

LEGAL RESPONSES TO TERRORISM
FINAL EXAM FALL 2008

INSTRUCTIONS

- (1) You have three hours to complete the exam.
- (2) It is open book. You may bring in the casebook, the supplemental assigned readings, and any notes or outlines that you create. You may not bring in any other materials nor consult any other resources. You may use a computer or write your answer by hand.
- (3) If you write your answer by hand, 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 June 2008, U.S. intelligence officers received a tip about the activities of Antti Niemi, an Estonian citizen lawfully resident in Concord, New Hampshire. The tipster, Peter Enckelman, had joined Viro Kulttuuria (VK), a Concord-based Estonian expatriate cultural organization. After attending a number of social events and meetings at VK, Enckelman had been approached by Niemi, who seemed very interested in Enckelman's attitude about the current political situation in Estonia. During the conversation, Niemi had vehemently criticized the current Estonian government, saying that he wished to see the government overthrown and hoped for the death of the President of Estonia. When Enckelman did not enthusiastically agree, Niemi dropped the subject, and Enckelman had not at first taken Niemi's statements seriously.

On subsequent occasions, though, Enckelman had seen Niemi suspiciously engaged in whispered conversations with other members of VK. One day in early June 2008, suspecting Niemi of violent intentions, Enckelman had looked through Niemi's unattended briefcase and found a document entitled "The Project." Enckelman photocopied the document and returned the original to the briefcase, without Niemi's knowledge. The document purported to be the work of the Estonian Liberation Front (ELF), an organization previously unknown to law enforcement. It outlined a plan for the destabilization of the Estonian government by means of the promotion of labor strikes, popular demonstrations against the government, the beating and physical intimidation of certain government officials, cyber attacks on government websites, and the destruction of certain public monuments and other cultural symbols offensive to the ELF. Upon discovering the document, Enckelman contacted the FBI to turn over the document and report his observations.

On the basis of that information, an FBI agent sought and obtained approval from the Attorney General to seek a warrant from the Foreign Intelligence Surveillance Court to tap Niemi's phone and search his home in Concord. The application set forth the information described above, and described certain procedures aiming to assure that FBI agents would only listen to telephone calls that involved Niemi's activities relating to Estonian politics. The court granted the warrant, authorizing FBI agents to use a wiretap to listen to Niemi's calls for a period of ninety days, in order to discover information about Niemi's activities with respect to the government of Estonia. The court also authorized the search of Niemi's home.

While listening to Niemi's calls pursuant to the court order, FBI agents discovered that Niemi was the head of the US chapter of the ELF. The FBI also learned the identities of several other ELF members, some living in the United States, some in Estonia, and some in other countries. Although many details of the group's plans remained obscure to the listening FBI agents, they could confirm that, as the "Project" document supplied by Enckelman had indicated, the ELF desired the overthrow of the Estonian government. The FBI also learned that Niemi and two other ELF members planned to travel to Estonia to work on the "project."

During the surreptitious search of Niemi's house, the FBI discovered a list of contributors to ELF, one of whom, Mart Poom, had given more than \$10,000 to the group. Poom was an Estonian citizen who had obtained a student visa entitling him to enter the U.S. in 2007, but the visa had expired in June 2008. Further investigation revealed that Poom had also joined the VK, and was an acquaintance of Niemi's. Enckelman told the FBI that he had seen Niemi and Poom talking at VK events, but Enckelman did not know what they had spoken about. The FBI agents did not overhear any telephone calls between Niemi and Poom, nor did they hear any relevant references to Poom on the calls they did overhear, and so could not determine whether Poom belonged to the ELF. In addition to the list of contributors, FBI agents also discovered in Niemi's house a cache of counterfeit US currency, totaling \$25,000. The agents did not seize the currency, but made note of its existence.

When, in November 2008, Enckelman reported that he had heard that Niemi was planning to go to Estonia, FBI agents increased their surveillance of Niemi. On December 11, they tracked him to Logan Airport in Boston, and arrested him as he prepared to board a flight to Finland. The agents reasoned that Niemi probably intended to sneak into Estonia across the Baltic Sea from Finland. A search of Niemi and his luggage disclosed some ELF pamphlets, but nothing else of note.

Apprised of the existence of the counterfeit money by the FBI agents who had initially discovered it, investigators for the US Attorney's office in New Hampshire subsequently sought a search warrant for Niemi's house from a federal magistrate, for the purpose of seeking the counterfeit currency. The magistrate issued the warrant and the investigators found and seized the currency during their subsequent search of Niemi's house.

FBI agents also notified INS officials about Niemi and Poom. Niemi's immigration lawyer has filed an affidavit in which Niemi

claims to have been arrested and held incommunicado in Estonia, prior to his emigration to the US. Niemi claims that he would be tortured if deported or otherwise returned to Estonia. To further complicate matters, the Estonian government has formally requested Niemi's extradition from the United States, pursuant to the Estonia-United States extradition treaty, on charges of plotting the overthrow by force of the Estonian government. The US-Estonia extradition treaty has all the usual terms.

The Estonian government has not sought the extradition of Poom. Indeed, the Estonian government has indicated that it will not accept Poom, should the US attempt to deport him.

You are a lawyer in the Justice Department's counter-terrorism bureau. Your supervisor has sought your advice with respect to action the United States could take against Niemi and Poom. In particular, the officer desires to know:

- (1) what possible criminal charges might be brought, together with an analysis of the strength of the evidence available to prove the elements of those charges. You should also identify any likely defenses to those charges;
- (2) whether the evidence discovered during the investigation as a result of the FBI wiretap and house search, as well as the counterfeit currency later seized during the second house search, would be admissible in criminal trials; and
- (3) what immigration, extradition, or deportation action the government can take with respect to Niemi and Poom.

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 "doctrine of specialty"?
- (2) To what does the "Beaver definition" refer?
- (3) What are the "Woods Procedures"?

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

- (1) To what extent do US courts have jurisdiction over habeas petitions filed by American citizens challenging their detention in Iraq?
- (2) Explain the role of the United States Constitution's Suspension Clause in the Supreme Court's decision with respect to the availability of federal habeas review of the status of persons imprisoned at Guantanamo Bay Naval Base.
- (3) To what extent did the AUMF authorize the President to implement the "Terrorist Surveillance Program" (TSP).

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

- (1) Various statutes and treaties that we have discussed this semester use different definitions of "terrorism." Identify some of the different definitions, and discuss the implications, if any, of the differences, as well as the reasons for preferring one version of the definition over another in particular contexts.

- (2) In a number of terrorism-related contexts, U.S. statutes and/or regulations draw distinctions between the treatment due to U.S. citizens and resident aliens on the one hand, and that due to non-U.S. persons on the other. Identify some of those contexts and discuss the justifications for such differences in treatment.

III. ESSAY QUESTION

In a variety of contexts, we have confronted the question of whether terrorist activity constitutes an act of war, implicating the laws of war and governmental war powers, or rather constitutes a crime, best addressed by the criminal justice system. Drawing upon some specific instances of that recurring controversy, comment on whether, and to what extent, the war paradigm or the crime paradigm applies (or should apply) in the law of counter-terrorism measures.