

WCS

Syracuse University

College of Law

Final Examination, Law 779

Prosecuting Terrorists

Fall, 2011

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This is a 3-hour, in-class, closed-book examination.

Instructions:

This examination consists of four parts. Part A contains one essay question based on one fact pattern and is worth twenty percent of the total exam. Part B contains one essay question and is also worth twenty percent of the exam. Part C is the largest part of the examination; it contains one essay question worth **forty percent** of the total examination. For essay questions, if you believe that any one issue is outcome determinative, you should still discuss the remaining issues. If you feel that you need more facts to resolve an issue, explain what facts you would want to know in order to resolve it.

Part D contains ten relatively short answer questions (numbers 4 through 13) that collectively constitute twenty percent of the total examination.

Answer the exam questions and give reasons for your answers. Particularly in Part C, there is no one right answer, so your explanations are very important for determining your grade. The questions in Part D have specific answers that do not require much explanation. Because partial credit will be available, feel free to explain your answers in Part D if you are not certain you are correct.

A statutory supplement is provided and should be in your examination packet.

Of course, the Code of Student Conduct is in effect.

Grading is anonymous. Do not include your name in your answers.

If a proctor, the Registrar or a Dean needs to contact me during the examination, please tell them that I can be reached at (518) 257-2435. You are not permitted to contact me directly.

- William Snyder

The Examination Questions

Part A

(20% of total examination – recommend 36 minutes)

From a United States Government press release:

RALEIGH, N.C. – Dylan Boyd, aka “Mohammed,” ..., 24, a U.S. citizen and resident of North Carolina, was first charged along with seven other defendants in a federal indictment returned on July 22, 2009. He was arrested on July 29, 2009, and the indictment was unsealed. On Sept. 24, 2009, a federal grand jury returned a superseding indictment in the case.

According to the superseding indictment, from before November 2006 through at least July 2009, Boyd aided and abetted other named defendants and others who conspired to provide material support and resources to terrorists, including currency, training, transportation and personnel. The object of the conspiracy, according to the indictment, was to advance violent *jihad*, including supporting and participating in terrorist activities abroad and committing acts of murder, kidnapping or maiming persons abroad.

The indictment alleges that, as part of the conspiracy, Boyd assisted other defendants as they prepared themselves to engage in violent *jihad* and were willing to die as martyrs. They also allegedly offered training in weapons and financing, and helped arrange overseas travel and contacts so others could wage violent *jihad* overseas. In addition, as part of the conspiracy, the defendants raised money to support training efforts, disguised the destination of such monies from the donors and obtained assault weapons to develop skills with the weapons. Some defendants also allegedly radicalized others to believe that violent jihad was a personal religious obligation.

So, the defendant was charged with **Aiding and Abetting a Conspiracy to Provide Material Support to a Conspiracy to Commit Murder.**

1. **Is that a crime? Specifically, what statutes would you need to allege were violated to support such a charge? What elements must the government prove to establish aiding and abetting a conspiracy to provide material support to a conspiracy to commit murder?** If it is a crime, what is the maximum possible penalty under these facts? [Don't be intimidated by the apparent complexity. Parse out the charge and the statutes one at a time. The aiding and abetting statute is Title 18 U.S.C. §2 found near the beginning of the statutory supplement.]

Part B

(20% of total examination – recommend 36 minutes)

The FBI maintains a document known as a “FISA Recipe” to guide agents in the field, who are not necessarily lawyers, in preparing applications and affidavits to present to the Foreign Intelligence Surveillance Court (FISC). It explains:

Without going into the historical background of FISA in detail, the impetus for its enactment was largely a concern for the privacy rights of U.S. persons, balanced against the government’s need to obtain foreign intelligence information. As a result, the statute’s treatment of “U.S. persons” and “non-U.S. persons” is different. For example,”

2. **In what ways does the Foreign Intelligence Surveillance Act treat U.S. persons and non-U.S. persons differently, and why did Congress design the statute this way?** Confine your answer to the portions of the statute that we studied in class, which were “traditional FISA” electronic surveillance under subchapter I and access to business records under subchapter IV. You may ignore subchapter II about physical searches, subchapter III about pen registers, subchapter V about reports, and subchapters VI and VII about certain persons outside of the United States.

Part C

(40% of total examination – recommend 70 minutes)

On September 16, 2011, at Harvard Law School, Assistant to the President for Homeland Security and Counterterrorism John Brennan stated:

When we succeed in capturing suspected terrorists who pose a threat to the American people, our other critical national security objective is to maintain a viable authority to keep those individuals behind bars. The strong preference of this Administration is to accomplish that through prosecution, **either in an Article III court or a reformed military commission**. Our decisions on which system to use in a given case must be guided by the factual and legal complexities of each case, and relative strengths and weaknesses of each system. Otherwise, terrorists could be set free, intelligence lost, and lives put at risk.

That said, it is the **firm position of the Obama Administration that suspected terrorists arrested inside the United States will -- in keeping with long-standing tradition -- be processed through our Article III courts**. As they should be. Our military does not patrol our streets or enforce our laws—nor should it. . . .

Similarly, when it comes to U.S. citizens involved in terrorist-related activity, whether they are captured overseas or at home, we will prosecute them in our criminal justice system. There is bipartisan agreement that **U.S. citizens should not be tried by military commission**. Since 2001, two U.S. citizens were held in military custody, and after years of controversy and extensive litigation, one was released; the other was prosecuted in federal court. Even as the number of U.S. citizens arrested for terrorist-related activity has increased, our civilian courts have proven they are more than up to the job.

3. **What criteria are applied in the paragraphs above to determine in which court to try an alleged terrorist? Are they good or bad criteria for making that decision? What criteria do you believe the President *should* use to decide? In your answer, address *at least four of the major criteria we discussed in class*. (In other words, if you think that one factor is dispositive for you, personally, do not stop there. For example, if you argue that “if the military captures someone, then the military should try him,” continue on to consider at least three more reasons for choosing one *forum* over another for prosecuting alleged terrorists.)**

Part D

(20 % of the exam -- recommend 35 minutes or less)

4. What is the legal standard for obtaining access to hotel records under FISA? More specifically, Title 50, United States Code, Section 1861(b)(2) states: "Each application under this section ... shall include ... a statement of facts showing that there are reasonable grounds to believe that the tangible things sought are _____."
5. International law recognizes five principles of jurisdiction by which domestic criminal courts of the United States may reach conduct outside United States territory. What are four of the five, along with a brief definition of each?
6. If a federal judge chooses to bifurcate a death penalty hearing as Judge Brinkema did in *United States v. Moussaoui*, what in general must the jury find to complete the first verdict form?
7. What provides the basis for legitimacy of international tribunals such as the International Criminal Court in The Hague?
8. What is the standard for classifying information as "TOP SECRET?"
9. What is the legal standard that a court must use in determining whether to order that a substitution be used in place of classified information under the Classified Information Procedures Act (CIPA)? In other words, "The court shall grant such a motion of the United States if it finds that a summary or admission will _____ [what]?"
10. Compare and contrast proceedings pursuant to Section 4 of the Classified Information Procedures Act with proceedings pursuant to Section 6 of that Act.
11. What must the defense do to raise the affirmative defense of entrapment? If the defense makes that showing, what if anything can the government do to overcome that defense? Who ultimately decides whether a defendant was entrapped?
12. When an organization is designated by the Secretary of State as a foreign terrorist organization, due process requires that the organization is entitled to what three things? In other words, what process is due?
13. The Foreign Intelligence Surveillance Act (FISA) at Title 50, United States Code, Section 1805, requires the judge to issue an order approving electronic surveillance if he/she finds, among other things, that there is probable cause to believe what?

END OF EXAMINATION

Good luck to all of you in your formal education and beyond. Truly, it has been a pleasure to get to know and to work with each of you. I hope that we can stay in touch with each other. - WCS