved by AG, minimization procedures in place (good faith test), not clearly erroneous
      1. For electronic surveillance: facilities where used is being used or about to be used by a foreign power/agent
      2. Physical searches: premise owned, used, possessed or in transit to or from foreign power/agent
   7. Is it third party information?
      1. Pen registers, “envelope” information? No warrant necessary.
   8. Is there standing to challenge?
      1. Injury in fact?
         1. Concrete AND
         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. Other arguments
   1. Quick turnaround: Intelligence demands quick action by the executive and warrant requirements will delay these efforts (*Keith*; loser)
   2. Secrecy concerns: risk of leaks by court employees and the need to maintain the utmost level of secrecy (*Keith*; loser)
   3. Institutional competency/expertise: complex, technical nature of intelligence processes that touch on matters of diplomacy/foreign affairs makes intelligence gathering outside the competency of a court to evaluate (*Keith*; loser)
   4. Separation of Powers: President responsible for foreign affairs and foreign intelligence surveillance (*Truong*)
   5. Paramount Executive interest: (*Truong*)
5. Other considerations
   1. Information gathering during the “spying” phase, can then be bootstrapped or leveraged to make a Title III warrant (*Truong*)
   2. Is it at the border? Can be more intrusive (*Arnold*)
      1. Reasonable suspicion is not needed for customs officials to search a laptop or other personal electronic storage devices at the border.

**Detention**

1. Is there authority to detain?
   1. Laws of war
      1. Cannot be applied to civilians (*Milligan*, Scalia in *Hamdi*)
   2. AUMF
      1. Does the person fit under
         1. Part 1 or
            1. Planned 9/11

Al-Qaeda

Taliban

* + - 1. Part 2
         1. Supported

Al-awlaki

* 1. NDA (Souter concurrence in Hamdi)
     1. Need an explicit act of Congress to authorize a detention regime (*Hamdi*)
     2. AUMF qualifies as this act, but has limits
        1. Detention part of war and war powers
        2. Force to prevent future acts (mission of AUMF)
     3. Argument AUMF doesn’t apply:
        1. All necessary and appropriate force--nations or persons planned, authorized, or aided, or harbored
        2. No longer in state of war
        3. 10 years old
        4. Not specific: not detention, military focus
        5. Limited to who it applies to
        6. Applies to particular acts re: 9/11
  2. Scalia: if US Person, cannot detain unless you are going to prosecute or suspend

1. Does the authority apply?
   1. Youngstown
   2. Lawfulness
   3. Where
   4. When
   5. US Person?
   6. Is it on US soil?
      1. Yes: see below
      2. No:
         1. US Person: Constitutional Protections still apply, though may look different (right to trial, but military may suffice) (*Reid*)
         2. On battlefield:
         3. Outside the US, off battlefield
   7. What is their status?
      1. Lawful/unlawful combatant
         1. AQ by definition unlawful b/c not a state and categorically not abiding by laws of war – UN conventions
         2. Taliban routinely fights in contravention
      2. On/off the battlefield
         1. On
            1. Hamdi (Afghanistan)
         2. Off
            1. Padilla (Chicago airport)
            2. Al-Marri (fraud, in US, trasfered to criminal justice system)
      3. Timing
         1. Beginning
            1. Quirin
            2. Hamdi
         2. End
            1. Milligan
            2. Boumediene, Kennedy flip
      4. USP – NOT a consideration post-***Quirin***
   8. Was the authority wielded in a permissible way or does it conflict with a constitutional right, here due process of law?
      1. How was this person in particular determined to fit into the detainable category?
      2. MCA
      3. DTA
2. Due Process
   1. Where the alien is
      1. In the US: some rights
         1. Constitutional: 4th amendment, seizure
         2. Legal alien: entitled to DP, risk of erroneous deprivation greater than if captured outside (*al Marri*)
      2. GTMO: some rights
      3. Outside the US: no constitutional rights
         1. Bahgram: NOT available to non-USPs outside the US not on GITMO??? (al-Maqalah)
         2. What degree of control does the US have over a foreign territory and does it amount to sovereignty
            1. Eisentrager
         3. Was there process below?
            1. Eisentrager (process below clear b/c Jackson prosecuted)
            2. Kennedy seems skeptical that “process” is sufficient (think CSRT)

Also keep in mind Boumediene/al-Maqalah

* 1. Did they commit the offense on US soil, even if overseas?
     1. Protected by the Bill of Rights and due trial in Trial III court (*Reid*)
        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*)
  2. Were they captured on the battlefield?
     1. 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
     2. **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.
     3. **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
     4. Due Process is a “sorting mechanism” to make sure that the detained person is in fact an enemy combatant
        1. If enemy combatant🡪can be detained indefinitely
        2. If challenge is successful🡪must they send back or can they still detain?
        3. Been in an AQ guesthouse or training camp? Can be rightly detained properly under the AUMF because you are a member of AQ.
     5. Matthews balancing test: privacy interest of Hamdi v. gov't interest in waging war
        1. Hamdi: risk of erroneous deprivation and value of safeguards = some safeguards, but not as high as what Hamdi wanted--still need to give something = middle ground (notice of factual basis for classification and fair opportunity to rebut before neutral decisionmaker)
  3. What is going on in the world?
     1. Not dispositive, but may make a difference in how the court rationalizes
     2. Beginning, middle, or end of war (if war at all)
     3. *Milligan*: Are the courts functioning properly?
     4. Quirin
  4. Can they appeal their status?
     1. US Person
     2. Non-US Person
     3. Habeas
  5. What to pick?
     1. **CSRTs**: “package for rights” that is constitutionally sufficient to be substituted for Habeas right (*Boumediene*)
        1. **Appeal:** DC Circuit Court of Appeals
     2. **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
     3. **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.
     4. **Article III criminal trials** (*Ghailani*)
     5. **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*)

**Interrogation**

1. Authority
   1. C-i-C
2. Restrictions
   1. Convention Against torture
      1. US reservations
   2. Torture Act
   3. War Crimes Act (Geneva Conventions🡪US law)
   4. DTA
   5. Army Field Manual
   6. MCA
   7. Yoo/Bybee
3. Due Process
4. Other considerations
   1. Rendition: may be prohibited to countries that torture?
   2. Extraterritorially exception closed; so if torture, extra-legally, rather than under law
5. State of torture today
   1. Exec order: army field manual governs all agencies
   2. Geneva conventions apply, theoretically liable under war crimes
   3. Loophole with reservations
   4. McCain tried to fill
   5. Bush signing statement
   6. Did Obama moot the issue? Self-imposed restriction
   7. Detainees can detain for a while, FISA emergency exception
   8. Certain arenas the law can't quite touch

**Targeted Killing (Drones)**

1. Authority
   1. International Legal Authority
      1. State of Armed Conflict
      2. Individual as Combatant
      3. Sovereignty
      4. Proportionality
      5. Necessity
   2. Domestic Legal Authority
      1. Article II Powers
         1. Commander in Chief
         2. He shall take Care that the Laws be faithfully executed
      2. AUMF
      3. Youngstown
         1. **Zone I:** Individual/organization clearly covered by AUMF; Congressional acquiescence through implied authorization
         2. **Zone II:** Individual possibly covered by AUMF, but unclear, or because it has been 10 years since AUMF (al-Awlaki)
         3. **Zone III:** If not authorized by AUMF; because there are criminal statutes targeting the problem; experessio unio (AUMF listed some individuals and not others)
      4. 12,333 forbids assassinations
      5. Laws of war
      6. 1989 Parks memo: can in times or war or peace if immediate threat to the US
      7. 1998 Clinton memo?
2. Due Process
   1. Are they a US Person?
   2. Are they located in the US or abroad?
      1. Executive making this decision—are they using an internal Matthews test?
   3. Does anyone have standing to get an injunction on their behalf?
   4. Does the state secrets doctrine protect the government from responding?
   5. Executive’s argument (Koh): intelligence gathering, analysis, and targeting decision are a form of internal due process
      1. Problem: no oversight or checks

**Criminal Law**

1. Authority
   1. Legislative: Material support statutes
   2. FISA: to gather information (that can later be used in prosecution)
2. Is there authority
   1. Kadi
   2. Kindhearts
      1. NOT Youngstown category 1: EO 13,224; IEEPA
   3. Counter-radicalization
   4. Espionage Act
3. Is it wielded permissibly or does it violate a basic constitutional right
   1. Kadi
   2. Kindhearts
      1. Violation of 4th amendment
         1. No special need or Keith exception
   3. Counter-radicalization
      1. Unanswered question: is there a 1st amendment violation? (courts will likely not intervene)
         1. Issue abroad (Does Verdugo mean no 1st A?)
         2. Domestically

**Controlling Access and Information**

**Civil Law**

**FOIA Request**

1. When “information has been ‘officially acknowledged,’ its disclosure may be compelled even over an agency’s otherwise valid exemption claim.”
   1. The information requested must be as specific as the information previously released;
   2. The information requested must match the information previously disclosed; AND
   3. The information requested must already have been made public through an official and documented disclosure.”

**Potential Exam Questions**

1. The FAA is up for renewal in Congress. Should it be renewed, repealed, or edited?
   1. Constitutionality of FISA and the TSP
      1. 4th amendment
   2. Youngstown
2. Where is the line between intelligence and intervention?
   1. Law of intelligence v. the law of interventions implicates different constitutional provisions, different institutions, different statutory laws, and different issues
   2. Domestic intelligence as exercised by the state on its own citizens is problematic, though less problematic while we are “at war”
   3. Argument for domestic intelligence collection: the greater the intelligence collection, the more likely you are to have a successful intervention or not need to intervene
   4. Some counter-terrorism actions are both intelligence and intervention (detention is both intervention-to bring someone off the battlefield-and intelligence-detain them for interrogation to gain intelligence)
3. Relationship between law and strategy: does the law justify the strategy, or does the strategy push the law?
   1. How is this influence by the evolution of the threat?
   2. How do definitions change?
4. 2012 Election: new president. What can he learn from Bush and Obama’s strategies in the war on terror?
   1. Similarities
   2. Differences
   3. Sources of authority
   4. Rationales for how to use those sources of authority
      1. Time of war
      2. Under attack
      3. Congressional authorization (Youngstown)
   5. Continuity between administrations
   6. Separation of Powers
   7. Oversight
5. Role of the judiciary in checking executive (and legislative?) power in this arena
   1. Where do they have authority?
   2. Where to they pick battles? Why do they choose to pick battles here?
   3. How law can support what needs to be done
   4. Can speak to if rights are being violated--courts can go to the merits
   5. Courts could be a way for requiring transparency and accountability
   6. If left up to democratic process, people should know
   7. By trying to meddle when they hadn't, legitimized (Levinson approach)
6. Using law to justify decisions versus operating outside of law
7. Law and civil liberties
   1. Procedure versus substance
   2. “Procedural safeguard” protection for civil liberties versus something fundamentally substantive--still ability to have indefinite detention!
   3. Is procedure the best check here?
   4. Hamdi: court found it sufficed to just outline a few DP requirements and refused the ultimate substantive question: how do we feel about indefinite detention?
   5. Kindhearts: detention of person versus their stuff, but constitutional right to property is a fundamental right
   6. FAA: same tension between civil liberties, protection from government intrusion, and security (seen as tradeoff)
      1. FAA procedural mechanism to make us feel better about this
      2. As long as the process is okay, national security trumps any personal rights
   7. Minimization as a safeguard (Directives)
   8. Torture: not okay, but just addressing processes to remedy violations
      1. Jeppesen: issue is torture, but can't reach, so fighting over Glomar
      2. Ghailani: still procedure, remedy
   9. Criminal Justice
      1. Material support: all about procedure
      2. Establishing constitutionality of procedure, knowing if covered
      3. CIPA:
         1. Procedural, judge decisions
         2. If not adequate redactive process, you have to choose
      4. FISA is a rubber stamp procedure-wise
      5. Humanitarian law project: exception
         1. Statute procedural way to hold accountable, in litigating in that case, really did reach the merits in freedom of speech
      6. MacWade
         1. Are your procedures sufficient?
         2. 4th amendment special needs exception: Analogy to special needs avoided substance of claim
         3. Reasonableness: seems more merits-based
            1. Are your procedures reasonable?
   10. Always presumption in favor of gov't security interest
       1. Domestic intelligence: Katz, Title III
       2. Burden-shifting
8. Torture and security
   1. Torture is counterproductive--undermines security
   2. Gov't needs to decide it bad policy; not up to courts to decide
   3. Loopholes
      1. Secret annex M: closer
      2. Rendition
   4. Extraterritorially exception closed; so if torture, extra-legally, rather than under law
9. Role of criminal justice system
   1. Tool
   2. Legitimizing
   3. Remedial
10. Focus on authority at the expense of policy
    1. 40,000 NSA people; harder it is to focus, instead of really getting dirty investigate work to produce leads
    2. More isn't always better
    3. GTMO: constantly used be enemies as idea of hatred versus Muslims, keeping 100 people off the battlefield at the expense of radicalizing thousands?
11. Professional responsibility
    1. Should lawyers be in the role of supporting military officials? Or Commander in Chief, legitimizing
    2. Objective and informed decisions
    3. If all they are doing giving bosses on what they can do just actors supporting torture?
    4. Dangerous to have legal mind developing something when every decision they make they turn in one direction (Yoo)
    5. Procedures are important--act more neutrally in weighing precedent
    6. Attorneys have to be lawyers working for soldiers
       1. Soldiers do as commanded
       2. When lawyers take direction to find a legal way to do something
       3. Have to advocate, not for a client, not defending your client
       4. Protect your client by making sure to examine all sides of the issues
    7. Whole world is a series of checks--even if they fail, having people asking questions and challenging
    8. Without, incremental steps that are allowed, and even if succeed, preventing things form going forward, slowing down
       1. Losing ground less rapidly
    9. Checking everyone, courts and executive
12. New area of law
    1. Some things just haven’t been determined yet