

**Winter/Spring 2009**  
**Professor Banks**

**COUNTER TERRORISM AND THE LAW**  
**Syllabus #1**

**Meeting time and place:** Tuesday/Thursday from 10:00 to 11:15 p.m., Room 275  
(College of Law)

**Text and other Readings:** Dycus, Banks & Raven-Hansen, *Counterterrorism Law* (Aspen Pub. 2007); *National Security Law, 2008-2009 Supplement* (Aspen 2008). Additional required readings will be available on the Blackboard page for this course, and those assigned readings appear on the list of assignments below. Other page references in the assignments below are to the CTL text and NSL supplement. In addition, depending on your familiarity with the policy issues and recent history surrounding terrorism and counter terrorism, you may want to read a good primer early in the semester. Good choices include *Final Report of the National Commission on Terrorist Attacks upon the United States (9/11 Commission Report)*, Louise Richardson, *What Terrorists Want* (2006), and Bruce Hoffman, *Inside Terrorism* (revised ed. 2006).

**Prerequisites:** There are no prerequisites for the course for law students, other than 2L or 3L status. Graduate students should consult with the professor before registering for the course.

**Assignments:** Classroom participation is expected; preparation is assumed. A “participation group” system will be explained during the first class. In addition, each of you will be asked to participate in case study briefing presentations to the class during the semester. (The briefing paper assignment is described in a separate memorandum.) If you have a disability that may affect your performance in this class, see Assistant Dean Tomas Gonzales to discuss necessary accommodations.

**Guest Professor Classes:** I will be out of the country for two different full weeks in February -- February 10 and 12 and February 24 and 26. Professor Bill Snyder, who taught CTL last year, will teach those classes. The materials covered in those classes are integral to the course and will be fair game for the exams. If I need to miss any other classes, we will schedule necessary make ups, and I will arrange for any makeup classes to be recorded on video so that you can watch the tape if you are unable to attend a particular make up class.

**Examinations and Grades:** Your grade for the course will be determined by your scores on three short writing assignments: a briefing paper and two take-home exams. The briefing papers are explained in a separate memorandum and their timing will be explained in class. The exams will be distributed on Thursdays: February 19 and April 30. They will be due the following Tuesdays: February 24 and May 5. Each of the three writing assignments will be equally weighted to constitute one-third of your course grade.

Excellence in class participation may weigh in your favor by as much as one-third letter grade. While I have no objection to the use of tape recorders in class, I do object to cell phone, pager, or other like interruptions. Please be sure that any such device is turned off during class sessions. In addition, laptops may be used in class only for taking notes; internet use and instant messaging are not permitted.

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**COUNTER TERRORISM AND THE LAW**  
**Course Topics and Assignments**

**PART I: INTRODUCTION**

**1. DEFINING TERRORISM**

**January 13**

A. A brief sketch

- **CTL, pp. 3-12; 37-38**
- **Military Guide to Terrorism in the 21<sup>st</sup> Century, Chap. 1**

**January 15**

B. The process of labeling terrorists and terrorist organizations

- **CTL, pp. 12-21**

C. Defining terrorism in international law

- **CTL, pp. 21-37**

**PART II: ATTACKING TERRORISTS ABROAD**

**January 20**

**2. WAGING WAR ON TERRORISTS**

A. The President's defensive war power

- **CTL, pp. 41-49**

B. Statutory authorization and its limits

- **CTL, pp. 50-57**

C. Defending against al Qaeda – 1998 and 2001

- **CTL, pp. 57-63**

**January 22**

**3. TARGETED KILLING**

A. Law and practice of assassination

- **CTL, pp. 65-71**

B. Targeted killing by Predator

- **CTL, pp. 71-80**

**Case Study No. 1: Attacking terrorist sanctuaries – Pakistan and Syria**

- New York Times, October/November 2008 articles
- Sean Murphy, The International Legality of U.S. Military Cross-Border Operations from Afghanistan into Pakistan

**PART III: DETECTING AND PREVENTING TERRORISM**

**January 27**

**4. THE FOURTH AMENDMENT AND COUNTERTERRORISM**

- A. Detection of terrorist threats
  - CTL, pp. 83-87
- B. The Fourth Amendment Framework
- C. National Security Exception?
  - CTL, pp. 87-101
- D. A Foreign Intelligence Exception?
  - CTL, pp. 101-110

**January 29**

**5. CONGRESS AND COUNTERTERRORISM INTELLIGENCE: FISA**

- A. The Scope of Fourth Amendment protection
  - CTL, pp. 111-118
- B. Congressional authority for surveillance: FISA
  - CTL, pp. 119-143

**February 3**

- C. FISA, Law enforcement, and “the wall”
  - CTL, pp. 143-155
  - NSL Supp., pp. 31-36
- D. FISA trends
  - CTL, pp. 156-174
  - NSL Supp., pp. 36-67
  - In re Directives (Blackboard)

**February 5**

**6. THIRD-PARTY RECORDS AND DATA MINING**

- A. Finding the Dots – Third-party records
  - CTL, pp. 175-200
  - NSL Supp., pp. 69-80
  - John Doe, Inc. v. Mukasey(Doe V), (Blackboard)
- B. Connecting the Dots – Data mining
  - CTL, pp. 200-208

February 10

## **7. ORGANIZING AND COORDINATING COUNTERTERRORISM INVESTIGATIONS**

- A. Executive authority for counterterrorism investigations
  - **Replacement Chapter 8 (Blackboard)**
- B. Information Sharing and agency reforms

February 12

## **8. INVESTIGATING ABROAD**

- CTL, pp. 267-278, 286-291
- In re Terrorist Bombings of U.S. embassies in East Africa, (2d Cir., Nov. 2008) (Blackboard)

February 17

**Case Study No. 2: The Terrorist Surveillance Program (TSP), FISA reform, and the uses and abuses of data mining**

**On Blackboard:**

- CRS, Presidential Authority to Conduct Warrantless Electronic Surveillance to Gather Foreign Intelligence Information (Jan. 5, 2006)
- Dept. of Justice, The NSA Program, Myth v. Reality (Jan. 27, 2006)
- NY Times, Lichtblau, Judge Rejects Bush's View on Wiretaps
- NY Times, Kahn, Mumbai Terrorists Relied on New Technology for Attacks
- Banks, Is the FISA Amendments Act of 2008 good policy? Is it constitutional?

February 19

## **PART IV: DETAINING AND INTERROGATING TERRORIST SUSPECTS**

### **9. CIVIL DETENTION OF TERRORIST SUSPECTS**

- CTL, pp. 295-310
- NSL Supp., pp. 123-132

February 22 and 24

## **10. SUSPENDING THE GREAT WRIT**

- A. Statutory basis for habeas corpus
- B. Suspending the writ for U.S. persons
  - CTL, pp. 311-320
- C. Availability of the writ to nonresident aliens
  - CTL, pp. 320-335
- D. Suspending the writ for aliens?
  - CTL, pp. 335-336, 346-348
  - NSL Supp., pp. 133-164
  - Boumediene v. Bush (D.C. Nov. 20, 2008) (Blackboard)
- E. Availability of the writ to U.S. citizens abroad
  - NSL Supp., pp. 164-173

## **11. MILITARY DETENTION OF TERRORIST SUSPECTS**

- A. Wartime detention of combatants before 9/11
  - CTL, pp. 349-359
- B. Detention of U.S. citizens as combatants after 9/11
  - CTL, pp. 359-394
  - Memorandum for the Attorney General, al-Marri, Jan. 2009 (Blackboard)
- C. Military detention of alien enemy combatants after 9/11
  - CTL, pp. 394-398
  - NSL Supp., pp. 182-213

### **Case Study No. 3: The Status of Habeas Corpus Review and Detention Alternatives for Accused Terrorists**

- Michael Mukasey, Proposal for New Detention Legislation, July 2008
- Matthew C. Waxman, Administrative Detention: The Integration of Strategy and Legal Process, Brookings, July, 2008

- **Scholars' Statement of Principles for the New President on U.S. Detention Policy: An Agenda for Change, September 2008**

## **12. INTERROGATING TERRORIST SUSPECTS**

- A. The evolving history of detainee interrogation in the war on terrorism
- B. The legal standards and their application
  - **CTL, pp. 399-451**
  - **Senate Armed Services Committee Inquiry into the Treatment of Detainees in U.S. Custody (Blackboard)**

### **Case Study No. 4: Applying the Interrogation Standards**

- **Senate Armed Services Committee Inquiry into the Treatment of Detainees in U.S. Custody**
- **Senate Judiciary Committee, Testimony, The Campaign to Ban Torture, September 2008**
- **DOD Intelligence Interrogations, Directive 3115.09 (October 9, 2008)**
- **Human Rights First, How to End Torture and Cruel Treatment, October 2008**
- **Obama Executive Order, Jan. 2009: Ensuring Lawful Interrogation (Blackboard)**

## **13. EXTRAORDINARY RENDITION**

- **CTL, pp. 453-467**

### **Case Study No. 5: Extraordinary Rendition**

- **DHS, Inspector General, Removal of a Canadian Citizen to Syria, June 2008**
- **Arar v. Ashcroft, 532 F. 3d 157 (2d Cir. 2008)**
- **Michael John Garcia, Renditions: Constraints Imposed by the Laws on Torture, CRS, October 2007**
- **Margaret L. Satterwaite, The Story of El-Masri v. Tenet: Human Rights and Humanitarian Law in the "War on Terror," December 2008**

## **PART V: ARRESTING, PROSECUTING, AND REMOVING TERRORISTS**

## **14. CRIMINALIZING TREASON, TERRORISM, AND MATERIAL SUPPORT**

- A. Treason and sedition
  - **CTL, pp. 471-478**
- B. Material support crimes
  - **CTL, pp. 478-493**

C. Extraterritorial criminal jurisdiction

- **CTL, pp. 493-503**

**15. APPREHENDING TERRORISTS**

A. Extradition

- **CTL, pp. 505-515**

B. Irregular rendition

- **CTL, pp. 516-527**

**16. TRYING SUSPECTED TERRORISTS AS CRIMINALS**

A. Classified information procedures act (CIPA)

- **CTL, pp. 529-539**

B. Confronting secret witnesses

- **NSL Supp., pp. 215-227**

C. Handling secret exculpatory testimony

- **CTL, pp. 547-555**
- **NSL Supp., pp. 228-239**

**17. TRYING SUSPECTED TERRORISTS AS UNLAWFUL ENEMY COMBATANTS**

A. Trial by Military Commission before 9/11

B. Trial by Military Commission after 9/11

- **CTL, pp. 557-587**

C. The Military Commissions Act of 2006

- **CTL, pp. 587-600**

**18. TRYING SUSPECTED TERRORISTS AS “SPECIAL INTEREST” IMMIGRANTS**

A. Are all terrorists a danger to national security?

- **CTL, pp. 601-610**

B. Using secret evidence against terrorist suspects

- **CTL, pp. 610-618**

**Case Study No. 6: Closing the Detention Facility at Guantanamo**

## **Bay**

(All on Blackboard)

- **Human Rights First, Prosecuting Terrorism Cases in the Federal Courts, executive summary, May 2008**
- **The Constitution Project, A Critique of “National Security Courts,” June 2008**
- **CSIS, Closing Guantanamo: From Bumper Sticker to Blueprint, September 2008**
- **CRS: Closing the Guantanamo Detention Center, Garcia and Bazan**
- **9 Alumni of Saudi Programs are Arrested, NY Times**
- **Afghan Prison Poses Problem in Overhaul of Detainee Policy, NY Times**
- **Obama Made a Rash Decision on Gitmo, Wall Street Journal**
- **Obama Executive Order: Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base**
- **Obama Executive Order: Review of Detention Policy Options**

## **PART VI: MANAGING TERRORIST ATTACKS**

### **19. RESPONDING TO A WMD ATTACK**

- A. Planning a Response to a terrorist attack
- B. A worst-case scenario
- C. First Responders: Roles and authorities
- D. Second Responders: The federal role
- E. Quarantines and other compulsory measures
  - **CTL, pp. 629-667**

### **20. THE MILITARY’S DOMESTIC ROLE IN COUNTERTERRORISM**

- A. The traditional role of the military in American society
- B. The military’s intelligence role in homeland security
- C. The military’s role in responding to domestic terrorist attacks
- D. Martial law: When planning fails
  - **CTL, pp. 669-699**

**Case Study No. 7: Legal Issues in Domestic Crisis Response  
(additional readings TBA)**

**PART VII: NONCRIMINAL SANCTIONS AGAINST TERRORISTS AND THEIR SPONSORS**

**21. PUBLIC SANCTIONS AGAINST TERRORISTS AND THEIR SPONSORS**

B. Domestic public sanctions

- **CTL, pp. 717-731**

**22. SUING TERRORISTS AND THEIR SPONSORS**

A. Non-state sponsors

- **CTL 733, 741-745**
- **Boim v. Holy Land Foundation (7<sup>th</sup> Cir. 2008)**

B. State sponsors

C. Collecting the judgment

- **CTL, pp. 745-756**