

GARDEN STATE CLE LESSON PLAN

A 4.0 CLE CREDIT COURSE

FREE DOWNLOAD LESSON PLAN AND EVALUATION

SEPTEMBER 11TH AND THE LAW OF WAR

**WITH
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Program Description

This 4 credit GARDEN STATE CLE® will trace the development of the Law of War as it is understood and followed in the United States from the Civil War era to present day conflicts, including those with non uniformed combatants. The curriculum will then analyze the impact that the events of September 11, 2001 had on the substantive and procedural aspects of the Laws of War as well as enforcement actions taken against those who violate its rules. Dissecting international law, treaties, conventions, pacts, Army Field Manuals and United Nations resolutions makes this a one-of-a-kind CLE.

I. INTRODUCTION

- Panelists
- Scope of Topic

II. THE LAW OF ARMED CONFLICT (“LOAC”)

- To protect civilians
- The body of law is generally founded upon concepts of international law
- US Army Field Manual 27-10
- Geneva Conventions
- Hague Conventions
- Department of Defense Directives
- Practical Aspects of LOAC
- UN Resolutions permit certain actions that may otherwise appear extreme. Bin Laden example.

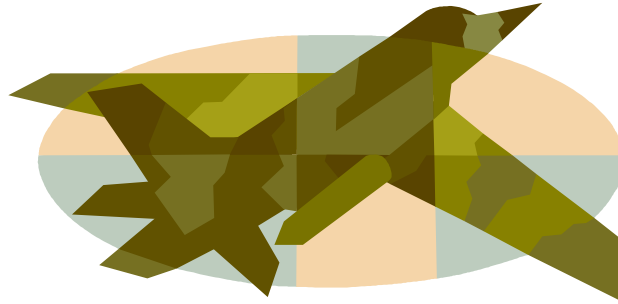
III. PROPORTIONALITY

IV. COMBATANTS: LAWFUL AND UNLAWFUL, AND NON-COMBATANTS

- Lawful combatants have a leader, uniform and carry weapons openly like traditional forces
- Non-combatants: contractors and such, medical personnel and chaplains and POWs and wounded
- Unlawful combatants: hostile without government authority, examples of Spandau's Speer and NASA's Van Braun.
- Undetermined Status: POW detainees until their status is determined

V. TARGETING

- Personnel
- Objects



- Enemy Military Aircraft
- Parachutist from dog fighter aircraft
- Parachutist as part of 101st Airborne etc.
- Enemy Civilian Aircraft
- Enemy Medical Aircraft
- Spies
- Camouflage

VI. PERFIDY AND TREACHERY

- No firing on white flags
- Can't trick a surrendering soldier into surrendering and then shoot the surrendering POW
- Reprisals—no statute of limitations on war crimes

VII. RULES OF ENGAGEMENT

- Strategic and political goals to be satisfied
- ROE issues
- Use of Force
- Deadly force

VIII. VICTOR'S JUSTICE

- Atomic Bomb
- POW Dresden rubble searches
- Incendiaries
- Operation Greif
- The "Great Escape" killings
- Nuremberg trials
- Malmedy Massacre at the Battle of the Bulge
- Hussein's Bunker

IX. WAR TROPHIES

- **Grandpa: yes**
- **Grandson: no**
- **Booby-trapped trophies are a danger**

X. SUBSTANTIVE LAW AND CHANGES IN ENFORCEMENT OF THE LAWS OF WAR

XI. QUESTION AND ANSWER SEGMENT

XII. THE CASE OF EX PARTE MILLIGAN 71 U.S. 2 (1866)

- Setting: Civil War Indiana
- Jurisdiction of Military Courts over civilians
- Current example: Jose Padilla case of civilian vs. military justice disposition
[http://en.wikipedia.org/wiki/Jos%C3%A9_Padilla_\(prisoner\)](http://en.wikipedia.org/wiki/Jos%C3%A9_Padilla_(prisoner))

XIII. THE CASE OF EX PARTE GUIRIN, 317 U.S. 1 (1942)

- Germans arrived in Long Island as soldiers intending to be saboteurs, changed into plainclothes and went to NY
- Other Germans arrived in Jacksonville as soldiers intending to be saboteurs, and went to Chicago
- Finally the FBI believed the confessing German when he brought \$85,000 to the office, half the budget of the operation. What cost **\$85,000** in 1942 would cost **\$1,124,312.60** in 2010 according to an online Inflation Calculator.
- A speedy but not public military trial was held. Very good counsel was provided. All were convicted, all sentenced to death. The cooperators had their sentences commuted to life and 30 years respectively.
- Writs of Habeas Corpus were filed and heard especially by the Court. Denied, and a full opinion followed---after the execution of the Germans.
- Those that arrive with hostile intent and other factors are subject to military commission trials.

- Fast forward to 2001: Guerin is the only case of precedential value.

XIV. APPLICATION OF YAMASHITA, 327 U.S. 1 (1946).

- Philippine atrocities were committed by Japanese Navy personnel.
- Yamashita charged with war crimes after surrender.
- Defense was skillful and professional as commented upon by the Supreme Court. Prosecution charged with hiding evidence.
- General MacArthur wanted speedy trials and swift meting out of justice.
- Yamashita had executed **his own** soldiers for committing war crimes and presented that information as part of his defense.
- The Supreme Court rejected procedural arguments made re: War Crimes and the absence of war after surrender.

- Medina (My Lei massacre) standard: The “Medina Standard” holds that a commanding officer, being aware of a human rights violation or a war crime, will be held criminally liable when he does not take action. Although Medina was eventually found not guilty, all American Army commanders are now fully aware of what might befall them should they fail in their duty to civilians.

**XV. JOHNSON V. EISENTRAGER,
339 U.S. 763 (1950)**

- German soldiers continued fighting with the Japanese in China after the surrender of the Germans. Unlawful combatants?
- U-boats too.
- Convicted of war crimes. Imprisoned in Germany after Chinese conviction. Then the Germans filed Writs of Habeas.
- Jurisdictional question: how far does the jurisdiction of the U.S. Constitution extend? Supreme Court looked at the “insular cases” relating to territorial islands like Hawaii, Puerto Rico, Guam etc.
- The answer hinged on the “Sovereignty” question

- Bringing the Germans here might give them Constitutional rights that the Court may not want them to have.
- Military ships, possibly the same result
- Guantanamo (Gitmo) Base: sovereignty rests with Cuba.

XVI. LITIGATION AFTER 9/11

- Rasul v. Bush, 542 U.S. 466 (2006): Writ denied in courts below on Eisentrager grounds. Supreme Court finds that the case is not an Eisentrager case and states that there is no declared war, there are no charges or counsel, no access to courts and the location of the custodian is key. Although sovereignty of Gitmo may be charged to Cuba technically, the whole base is U.S. controlled and therefore the Writ of Habeas Corpus is available there. Also, non Habeas complaints about conditions etc. are not barred by Eisentrager or other cases.
- Concurrence: apply Eisentrager but distinguish Gitmo as a US Territory and retain the geographic analysis rather than apply the “custodian” analysis.

- Hamdi v. Rumsfeld, 542 U.S. 507 (2004). What to do when holding a U.S. citizen as an enemy combatant on U.S. soil. Hamdi's Dad filed a Petition for Habeas on son's behalf. The high Court noted that the rules are unclear. What defines an enemy combatant? Since Hamdi fought the U.S., he is found to be an enemy combatant. The Court then finds that citizenship does not preclude the capture and detention of unlawful combatants. Detention cannot be unlimited, but during an active conflict he participated in--like Afghanistan--he can be detained until the end of that conflict. Milligan distinguished.
- Detainee Treatment Act (DTA)
- Hamdi permits the use of the process of Habeas, subject to the due process balancing test of private interest of freedom against the government's interest to ensure that enemy combatants don't return to fight against the U.S. Held: Citizen detainees must receive actual notice of their classification as an enemy combatant as well as be given the opportunity to appear before a neutral decision maker to rebut that classification. Burden shifting part of the decision.

Dissent: Scalia and Stevens. Hamdi is entitled to release absent a suspension of the Writ of Habeas or criminal charges being leveled against him.

- Hamden v. Rumsfeld, 548 U.S. 557 (2006). Yemeni national, housed at Gitmo, charged with conspiracy to commit offenses triable by a military commission (tail wagging dog). He was a Bin Laden driver before the hostilities in Afghanistan. No Law of War violation here. Allegations vs. Hamden predated the conduct of the action in Afghanistan. “Conspiracy” is too vague to constitute a violation of the Law of War. UCMJ procedural requirements need to be met for the person charged. Even hearsay and evidentiary requirements of the UCMJ.
- Boumediene v. Bush, 553 U.S. 723 (2008). The most important Habeas decision of our age. It affects the average person in the U.S.

Next friend petition is filed. Jurisdiction issue addressed. Congress sets the jurisdictional limits of the Courts. Held: Habeas exists to ensure a true separation of powers. The Constitution is not a light switch.

This case traces a long history and reaffirms the right of Habeas Corpus.