

LEGAL RESPONSES TO TERRORISM
FINAL EXAM FALL 2007

INSTRUCTIONS

- (1) You have three hours to complete the exam.
- (2) It is open book. You may bring in the casebooks, any notes or outlines that you create, and any of the readings assigned in the student-led classes. You may not bring in any other materials. You may not use a laptop computer.
- (3) Please write in ink, and write on only one side of the paper.
- (4) There are three parts to the exam. Each part carries equal weight in the grading of the exam.
- (5) Part I asks for you to analyze a fact pattern, applying relevant law. You may use such space, in answering the question, as you need.
- (6) Part II contains three sets of short-answer questions, containing three, three, and two questions, respectively. You may pick one question from each group not to answer. In other words, answer two of the three questions from each of the first two sets. Answer one of the two questions from the third set.
- (7) Part III is self-explanatory. You may use such space, in answering the question, as you need.
- (8) Good luck, and have a great break.

I. FACT PATTERN QUESTION

In the 1980's, Borislav Aslanovich emigrated from his native Kazakhstan to the United States. He lived legally in the United States for ten years, until 1997. While here, he married an American citizen, bought a home, and fathered two children. He did not, however, become an American citizen himself. In 1997, he and his wife divorced, and he returned to Kazakhstan to work in a family business. Thereafter, he visited the United States every year to see his children, staying each time for periods varying between one week and one month. He continues to own a share of the house in which his ex-wife and children live. His last such visit took place in 2006, and he did not come to the United States at all in 2007.

Beginning after 2001, Aslanovich began to associate with a group called the Kazakh Liberation Front ("KLF"). The group sought to overthrow the government of Kazakhstan, and to that end engaged in acts of violence, including assassinations, bombings, and kidnappings. The KLF also funds religious schools, food banks, and medical clinics, in those parts of Kazakhstan over which it has effective control. In 2004, the Secretary of State designated the KLF as a foreign terrorist organization.

In 2005 and 2006, during his trips to United States, Aslanovich gave speeches at Kazakh-American community centers, urging Kazakh expatriates to support the KLF "in its effort to bring a new era to Kazakhstan." On those occasions, Aslanovich delivered lengthy diatribes against the current Kazakh regime, declaring, among other things, that "death is too good for the criminal tyrants in power in Kazakhstan," and "their crimes against our people must never be forgotten, nor forgiven." In his lectures, he also touted the humanitarian work of the KLF. At the conclusion of each lecture, he invited and accepted donations from persons to "support the important work of the KLF." In an effort to monitor terrorist activities, the FBI sent an undercover agent to listen to Aslanovich's lectures, and that agent reported back to FBI supervisors about them.

In 2007, for reasons never made clear, the KLF carried out a bomb attack on the U.S. Embassy in Kazakhstan. Two persons died, and extensive damage to U.S. property resulted. Intelligence sources investigating the attack never uncovered any evidence connecting Aslanovich to that particular KLF operation. However, the U.S. government provided his name to the Kazakh authorities on a list of persons known by U.S. authorities to sympathize with the KLF.

Apparently on the basis of the list and other information provided by U.S. authorities describing Aslanovich's activities

in the U.S., Kazakh police entered Aslanovich's home in Kazakhstan in the early morning hours of June 30, 2007. They arrested him and seized papers from his house. Those papers listed the sums of money Aslanovich had provided to KLF officials, some of whom worked in the armed resistance branch of the organization. After Aslanovich's arrest, Kazakh police interrogated him, using methods characteristic of "robust interrogation." As a result of that interrogation, Aslanovich made a statement in which he admitted belonging to the armed resistance branch of KLF, though he denied any knowledge of, or role in, the embassy bombing. The Kazakh police immediately provided a summary of the interrogation to U.S. authorities, including Aslanovich's signed confession.

After interrogating Aslanovich, Kazakh police turned him over to U.S. authorities, who flew him to the United States. Upon arrival, FBI agents questioned him, after giving him the Miranda warnings and obtaining from him a waiver of his rights. Aslanovich again denied any role in the embassy bombing, admitted belonging to the KLF, but stated that while he was aware of some of the KLF's "military operations," he did not participate in any of them, nor did he provide funding for them. He said that his work for the KLF related exclusively to its humanitarian activities.

You are a prosecutor in the Justice Department, asked by your supervisor to draft a memo outlining the criminal charges that could be brought against Aslanovich, and identifying the evidence likely to be admissible against him at a trial in a U.S. Federal criminal court.

With respect to the evidence, your supervisor seeks your opinion with respect to the admissibility of: (1) the papers seized from Aslanovich's home by Kazakh police; (2) the statement Aslanovich made to Kazakh police; (3) the statement Aslanovich made to FBI agents after his arrest; and (4) the observations about Aslanovich's speeches made by the undercover FBI agent.

With respect to the charges, you should outline the elements of any charges for which the government can reasonably expect to convict Aslanovich. In your memo, you should identify the elements of any such charge or charges, noting the evidence that tends to support the government's case on such elements. You should also note any elements as to which the government's case may require additional evidence, in order to be sufficient to convict.

II. SHORT ANSWER QUESTIONS

Answer two questions each from group A and group B. Answer one question from group C.

(A) Pick two of the following three questions. Your answer for each question is limited to one-half of one page.

- (1) What is the Watson Declaration?
- (2) What is the Vaughn Index?
- (3) What is the "lone wolf" provision?

(B) Pick two of the following three questions. Your answer for each question is limited to one page.

- (1) To what extent has U.S. law established a "wall" preventing the sharing of information between intelligence and law enforcement agents?
- (2) Under what circumstances can the U.S. detain indefinitely a foreign national suspected of involvement in terrorist activities (but not to a degree sufficient to bring a criminal charge), when the national is subject to deportation, but no country is willing to accept the individual?
- (3) What are the conditions the government must meet to obtain a FISA warrant to conduct electronic surveillance of a person in the United States?

(C) Pick one of the following two questions. Limit the length of your answer to two pages.

- (1) Summarize the legal controversy surrounding the Guantanamo Bay military tribunals. In particular, identify the legal arguments advanced by detainees against the tribunals, the arguments advanced by the Bush administration against the detainees' position, and the Supreme Court's holdings thus far. Note also any remaining significant pertinent issues yet to be decided by the Supreme Court.

- (2) Summarize the legal controversy surrounding the claims of persons held as enemy combatants to the right to federal court judicial review of the lawfulness of their detention. In particular, identify the detainees' arguments, the Bush Administration's position as to their claim of right to federal court judicial review, and the Supreme Court's pertinent holdings thus far. Note also any remaining, significant issues yet to be decided by the Supreme Court.

III. ESSAY QUESTION

Since 9/11, the Bush Administration has adopted a number of initiatives in its efforts to combat terrorism. Some people, including many representatives of the Bush Administration, contend that, while the policies may be new, they do not effect a significant change in the law. That is, the legal authority supporting the policies has long existed. Moreover, to the extent that Administration policy relies on new statutes and executive orders, the Administration contends that many such statutes and orders simply fill in gaps, or close loopholes, in older laws. The statutes, thus, do not mark a significant new direction in American law.

Others, including many critics of Administration policy, contend that post-9/11 Bush Administration initiatives mark a significant, even radical, departure from prior law. That is, the legal justifications advanced in support of such initiatives require a new understanding of precedent and Presidential power, and the new statutes do not merely fill gaps and close loopholes, but significantly change prior law.

Do you think that the Administration's post-9/11 initiatives mark a significantly new direction in American law? Cite examples of specific statutes, rules, or doctrines, and explain how they support your answer.