

Balancing Liberty and Security

Fall 2010 Syllabus

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Tuesdays & Thursdays: 10:15 – 11:45

Texts:

- Supplemental Materials (“Supp”). Please download from TWEN

Notes:

- The Supplement is broken down into 4 PDF sections. The pagination starts over in each section.
- The page numbers on the syllabus follow the PDF pagination on your computer screen

I. INTRODUCTION

NO CLASS on Tuesday, Aug. 31

Class 1 (Sept. 2)

- **PDF PART 1 (Pages 1-116)**

The scope of the terrorism problem

- (1) **Supp pp. 1-3:** Fareed Zakaria, *The Enemy Within*, NYT Book Review (Dec. 17, 2006).
- (2) **Supp. pp. 4-5:** Richard Posner, *The Law: Security Versus Civil Liberties*, The Atlantic Monthly (Dec. 2001).
- (3) **Supp. pp. 30-31:** Expansive Executive Authority and the AUMF
- (4) **Supp. pp. 32-38:** *A Brief History of Terrorist Attacks Against the United States Interests and an Introduction to the Law Enforcement Response*
- (5) **Supp. pp. 39-43:** Viet Dinh, *Ordered Liberty in the Age of International Terrorism*, Harold Leventhal Talk (June 7, 2002).
- (6) **Supp. pp. 44-47:** Michael Mukasey, *Jose Padilla Makes Bad Law*, Wall Street Journal (Aug. 22, 2007).
- (7) **Supp. pp. 48-49:** John Coughenour, *How to Try a Terrorist*, New York Times (Nov. 1, 2007).
- (8) **Supp. pp. 50-51:** Michael Jordan, *Terrorism’s Slippery Definition Eludes UN Diplomats*, Christian Science Monitor (Feb. 3, 2005)

Class 2 (Sept. 7)

Pre-9/11 Statutes

- (1) **Supp. pp. 52-69:** *Sattar*
- (2) **Supp. pp. 70-74:** Congressional Research Service, *Terrorism at Home: A Quick Look at Applicable Federal and State Criminal Law* (Oct. 2001).

NO CLASS on Thursday, Sept. 9 (School closed for Rosh Hashanah)

Class 3 (Sept. 14)

Post-9/11: PATRIOT Act

- (1) **Supp. pp. 75-94:** The PATRIOT Act (pp. 7 - 27 on photocopies)
- (2) **Supp. pp. 95-104:** *Doe v. Gonzalez*
- (3) **Supp. pp. 105-114:** Homeland Security Act

Class 4 (Sept. 16)

The Geneva Convention and Detention of Enemy Combatants – US Citizens

- (1) **Supp. pp. 115-116:** The Geneva Convention Memo
- **PDF PART 2 (Pages 1-130)**
 - (2) **Supp. pp. 1-15:** *Korematsu v. United States*, 323 U.S. 214 (1944).
 - (3) **Supp. pp. 16-17:** *Padilla v. Hanft*, 126 S.Ct. 1649 (2006).
 - (4) **Supp. pp. 18-34:** *Hamdi*

Class 5 (Sept. 21)

The Geneva Convention and Detention of Enemy Combatants – Foreign Combatants

- (1) **Supp. pp. 35-38:** Gonzalez 1/25/2002 Memorandum to the President
(Please note: this and the following memo are declassified documents, they have a grainy textured look. Unfortunately, these are the best copies available).
- (2) **Supp. pp. 39-43:** Powell Comments on 1/25/2002 Memorandum to the President
- (3) **Supp. pp. 44-45:** 2/7/2002 White House Memorandum
- (4) **Supp. pp. 46-53:** Jason Leopold, *The Bush Administration's Stunning Geneva Hypocrisy* (Apr. 2009)

Class 6 (Sept. 23)

Torture: The Ticking Time Bomb Scenario

- (1) **Supp. p. 54:** Ticking Time Bomb Scenario

Class 7 (Sept. 28)

Torture: Objectives and Methods

- (1) **Supp. pp. 55-56:** Ali Soufan, *My Tortured Decision*, The New York Times (Apr. 2009)
- (2) **Supp. pp. 57-63:** Statement of FBI Agent Ali Soufan at the Torture Hearings
- (3) **Supp. pp. 64-65:** Morris D. Davis, *AWOL Military Justice*, The Los Angeles Times (Dec. 2007)
- (4) **Supp. pp. 66-79:** *Bin Laden, Abu Ali, OK v. Bush*

Class 8 (Sept. 30)

Torture: The Legal Framework

- (1) **Supp. pp. 80-86:** Excerpt from *Youngstown Sheet v. Sawyer*, 343 US 579
- (2) **Supp. pp. 87-91:** Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Part I.
- (3) **Supp. pp. 92-130:** Excerpt from the Bybee-Yoo Torture Memo

PDF PART 3 (Pages 1-154)

- (4) **Supp. pp. 1-3:** Mark Mazzetti and Scott Shane, Interrogation Memos Detail Harsh Tactics by the C.I.A., The New York Times (April 17, 2009)
- (5) **Supp. pp. 4-11:** Harold Koh, *A World Without Torture*, 43 Colum. J. Transnat'l L. Initial Post 9/11 Responses -- The Season of Fear

Class 9 (Oct. 5)

Torture: The Legal Framework (continued)

- (1) **Supp. pp. 12-16:** David L. Applegate, *State Secrets Privilege in the United States – The Price of Security*, 23-JAN. CBA. Rec. 32 (Jan. 2009).
- (2) **Supp. pp. 17-24:** Background Memo on El-Masri; *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007)
- (3) **Supp. p. 25:** Torture Update Memorandum

Class 10 (Oct. 7)

FISA/NSA

- (1) **Supp. pp. 26-36:** FISA History Memo; FISA Background Memo
- (2) **Supp. pp. 37-66:** FISA Amendments Act of 2008
- (3) **Supp. pp. 67-68:** Chris Hedges, *Surveillance Law Threatens our Liberty*, Newark Star-Ledger (July 14, 2008)
- (4) **Supp. pp. 69-71:** Homegrown Terrorism: Will the Next Potential Act Come from Within?

- (5) **Supp. pp. 72-80:** Evan F. Kohlmann, *Terrorism: What the Next President Will Face*, 618 Annals. Am. Acad. Pol. & Soc. Sci. 95 (2008).
- (6) **Supp. pp. 81-83:** Partnering for Prevention Memo

Class 11 (Oct. 12)

FISA/NSA (cont.)

- (1) **Supp. pp. 84-97:** John Cary Sims, *What NSA is Doing and Why it's Illegal*, 33 Hastings Constitutional Law Quarterly 105 (Winter/Spring 2006)
- (2) **Supp. pp. 98-118:** *American Civil Liberties Union et al v. National Security Agency*, 493 F.3d 644 (6th Cir. July 6, 2007)
- (3) **Supp. pp. 119-134:** Barton Gellman, *Conflict Over Spying Led White House to Brink*, The Washington Post (Sept. 14, 2008), Barton Gellman, *Cheney Shielded Bush from Crisis*, The Washington Post (Sept. 15, 2008)

Class 12 (Oct. 14)

Rendition

- (1) **Supp. pp. 135-144:** *Alvarez-Machain I; Alvarez-Machain II*
- (2) **Supp. pp. 145-151:** President Bush's Sept. 6, 2006 Speech; Secretary Rice's Remarks Before and After Traveling to Europe, Dec. 5-6, 2005
- (3) **Supp. pp. 152-154:** *Arar v. Ashcroft* Memo

Class 13 (Oct. 19)

▪ PDF PART 4 (Pages 1-175)

Tribunal

- (1) **Supp. pp. 1-27:** *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); Military Commissions Act of 2006 ("MCA")
- (2) **Supp. pp. 28-29:** Jonathan Mahler, *The Fog of War-Crimes Trials*, The New York Times (Aug. 3, 2008)

II. MOVING FORWARD

Class 14 (Oct. 21)

Boumediene and Habeus Corpus

- (1) **Supp. p. 30:** *Boumediene* Introductory Memorandum
- (2) **Supp. pp. 31-69:** Excerpt from *Boumediene v. Bush*, 128 S.Ct. 2229
- (3) **Supp. pp. 70-72:** William Glaberson, *U.S. Drops Charges for 5 Guantanamo Detainees*, The New York Times (Oct. 22, 2008)

- (4) **Supp. pp. 73-75:** Charles Savage, *Judge Rules Some Prisoners at Bagram Have Rights of Habeus Corpus*, The New York Times (Apr. 3, 2009)
- (5) **Supp. pp. 76-78:** *Boumediene* Update Memorandum

Class 15 (Oct. 23)

CIPA – Classified Information Procedures Act

- (1) **Supp. pp. 79-93:** *Paracha; Lee*
- (2) **Supp. pp. 94-102:** Jim McAdams, *The Classified Information Procedures Act: An Introduction and Practical Guide for Criminal Investigators*, Federal Law Enforcement Training Center (Nov. 13, 2007)
- (3) **Supp. pp. 103-108:** Rachel S. Holzer, *National Security v. Defense Counsel's "Need to Know": An Objective Standard for Resolving the Tension*, 73 Fordham L. Review 1941

Class 16 (Oct. 28)

The Obama Administration: Moving Forward

- (1) **Supp. pp. 109-112:** Executive Order, *Ensuring Lawful Interrogations*, 01/22/2009
- (2) **Supp. pp. 113-116:** Executive Order, *Closure of Guantanamo Detention Facilities*, 01/22/2009
- (3) **Supp. pp. 117-121:** Lt. Matthew Ivey, Note, *A Framework for Closing Guantanamo Bay*, 32 B.C. Int'l & Comp. L. Rev. 353 (2009)
- (4) **Supp. pp. 122-123:** Categories of Detention Memo
- (5) **Supp. pp. 124-127:** Keith Perine, *Executive Power: A New Advocate*, Oct. 4, 2009, Congressional Quarterly.
- (6) **Supp. pp. 128-131:** Preventative Detention Memo
- (7) **Supp. pp. 132-133:** Devlin Bartlett, *Obama: Professed 9/11 Mastermind Will Be Convicted*, Nov. 18, 2009, THE WASHINGTON POST.

Class 17 (Nov. 2)

Moving Forward While Looking Back: Prosecuting the Bush Administration

- (1) **Supp. pp. 134-135:** Patrick Leahy, *The Case for a Truth Commission*, Time Magazine (Feb. 19, 2009)
- (2) **Supp. pp. 136-140:** Robert Pallitto, *Prosecuting the Bush Team?*, Foreign Policy in Focus (Mar. 2, 2009)
- (3) **Supp. pp. 141-144:** Jonathan Weisman, *Probe of Bush Officials Looms*, Wall Street Journal (Apr. 22, 2009)

Class 18 (Nov. 4)

The Role of the Judiciary/How to Try Terrorists?

- (1) **Supp. pp. 145-147:** Stuart Gottlieb, *A Way Forward: When It Comes to Counterterrorism Policy, Obama Needs a Healthy Dose of Candor and America Needs a National Security Court*, 9/2009 Am. Law. 61 (2009).
- (2) **Supp. pp. 148-157:** Matthew Shapanka, *The Crime of Terrorism: Military and Civilian Approaches to Prosecuting Terrorists*, 56-Sep. Fed. Law. 32 (2009).

Class 19 (Nov. 9)

The New Face of Terrorism and the Needed Response

- (1) **Supp. pp. 158-160:** Partnering for Prevention Memo I: Homegrown Terrorism: Will the Next Potential Attack Come from Within
- (2) **Supp. pp.161-170:** Evan H. Kohlman, *"Homegrown" Terrorists: Theory and Cases in the War on Terror's Newest Front*, in *TERRORISM: WHAT THE NEXT PRESIDENT WILL FACE*, 618 Annals Am. Acad. Pol. & Soc. Sci. 95 (R. Clarke ed., 2008)
- (3) **Supp. pp. 171-172:** Partnering for Prevention Memo II: Case Studies in Responses
- (4) **Supp. pp. 173-175:** Partnering for Prevention Memo III

NO CLASS on Thursday, Nov. 11 (School closed for Veterans Day)