

Syllabus For
COUNTERTERRORISM LAW
(Course No. 383-10; 2 credits)
Professor Gregory E. Maggs

Content of the Course:

This course examines domestic and international legal issues that arise when a government responds to terrorism or the threat of terrorism. It considers nine basic topics:

- (1) the problem of defining terrorism;
- (2) criminal law enforcement and its limitations;
- (3) immigration control;
- (4) sanctions;
- (5) authority to use military force against suspected terrorists, both internationally and domestically;
- (6) military counter-terrorism operations, including targeted killing, group punishments, data mining and wiretapping;
- (7) military detention and interrogation of suspected terrorists;
- (8) military trial and punishment of suspected terrorists; and
- (9) the rights of victims of terrorism and governmental responses to terrorism.

Course Enrollment Restrictions:

Because of the substantial overlap of the topics considered, students may not take this course if they already have taken or if they are currently taking either Human Rights and Military Responses to Terrorism (Course No. 836) or National Security Law (Course No. 386). The course has no prerequisites.

Class Schedule:

The course will meet in room LL102 on Tuesday and Thursday from 1:40 p.m. until 2:35 p.m. The course will not meet on March 6 and 8 (spring break). April 12 is the last day of class.

Office, Telephone, Etc.:

My office is in Stuart 306. My office hours are on Mondays from 3:00 p.m. to 5:00 p.m., but feel free to stop by at other times. You also may contact me by phone or email. My office telephone number is (202) 994-6031. My email address is gmaggs@law.gwu.edu. You may obtain more information, including copies of past examinations and their grading guides, at my website (docs.law.gwu.edu/facweb/gmaggs).

Required Books:

We will use the following books:

- (1) Maggs, Terrorism and the Law: Cases and Materials (Thomson-West 2005).
- (2) Maggs, 2006 Supplement to Terrorism and the Law: Cases and Materials (Thomson-West 2006)

Final Examination:

This course will have a two-hour, open-book examination on Wednesday, May 2, at 2:00 p.m. In completing the examination, you may use any written materials that you have brought with you.

Class Participation:

Please come to class prepared to discuss the assigned material. Class participation does not affect your final grade.

Recording of Classes:

This course will follow the law school's "Class Recording Policy," which is available at the Student Affairs Office website. This policy permits students to request the recording of classes when they will be absent for religious reasons, family emergencies, and certain other causes. Please make the requests for recording and address questions about the policy to the Student Affairs Office.

Reading Assignments:

At the end of each class, I will specify how far to read in the outline below for the next class. Pages marked "supp." are found in the 2006 Supplement to Terrorism and the Law: Cases and Materials. Additional materials are found in the "Syllabus Appendix" at the end of this syllabus.

I. THE PROBLEM OF DEFINING TERRORISM

Text, pp. 1-4

Notes (1)-(4), p. 4

II. CRIMINAL LAW ENFORCEMENT AND ITS LIMITATIONS

A. ORDINARY CRIMINAL LAWS APPLIED TO TERRORISTS

Text, pp. 5-6

Kasi v. Virginia, pp. 6-9

Notes (1)-(2), p. 9

B. LAWS AIMED SPECIFICALLY AT TERRORISM

Text, pp. 9-11

United States v. Hammoud, pp. 11-18

Notes (1)-(4), p. 18

Syllabus Appendix, Part 1, p. 11

[United States v. Hammoud, subsequent litigation]

C. DIFFICULTIES IN CRIMINAL PROSECUTIONS

1. The Prosecution's Dilemma

Text, pp. 49-51

United States v. Moussaoui, pp. 51-64

Notes (1)-(4), pp. 64-65

Text, p. 65

People v. El Motassadeq, pp. 65-71

Note, p. 71 & supp. 1

Syllabus Appendix, Part 2, p. 11

United States v. Koubriti, pp. 71-75

Note (1), p. 75

2. Lack of Sufficient Evidence to Act

Text, p. 77

9/11 Commission Report Excerpt, pp. 77-80

Notes (1)-(2), p. 81

3. Difficulty Capturing Suspected Terrorists

Text, p. 81

United States v. Bin Laden, pp. 81-84

Notes (1)-(5), p. 85

4. Concerns about the Safety of Juries

Text, p. 86

Note (1), p. 93

Note (5), pp. 109-110

III. IMMIGRATION CONTROL

A. Exclusion of Suspected Terrorists

Text, pp. 114-116 & supp. 8-9

Notes (1) & (2), p. 116

Adams v. Baker, pp. 117-123

B. Immigration Sweeps

Text, p. 124

Report of the Inspector General, pp. 124-127

C. Deportation and Human Rights

Text, pp. 138-139

Appendix G, pp. 612-613
[The Convention Against Torture]

Bellout v. Ashcroft, pp. 139-143

Notes (1)-(3), pp. 143-144 & supp. 9

IV. ECONOMIC SANCTIONS

Text, pp. 145-146, 156-157

U.N. Security Council Resolution No. 1267, pp. 157-158

Notes (1)-(2), p. 158

V. AUTHORITY TO USE MILITARY FORCE AGAINST TERRORISTS

A. EXTRA-TERRITORIAL USE OF MILITARY FORCE

Text, pp. 159-161

Notes (1)-(2), pp. 161

Appendix B, pp. 578-582
[The United Nations and the U.N. Charter]

Text, pp. 161-163 & supp. 10

Notes (1), (2), & (4), pp. 164-165

Nicaragua v. United States, pp. 165-171

Notes (1) & (2), p. 171

Iran v. United States, pp. 172-176

Notes (1)-(2), pp. 176-177

Israeli Separation Barrier Case, supp. 10-16

Notes (1)-(2), supp. 16

B. DOMESTIC USE OF MILITARY FORCE

Text, p. 178

Notes (1)-(3), pp. 178-179

Padilla ex rel. Newman v. Bush, pp. 179-180

Note (1), p. 180

Notes (3) & (4), supp. 17-18
[D.C. Snipers and Operation Able Danger]

Text, p. 182

Attorney-Gen. for N. Ireland's Reference, pp. 182-188

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VI. MILITARY COUNTER-TERRORISM OPERATIONS

A. TARGETED KILLING OF SUSPECTED TERRORISTS

Text, pp. 189-190

Appendix E, pp. 605-607
[Int'l Covenant on Civil and Political Rights]

Report of the Special Rapporteur, pp. 191-194

Notes (1)-(3), pp. 194-196

Syllabus Appendix, Part 3, pp. 11-17
[Public Committee Against Torture v. Israel]

Notes (4)-(6), p. 196

B. GROUP PUNISHMENTS IN RESPONSE TO TERRORISM

Text, p. 205

Almarin v. IDF Commander, pp. 205-213

Notes (1)-(2), pp. 213-214

C. DATA MINING AND WIRETAPPING

Text, pp. 227-229

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Syllabus Appendix, Part 4, pp. 17-23
[ACLU v. National Security Agency]

VII. MILITARY DETENTION AND INTERROGATION OF SUSPECTED TERRORISTS

A. CLASSIFICATIONS OF DETAINEES

1. Possible Classifications

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Appendix C, pp. 585-587
[Geneva Convention III]

Appendix D, p. 599
[Geneva Convention IV]

Notes (1)-(4), pp. 233-234 & Supp. 21

2. Process for Making Classifications

Text, pp. 234-237

Hamdi v. Rumsfeld, pp. 238-263

Notes (1)-(6), pp. 264 & supp. 21

Text, supp. 22-23
[Detainee Treatment Act of 2005]

B. DETENTION ABSENT CRIMINAL CHARGES

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Notes (1)-(3), pp. 278-279

Padilla v. Hanft, supp. 23-30

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Appendix F, pp. 608-611
[European Convention on Human Rights]

Lawless v. Ireland, pp. 279-292

Murray v. United Kingdom, pp. 293-302

Marab v. Commander of IDF Forces, supp. 31-39

C. CONDITIONS OF MILITARY DETENTION

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D. MILITARY INTERROGATION OF DETAINEES

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Republic of Ireland v. United Kingdom, pp. 314-321

Public Committee Against Torture v. Israel, pp. 321-333

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Dep't of Defense News Release No. 596-04, pp. 333-337

Notes (1)-(5), pp. 337-338

Text, supp. 40-41
[Detainee Treatment Act of 2005]

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E. FEDERAL HABEAS CORPUS JURISDICTION

Text, pp. 339-340

Johnson v. Eisentrager, pp. 340-352

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Text, supp. 43-44
[Detainee Treatment Act of 2005]

Hamdan v. Rumsfeld [1st excerpt], supp. 44-60

Note, supp. 60

Syllabus Appendix, Part 5, pp. 23
[Military Commissions Act of 2006 -- Habeas Corpus]

F. RELEASE FROM DETENTION THROUGH DIPLOMACY

Text, p. 372

Application of Abbasi, pp. 372-382

Note, p. 382

Syllabus Appendix, Part 6, pp. 24
[Transcript of Feroz Abbasi's CSRT Hearing]

VIII. TRIAL OF SUSPECTED TERRORISTS BY MILITARY COMMISSIONS

A. AUTHORITY TO USE MILITARY COMMISSIONS

Text, pp. 383-384

Notes (1) & (2), p. 384

Text, pp. 384-385

Ex Parte Milligan, pp. 385-393

Ex Parte Quirin, pp. 393-408

Notes (1)-(2), pp. 408-409

Text, p. 409

Military Order of November 13, 2001, pp. 409-413

Notes (1)-(3), p. 413

Hamdan v. Rumsfeld [2d excerpt], supp. 61-70

Notes (1)-(3), supp. 71

Syllabus Appendix, Part 7, pp. 24-26

[Military Commission Act of 2006 -- Authority]

B. COMBATANT IMMUNITY

Text, pp. 414-415

United States v. Lindh, pp. 415-422

Notes (1)-(2), pp. 422-423

C. OFFENSES TRIABLE BY MILITARY COMMISSION

Text, p. 424

Application of Yamashita, pp. 424-434

Notes (1) & (2), p. 434

Hamdan v. Rumsfeld [excerpt 3], supp. 72-89

Notes (1)-(3), supp. 89

Syllabus Appendix, Part 8, pp. 26-27

[Military Commission Act of 2006 -- Offenses]

D. MILITARY COMMISSION PROCEDURES

Text, p. 444

Military Commission Order No. 1, pp. 444-446

Text, pp. 447-449

[Application of Yamashita]

Notes (1)-(3), p. 449

Hamdan v. Rumsfeld [excerpt 4], supp. 92-114

Notes (1) & (2), pp. 114

Syllabus Appendix, Part 9, pp. 27-29
[Military Commissions Act of 2006 -- Procedures]

IX. VICTIMS OF TERRORISM AND MILITARY RESPONSES TO TERRORISM

A. FAILURE TO PROVIDE SECURITY AGAINST TERRORISM

Text, pp. 471-472

A v. United Kingdom & Ireland, pp. 472-478

Notes (1)-(2), p. 478

Macharia v. United States, pp. 478-485

Note, p. 485

B. ERRONEOUS TARGETING BY MILITARY FORCES

Text, p. 528

El-Shifa Pharmaceutical v. United States, pp. 529-548

Notes (1)-(3), p. 548

Farrell v. Secretary of Defence, pp. 549-551

Notes (1)-(3), pp. 551-552

SYLLABUS APPENDIX

PART 1 : United States v. Hammoud (Subsequent Litigation)

The U.S. Supreme Court vacated the Fourth Circuit's decision in United States v. Hammoud, 381 F.3d 316 (4th Cir. 2004) (en banc), based on a sentencing issue not addressed in the excerpt of the case printed in the textbook. See Hammoud v. United States, 543 U.S. 1097 (2005). The Fourth Circuit, on remand, concluded that "the order of the Supreme Court does not affect our resolution of Hammoud's challenges to his convictions." United States v. Hammoud, 405 F.3d 1034 (4th Cir. 2005) (en banc).

PART 2 : People v. El Motassadeq (Subsequent Litigation)

In November 2006, a German appellate court disagreed with trial court's acquittal of El Motassadeq on the charge of complicity in the attacks. A new trial is pending. See Mark Landler, *Sentence Trial For 9/11 Friend*, N.Y. Times, Jan. 6, 2007, at A2.

PART 3 : Public Committee Against Torture in Isreal v. Isreal

**PUBLIC COMMITTEE AGAINST TORTURE IN ISRAEL
v. GOVERNMENT OF ISRAEL**
High Court of Justice of Israel
HCJ 769/02

President (Emeritus) A. Barak:

The Government of Israel employs a policy of preventative strikes which cause the death of terrorists in Judea, Samaria, or the Gaza Strip. It fatally strikes these terrorists, who plan, launch, or commit terrorist attacks in Israel and in the area of Judea, Samaria, and the Gaza Strip, against both civilians and soldiers. These strikes at times also harm innocent civilians. Does the State thus act illegally? That is the question posed before us.

1. Factual Background

In February 2000, the second intifada began. A massive assault of terrorism was directed against the State of Israel, and against Israelis, merely because they are Israelis. This assault of terrorism differentiates neither between combatants and civilians, nor between women, men, and children. The terrorist attacks take place both in the territory of Judea, Samaria, and the Gaza Strip, and within the borders of the State of Israel. They are directed against civilian centers, shopping centers and markets, coffee houses and restaurants. Over the last five years, thousands of acts of terrorism have been committed against Israel. In the attacks, more than one thousand Israeli citizens have been killed. Thousands of Israeli citizens have been wounded. Thousands of Palestinians have been killed and wounded during this period as well.

2. In its war against terrorism, the State of Israel employs various means. As part of the security activity intended to confront the terrorist attacks, the State employs what it calls “the policy of targeted frustration” of terrorism. Under this policy, the security forces act in order to kill members of terrorist organizations involved in the planning, launching, or execution of terrorist attacks against Israel. During the second intifada, such preventative strikes have been performed across Judea, Samaria, and the Gaza Strip. According to the data relayed by petitioners, since the commencement of these acts, and up until the end of 2005, close to three hundred members of terrorist organizations have been killed by them. More than thirty targeted killing attempts have failed. Approximately one hundred and fifty civilians who were proximate to the location of the targeted persons have been killed during those acts. Hundreds of others have been wounded. The policy of targeted killings is the focus of this petition.

* * *

3. Petitioners' position is that the legal system applicable to the armed conflict between Israel and the terrorist organizations is not the laws of war, rather the legal system dealing with law enforcement in occupied territory. . . . Within that framework, suspects are not to be killed without due process, or without arrest or trial. The targeted killings violate the basic right to life, and no defense or justification is to be found for that violation. The prohibition of arbitrary killing which is not necessary for self defense is entrenched in the customary norms of international law. Such a prohibition stems also from the duties of the force controlling occupied territory toward the members of the occupied population, who are protected persons according to IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1949 (hereinafter—the Fourth Geneva Convention), as well as the two additional protocols to the conventions signed in 1977. . . .

4. Alternatively, petitioners claim that the targeted killings policy violates the rules of international law even if the laws applicable to the armed conflict be-

tween Israel and the Palestinians are the laws of war. These laws recognize only two statuses of people: combatants and civilians. Combatants are legitimate targets, but they also enjoy the rights granted in international law to combatants, including immunity from trial and the right to the status of prisoner of war. Civilians enjoy the protections and rights granted in international law to civilians during war. Inter alia, they are not a legitimate target for attack. . . .

10. On the merits, respondents point out the security background which led to the targeted killings policy. Since late September 2000, acts of combat and terrorism are being committed against Israel. As a result of those acts, more than one thousand Israeli citizens have been killed during the period from 2000-2005. Thousands more have been wounded. The security forces take various steps in order to confront these acts of combat and terrorism. In light of the armed conflict, the laws applicable to these acts are the laws of war, or the laws of armed conflict, which are part of international law. Respondents' stance is that the argument that Israel is permitted to defend herself against terrorism only via means of law enforcement is to be rejected. It is no longer controversial that a state is permitted to respond with military force to a terrorist attack against it. That is pursuant to the right to self defense determined in article 51 of the Charter of the United Nations, which permits a state to defend itself against an "armed attack." Even if there is disagreement among experts regarding the question what constitutes an "armed attack," there can be no doubt that the assault of terrorism against Israel fits the definition of an armed attack. Thus, Israel is permitted to use military force against the terrorist organizations. Respondents point out that additional states have ceased to view terrorist activity as mere criminal offenses, and have begun to use military means and means of war to confront terrorist activities directed against them. That is especially the case when dealing with wide scale acts of terrorism which continue for a long period of time. Respondents' stance is that the question whether the laws of belligerent occupation apply to all of the territory in the area is not relevant to the issue at hand, as the question whether the targeted killings policy is legal will be decided according to the laws of war, which apply both to occupied territory and to territory which is not occupied, as long as armed conflict is taking place on it.

* * *

29. Civilians enjoy comprehensive protection of their lives, liberty, and property. . . . As opposed to combatants, whom one can harm due to their status as combatants, civilians are not to be harmed, due to their status as civilians. A provision in this spirit is determined in article 51(2) of The First Protocol,*

*The Court is referring to the Protocol Additional to the Geneva Conventions of 12 August 1949 (1977). This international treaty, which neither the United States nor Israel has ratified, is discussed on page 486 of the textbook.—Ed.

which constitutes customary international law:

“The civilian population as such, as well as individual civilians, shall not be the object of attack”

* * *

30. [But] . . . civilians taking a direct part in hostilities are not protected from attack upon them at such time as they are doing so. This principle is manifest in § 51(3) of The First Protocol, which determines:

“Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities.”

As is well known, Israel is not party to The First Protocol. Thus, it clearly was not enacted in domestic Israeli legislation. Does the basic principle express customary international law? The position of The Red Cross is that it is a principle of customary international law That position is acceptable to us. It fits the provision Common Article 3 of The Geneva Conventions, to which Israel is party and which, according to all, reflects customary international law, pursuant to which protection is granted to persons “[T]aking no active part in the hostilities.” . . .

* * *

38. Article 51(3) of The First Protocol states that civilians enjoy protection from the dangers stemming from military acts, and that they are not targets for attack, unless “and for such time” as they are taking a direct part in hostilities. The provisions of article 51(3) of The First Protocol present a time requirement. A civilian taking a part in hostilities loses the protection from attack “for such time” as he is taking part in those hostilities. If “such time” has passed—the protection granted to the civilian returns. In respondents’ opinion, that part of article 51(3) of The First Protocol is not of customary character, and the State of Israel is not obligated to act according to it. We cannot accept that approach. As we have seen, all of the parts of article 51(3) of The First Protocol reflect customary international law, including the time requirement. The key question is: how is that provision to be interpreted, and what is its scope?

39. As regarding the scope of the wording “takes a direct part” in hostilities, so too regarding the scope of the wording “and for such time” there is no consensus in the international literature. Indeed, both these concepts are close to each other. However, they are not identical. With no consensus regarding the interpretation of the wording “for such time,” there is no choice but to proceed from case to case. Again, it is helpful to examine the extreme cases. On the one hand, a civilian taking a direct part in hostilities one single time, or sporadically, who later detaches himself from that activity, is a civilian who, starting from the time he detached himself from that activity, is entitled to protection

from attack. He is not to be attacked for the hostilities which he committed in the past. On the other hand, a civilian who has joined a terrorist organization which has become his “home,” and in the framework of his role in that organization he commits a chain of hostilities, with short periods of rest between them, loses his immunity from attack “for such time” as he is committing the chain of acts. Indeed, regarding such a civilian, the rest between hostilities is nothing other than preparation for the next hostility (see Daniel Statman, *Targeted Killing*, 5 *THEORETICAL INQUIRIES IN LAW* 179, 195 (2004)).

42. . . . The principle of proportionality arises when the military operation is directed toward combatants and military objectives, or against civilians at such time as they are taking a direct part in hostilities, yet civilians are also harmed. The rule is that the harm to innocent civilians caused by collateral damage during combat operations must be proportionate. . . . Civilians might be harmed due to their presence inside of a military target, such as civilians working in an army base; civilians might be harmed when they live or work in, or pass by, military targets; at times, due to a mistake, civilians are harmed even if they are far from military targets; at times civilians are forced to serve as “human shields” from attack upon a military target, and they are harmed as a result. In all those situations, and in other similar ones, the rule is that the harm to the innocent civilians must fulfill, inter alia, the requirements of the principle of proportionality.

* * *

45. The proportionality test determines that attack upon innocent civilians is not permitted if the collateral damage caused to them is not proportionate to the military advantage (in protecting combatants and civilians). In other words, attack is proportionate if the benefit stemming from the attainment of the proper military objective is proportionate to the damage caused to innocent civilians harmed by it. That is a values based test. It is based upon a balancing between conflicting values and interests It is accepted in the national law of various countries. It constitutes a central normative test for examining the activity of the government in general, and of the military specifically, in Israel. . . .

* * *

46. That aspect of proportionality is not required regarding harm to a combatant, or to a civilian taking a direct part in the hostilities at such time as the harm is caused. Indeed, a civilian taking part in hostilities is endangering his life, and he might—like a combatant—be the objective of a fatal attack. That killing is permitted. However, that proportionality is required in any case in which an innocent civilian is harmed. Thus, the requirements of proportionality *stricto sensu* must be fulfilled in a case in which the harm to the terrorist carries with it collateral damage caused to nearby innocent civilians. The

proportionality rule applies in regards to harm to those innocent civilians (see § 51(5)(b) of The First Protocol). The rule is that combatants and terrorists are not to be harmed if the damage expected to be caused to nearby innocent civilians is not proportionate to the military advantage in harming the combatants and terrorists Performing that balance is difficult. Here as well, one must proceed case by case, while narrowing the area of disagreement. Take the usual case of a combatant, or of a terrorist sniper shooting at soldiers or civilians from his porch. Shooting at him is proportionate even if as a result, an innocent civilian neighbor or passerby is harmed. That is not the case if the building is bombed from the air and scores of its residents and passersby are harmed The hard cases are those which are in the space between the extreme examples. There, a meticulous examination of every case is required; it is required that the military advantage be direct and anticipated (see §57(2)(iii) of The First Protocol). Indeed, in international law, as in internal law, the ends do not justify the means. The state's power is not unlimited. Not all of the means are permitted. . . .

However, when hostilities occur, losses are caused. The state's duty to protect the lives of its soldiers and civilians must be balanced against its duty to protect the lives of innocent civilians harmed during attacks on terrorists. That balancing is difficult when it regards human life. It raises moral and ethical problems (see Asa Kasher & Amos Yadlin, *Assassination and Preventative Killing*, 25 SAIS Review 41 (2005)). Despite the difficulty of that balancing, there's no choice but to perform it.

* * *

Implementation of the General Principles in This Case

60. . . . The examination of the “targeted killing”—and in our terms, the preventative strike causing the deaths of terrorists, and at times also of innocent civilians—has shown that the question of the legality of the preventative strike according to customary international law is complex. . . . The result of that examination is not that such strikes are always permissible or that they are always forbidden. The approach of customary international law applying to armed conflicts of an international nature is that civilians are protected from attacks by the army. However, that protection does not exist regarding those civilians “for such time as they take a direct part in hostilities” (§ 51(3) of The First Protocol). Harming such civilians, even if the result is death, is permitted, on the condition that there is no other less harmful means, and on the condition that innocent civilians nearby are not harmed. Harm to the latter must be proportionate. That proportionality is determined according to a values based test, intended to balance between the military advantage and the civilian damage. As we have seen, we cannot determine that a preventative strike is always legal, just as we cannot determine that it is always illegal. All

depends upon the question whether the standards of customary international law regarding international armed conflict allow that preventative strike or not.

Conclusion

* * *

63. The question is not whether it is possible to defend ourselves against terrorism. Of course it is possible to do so, and at times it is even a duty to do so. The question is how we respond. On that issue, a balance is needed between security needs and individual rights. . . .

* * *

Let it be so.

PART 4 : ACLU v. National Security Agency

**AMERICAN CIVIL LIBERTIES UNION
v. NATIONAL SECURITY AGENCY**

U.S. District Court for the Eastern District of Michigan
438 F. Supp.2d 754 (E.D. Mich. 2006)

ANNA DIGGS TAYLOR, District Judge.

I. Introduction

This is a challenge to the legality of a secret program (hereinafter “TSP”) undisputedly inaugurated by the National Security Agency (hereinafter “NSA”) at least by 2002 and continuing today, which intercepts without benefit of warrant or other judicial approval, prior or subsequent, the international telephone and internet communications of numerous persons and organizations within this country. The TSP has been acknowledged by this Administration to have been authorized by the President’s secret order during 2002 and re-authorized at least thirty times since.

Plaintiffs are a group of persons and organizations who, according to their affidavits, are defined by the Foreign Intelligence Surveillance Act (hereinafter “FISA”) as “U.S. persons.”² They conducted regular international telephone and internet communications for various uncontestedly legitimate reasons including journalism, the practice of law, and scholarship. Many of their communications are and have been with persons in the Middle East. Each Plaintiff has alleged a “well founded belief” that he, she, or it, has been subjected to Defendants’ interceptions, and that the TSP not only injures them specifically and directly, but that the TSP substantially chills and impairs their constitu-

2. Pub.L. 95-511, Title I, 92 Stat 1976 U.S.C. §§ 1801 et seq (Oct. 25, 1978), codified as amended at 50

tionally protected communications. Persons abroad who before the program spoke with them by telephone or internet will no longer do so.

Plaintiffs have alleged that the TSP violates their free speech and associational rights, as guaranteed by the First Amendment of the United States Constitution; their privacy rights, as guaranteed by the Fourth Amendment of the United States Constitution; the principle of the Separation of Powers because the TSP has been authorized by the President in excess of his Executive Power under Article II of the United States Constitution, and that it specifically violates the statutory limitations placed upon such interceptions by the Congress in FISA because it is conducted without observation of any of the procedures required by law, either statutory or Constitutional.

* * *

II. State Secrets Privilege

Defendants argue that the state secrets privilege bars Plaintiffs' claims because Plaintiffs cannot establish standing or a *prima facie* case for any of their claims without the use of state secrets. Further, Defendants argue that they cannot defend this case without revealing state secrets. For the reasons articulated below, the court rejects Defendants' argument with respect to Plaintiffs' claims challenging the TSP. . . .

The state secrets privilege is an evidentiary rule developed to prevent the disclosure of information which may be detrimental to national security. There are two distinct lines of cases covering the privilege. In the first line of cases the doctrine is more of a rule of "non-justiciability because it deprives courts of their ability to hear suits against the Government based on covert espionage agreements." *El-Masri v. Tenet*, 437 F.Supp.2d 530, 539-40 (E.D. Va. 2006). The seminal decision in this line of cases is *Totten v. United States*, 92 U.S. 105 (1875). In *Totten*, the plaintiff brought suit against the government seeking payment for espionage services he had provided during the Civil War. In affirming the dismissal of the case, Justice Field wrote:

The secrecy which such contracts impose precludes any action for their enforcement. The publicity produced by an action would itself be a breach of a contract of that kind, and thus defeat a recovery.

Totten, 92 U.S. at 107.

The Supreme Court reaffirmed *Totten* in *Tenet v. Doe*, 544 U.S. 1, 125 (2005). In *Tenet*, the plaintiffs, who were former Cold War spies, brought estoppel and due process claims against the United States and the Director of the Central Intelligence Agency (hereinafter "CIA") for the CIA's alleged failure to provide them with the assistance it had allegedly promised in return for their espionage services. *Tenet*, 544 U.S. at 3. Relying heavily on *Totten*, the Court held that the plaintiffs claims were barred. Delivering the opinion for a unanimous Court, Chief Justice Rehnquist wrote:

We adhere to *Totten*. The state secrets privilege and the more frequent use of *in camera* judicial proceedings simply cannot provide the absolute pro-

tection we found necessary in enunciating the *Totten* rule. The possibility that a suit may proceed and an espionage relationship may be revealed, if the state secrets privilege is found not to apply, is unacceptable: “Even a small chance that some court will order disclosure of a source’s identity could well impair intelligence gathering and cause sources to ‘close up like a clam.’ ” (citations omitted).

Tenet, 544 U.S. at 11, 125 S.Ct. 1230.

* * *

Predictably, the War on Terror of this administration has produced a vast number of cases, in which the state secrets privilege has been invoked. In May of this year, a district court in the Eastern District of Virginia addressed the state secrets privilege in *El-Masri v. Tenet*, 437 F. Supp.2d 530 (E.D.Va. 2006). In *El Masri*, the plaintiff, a German citizen of Lebanese descent, sued the former director of the CIA and others, for their alleged involvement in a program called Extraordinary Rendition. *Id.* at 532. The court dismissed the plaintiff’s claims, because they could not be fairly litigated without the disclosure of state secrets. *Id.* at 538-39.

In *Hepting v. AT & T Corp.*, 439 F. Supp.2d 974 (E.D. Cal. 2006), which is akin to our inquiry in the instant case, the plaintiffs brought suit, alleging that AT & T Corporation was collaborating with the NSA in a warrantless surveillance program, which illegally tracked the domestic and foreign communications and communication records of millions of Americans. *Id.* at 978. The United States intervened and moved that the case be dismissed based on the state secrets privilege. *Id.* Before applying the privilege to the plaintiffs’ claims, the court first examined the information that had already been exposed to the public, which is essentially the same information that has been revealed in the instant case. District Court Judge Vaughn Walker found that the Government had admitted:

... it monitors “contents of communications where * * * one party to the communication is outside the United States and the government has a reasonable basis to conclude that one party to the communication is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda, or working in support of al Qaeda.” (citations omitted).

Hepting, 439 F.Supp.2d at 996-97. Accordingly Judge Walker reasoned that “[b]ased on these public disclosures,” the court could not “conclude that the existence of a certification regarding the ‘communication content’ program is a state secret.” *Id.*

Defendants’ assertion of the privilege without any request for answers to any discovery has prompted this court to first analyze this case under *Totten/Tenet*, since it appears that Defendants are arguing that this case should not be subject to judicial review. As discussed *supra*, the *Totten/Tenet* cases provide an absolute bar to any kind of judicial review. *Tenet*, 544 U.S. at 8. This rule should not be applied in the instant case, however, since the rule applies to actions where there is a secret espionage relationship between the

Plaintiff and the Government. *Id.* at 7-8, 125 S.Ct. 1230. It is undisputed that Plaintiffs' do not claim to be parties to a secret espionage relationship with Defendants. Accordingly, the court finds the *Totten/Tenet* rule is not applicable to the instant case. . . .

Defendants argue that Plaintiffs' claims must be dismissed because Plaintiffs cannot establish standing or a *prima facie* case for any of its claims without the disclosure of state secrets. Moreover, Defendants argue that even if Plaintiffs are able to establish a *prima facie* case without revealing protected information, Defendants would be unable to defend this case without the disclosure of such information. Plaintiffs argue that Defendants' invocation of the state secrets privilege is improper with respect to their challenges to the TSP, since no additional facts are necessary or relevant to the summary adjudication of this case. Alternatively, Plaintiffs argue, that even if the court finds that the privilege was appropriately asserted, the court should use creativity and care to devise methods which would protect the privilege but allow the case to proceed.

* * *

Contrary to Defendants' arguments, the court is persuaded that Plaintiffs are able to establish a *prima facie* case based solely on Defendants' public admissions regarding the TSP. Plaintiffs' declarations establish that their communications would be monitored under the TSP. Further, Plaintiffs have shown that because of the existence of the TSP, they have suffered a real and concrete harm. Plaintiffs' declarations state undisputedly that they are stifled in their ability to vigorously conduct research, interact with sources, talk with clients and, in the case of the attorney Plaintiffs, uphold their oath of providing effective and ethical representation of their clients. In addition, Plaintiffs have the additional injury of incurring substantial travel expenses as a result of having to travel and meet with clients and others relevant to their cases. Therefore, the court finds that Plaintiffs need no additional facts to establish a *prima facie* case for any of their claims questioning the legality of the TSP.

Finally, Defendants assert that they cannot defend this case without the exposure of state secrets. This court disagrees. The Bush Administration has repeatedly told the general public that there is a valid basis in law for the TSP. Further, Defendants have contended that the President has the authority under the AUMF and the Constitution to authorize the continued use of the TSP. Defendants have supported these arguments without revealing or relying on any classified information. Indeed, the court has reviewed the classified information and is of the opinion that this information is not necessary to any viable defense to the TSP. Defendants have presented support for the argument that "it . . . is well-established that the President may exercise his statutory and constitutional authority to gather intelligence information about foreign enemies." Defendants cite to various sources to support this position. Consequently, the court finds Defendants' argument that they cannot defend this case without the use of classified information to be disingenuous and without merit.

* * *

IV. The History of Electronic Surveillance in America

Since the Court's 1967 decision of *Katz v. U.S.*, 389 U.S. 347 (1967), it has been understood that the search and seizure of private telephone conversations without physical trespass required prior judicial sanction, pursuant to the Fourth Amendment. Justice Stewart there wrote for the Court that searches conducted without prior approval by a judge or magistrate were per se unreasonable, under the Fourth Amendment. *Id.* at 357.

* * *

In 1976 the Congressional "Church Committee" disclosed that every President since 1946 had engaged in warrantless wiretaps in the name of national security, and that there had been numerous political abuses, and in 1978 Congress enacted the FISA.³¹

* * *

The FISA defines a "United States person"³³ to include each of Plaintiffs herein and requires a prior warrant for any domestic international interception of their communications. For various exigencies, exceptions are made. That is, the government is granted fifteen days from Congressional Declaration of War within which it may conduct intercepts before application for an order.³⁴ It is also granted one year, on certification by the Attorney General,³⁵ and seventy-two hours for other defined exigencies.³⁶

* * *

The FISA was essentially enacted to create a secure framework by which the Executive branch may conduct legitimate electronic surveillance for foreign intelligence while meeting our national commitment to the Fourth Amendment. It is fully described in *United States v. Falvey*, 540 F. Supp. 1306 (E.D.N.Y. 1982), where the court held that FISA did not intrude upon the President's undisputed right to conduct foreign affairs, but protected citizens and resident aliens within this country, as "United States persons." *Id.* at 1312.

The Act was subsequently found to meet Fourth Amendment requirements constituting a reasonable balance between Governmental needs and the protected rights of our citizens, in *United States v. Cavanagh*, 807 F.2d 787 (9th Cir.1987), and *United States v. Duggan*, 743 F.2d 59 (2d Cir.1984).

Against this background the present program of warrantless wiretapping has been authorized by the administration and the present lawsuit filed.

31. Pub.L. 95-511, Title I, 92 Stat 1976 (Oct. 25, 1978), codified as amended at 50 U.S.C. §§ 1801 *et seq.*

33. 50 U.S.C. § 1801(h)(4)(i) ("United States person") means a citizen of the United States, an alien lawfully admitted for permanent residence, an unincorporated association a substantial number of members of which are citizens of the United States or

aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States which is not a foreign power.

34. 50 U.S.C. § 1811

35. 50 U.S.C. § 1802

36. 50 U.S.C. § 1805(f).

V. The Fourth Amendment

The Constitutional Amendment which must first be discussed provides:

The right the of 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.

U.S. CONST. Amend. IV.

* * *

Accordingly, the Fourth Amendment, about which much has been written, in its few words requires reasonableness in all searches. It also requires prior warrants for any reasonable search, based upon prior-existing probable cause, as well as particularity as to persons, places, and things, and the interposition of a neutral magistrate between Executive branch enforcement officers and citizens.

In enacting FISA, Congress made numerous concessions to stated executive needs. They include delaying the applications for warrants until after surveillance has begun for several types of exigencies, reducing the probable cause requirement to a less stringent standard, provision of a single court of judicial experts, and extension of the duration of approved wiretaps from thirty days (under Title III) to a ninety day term.

All of the above Congressional concessions to Executive need and to the exigencies of our present situation as a people, however, have been futile. The wiretapping program here in litigation has undisputedly been continued for at least five years, it has undisputedly been implemented without regard to FISA and of course the more stringent standards of Title III, and obviously in violation of the Fourth Amendment.

* * *

[In omitted portions of the opinion, the court also held that the TSP violated the First Amendment and the Separation of Powers.]

VIII. The Authorization for Use of Military Force

After the terrorist attack on this Country of September 11, 2001, the Congress jointly enacted the Authorization for Use of Military Force (hereinafter "AUMF") which states:

That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

The Government argues here that it was given authority by that resolution to conduct the TSP in violation of both FISA and the Constitution.

First, this court must note that the AUMF says nothing whatsoever of intelligence or surveillance. The government argues that such authority must be implied. Next it must be noted that FISA and Title III, are together by their terms denominated by Congress as the exclusive means by which electronic surveillance may be conducted. Both statutes have made abundantly clear that prior warrants must be obtained from the FISA court for such surveillance, with limited exceptions, none of which are here even raised as applicable. Indeed, the government here claims that the AUMF has by implication granted its TSP authority for more than five years, although FISA's longest exception, for the Declaration of War by Congress, is only fifteen days from date of such a Declaration.

* * *

The AUMF resolution, if indeed it is construed as replacing FISA, gives no support to Defendants here. Even if that Resolution superceded all other statutory law, Defendants have violated the Constitutional rights of their citizens including the First Amendment, Fourth Amendment, and the Separation of Powers doctrine.

[In other omitted portions of the opinion, the court rejected both the government's argument that the President had inherent power to conduct the wiretapping and its argument that practical justifications, "including judicial competence, danger of security leaks, less likelihood of criminal prosecution, delay, and the burden placed upon both the courts and the Executive branch by compliance," supported the TSP. The court granted the plaintiffs a permanent injunction.]

The Court of Appeals for the Sixth Circuit stayed the injunction pending appeal. *See American Civil Liberties Union v. National Sec. Agency/Central Sec. Service*, 467 F.3d 590 (6th Cir. 2006)

PART 5 : Military Commission Act of 2006 -- Habeas Corpus

In response to the Hamdan v. Rumsfeld decision, Congress enacted the Military Commissions Act of 2006, Pub. L. 109-366, 120 Stat. 260 (Oct. 17, 2006). Part of this act again revised 28 U.S.C. § 2241(e). The statute now reads:

10 U.S.C. § 2241. Power to Grant Writ

* * *

(e)(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

In amending the statute this time, Congress specified: "The amendment . . . shall take effect on the date of the enactment of this Act, and shall apply to all cases, without exception, pending on or after the date of the enactment of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001." Pub. L. 109-366, § 7(b).

Must the federal courts dismiss all pending habeas corpus cases pertaining to Guantanamo?

PART 6 : Transcript from Feroz Abbasi's CSRT Hearing

The Department of Defense has released the transcript of the Combatant Status Review Tribunal hearing for Feroz Abbasi. At the hearing, Abbasi explained "I actually left Britain to either join the Taleban or fight for the sake of Allah in Kashmir." He also said: "Do not be fooled into thinking I am in any way perturbed by you classifying me as a (nonsensical) 'enemy combatant.' In fact quite to the contrary I am humbled that Allah would honor me so." Abbasi also admitted that he attended a speech by Osama Bin Laden at an al-Qaida training camp. (The transcript is available at http://www.dod.mil/pubs/foi/detainees/csrt/Set_5_0465-0672_Revised.pdf.)

PART 7 : Military Commissions Act -- Authority

In the Military Commissions Act of 2006, § 2, Pub. L. 109-366, 120 Stat. 260 (Oct. 17, 2006) Congress add this following provision to the U.S. Code.:

10 U.S.C. § 948b. Military commissions generally

(a) Purpose.--This chapter establishes procedures governing the use of military commissions to try alien unlawful enemy combatants engaged in hostilities against the United States for violations of the law of war and other offenses triable by military commission.

(b) Authority for military commissions under this chapter.--The President is authorized to establish military commissions under this chapter for offenses triable by military commission as provided in this chapter.

(c) Construction of provisions.--The procedures for military commissions set forth in this chapter are based upon the procedures for trial by general courts-martial under chapter 47 of this title (the Uniform Code of Military Justice). Chapter 47 of this title does not, by its terms, apply to trial by military commission except as specifically provided in this chapter. The judicial construction and application of that chapter are not binding on military commissions established under this chapter.

(d) Inapplicability of certain provisions.--(1) The following provisions of this title shall not apply to trial by military commission under this chapter:

(A) Section 810 (article 10 of the Uniform Code of Military Justice), relating to speedy trial, including any rule of courts-martial relating to speedy trial.

(B) Sections 831(a), (b), and (d) (articles 31(a), (b), and (d) of the Uniform Code of Military Justice), relating to compulsory self-incrimination.

(C) Section 832 (article 32 of the Uniform Code of Military Justice), relating to pretrial investigation.

(2) Other provisions of chapter 47 of this title shall apply to trial by military commission under this chapter only to the extent provided by this chapter.

* * *

(f) Status of commissions under common Article 3.--A military commission established under this chapter is a regularly constituted court, affording all the necessary "judicial guarantees which are recognized as indispensable by civilized peoples" for purposes of common Article 3 of the Geneva Conventions.

(g) Geneva Conventions not establishing source of rights.--No alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights.

PART 8 : Military Commissions Act -- Offenses Triable

In part of the Military Commissions Act of 2006, Pub. L. 109-366, § 3(a)(1), 120 Stat. 2625, Congress add a new provision to Uniform Code of Military Justice defining the offenses that the military commissions may try. The excerpt below provides a few examples:

10 U.S.C. § 950v. Crimes triable by military commissions

* * *

(b) Offenses.--The following offenses shall be triable by military commission under this chapter at any time without limitation:

(1) Murder of protected persons.--Any person subject to this chapter who intentionally kills one or more protected persons shall be punished by death or such other punishment as a military commission under this chapter may direct.

(2) Attacking civilians.--Any person subject to this chapter who intentionally engages in an attack upon a civilian population as such, or individual civilians not taking active part in hostilities, shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.

* * *

(15) Murder in violation of the law of war.--Any person subject to this chapter who intentionally kills one or more persons, including lawful combatants, in violation of the law of war shall be punished by death or such other punishment as a military commission under this chapter may direct.

* * *

(24) Terrorism.--Any person subject to this chapter who intentionally kills or inflicts great bodily harm on one or more protected persons, or intentionally engages in an act

that evinces a wanton disregard for human life, in a manner calculated to influence or affect the conduct of government or civilian population by intimidation or coercion, or to retaliate against government conduct, shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.

(25) Providing material support for terrorism.--

(A) Offense.--Any person subject to this chapter who provides material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, an act of terrorism (as set forth in paragraph (24)), or who intentionally provides material support or resources to an international terrorist organization engaged in hostilities against the United States, knowing that such organization has engaged or engages in terrorism (as so set forth), shall be punished as a military commission under this chapter may direct.

(B) Material support or resources defined.--In this paragraph, the term "material support or resources" has the meaning given that term in section 2339A(b) of title 18.

* * *

(28) Conspiracy.--Any person subject to this chapter who conspires to commit one or more substantive offenses triable by military commission under this chapter, and who knowingly does any overt act to effect the object of the conspiracy, shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.

PART 9 : Military Commissions Act -- Procedures

In the Military Commission Act of 2006, Congress also codified the rules and procedures for trials by military commission. In doing this, Congress only changed a few of the rules. The Act contains the following new rules:

1. Presence of the Accused

The accused shall be present at all sessions of the military commission (other than those for deliberations or voting), except when excluded under section 949d of this title.

10 U.S.C. § 949a(b) (1) (B)

2. Limitations on Hearsay Evidence

(i) Except as provided in clause (ii), hearsay evidence not otherwise admissible under the rules of evidence applicable in trial by general courts-martial may be admitted in a trial by military commission if the proponent of the evidence makes known to the adverse party, sufficiently in advance to provide the adverse party with a fair opportunity to meet the evidence, the intention of the proponent to offer the evidence, and the particulars of the evidence (including information on the general circumstances under which the evidence was obtained). The disclosure of evidence under the preceding sentence is subject to the requirements and limitations applicable to the disclosure of classified information in section 949j(c) of this title.

(ii) Hearsay evidence not otherwise admissible under the rules of evidence applicable in trial by general courts-martial shall not be admitted in a trial by military commission if the party opposing the admission of the evidence demonstrates that the evidence is unreliable or lacking in probative value.

10 U.S.C. § 949a(b) (2) (E).

3. Statements obtained by Torture and Coercion

(b) Exclusion of statements obtained by torture.--A statement obtained by use of torture shall not be admissible in a military commission under this chapter, except against a person accused of torture as evidence that the statement was made.

(c) Statements obtained before enactment of detainee treatment act of 2005.--A statement obtained before December 30, 2005 (the date of the enactment of the Defense Treatment Act of 2005) in which the degree of coercion is disputed may be admitted only if the military judge finds that--

(1) the totality of the circumstances renders the statement reliable and possessing sufficient probative value; and

(2) the interests of justice would best be served by admission of the statement into evidence.

(d) Statements obtained after enactment of Detainee Treatment Act of 2005.--A statement obtained on or after December 30, 2005 (the date of the enactment of the Defense Treatment Act of 2005) in which the degree of coercion is disputed may be admitted only if the military judge finds that--

(1) the totality of the circumstances renders the statement reliable and possessing sufficient probative value;

(2) the interests of justice would best be served by admission of the statement into evidence; and

(3) the interrogation methods used to obtain the statement do not amount to cruel, inhuman, or degrading treatment prohibited by section 1003 of the Detainee Treatment Act of 2005.

10 U.S.C. § 948r

4. Appellate Review

The Military Commission Act provides creates a new court called the Court of Military Commission Review to review the decisions military commissions in the first instance. 10 U.S.C. § 950f. The decisions of this new court may then be reviewed by the U.S. Court of Appeals for the D.C. Circuit. 10 U.S.C. § 950g(a). The Supreme Court then may assert jurisdiction by certiorari. 10 U.S.C. § 950g(d).