

**QUESTION**  
**(DETENTION, CUSTODY, AND HABEAS RELIEF)**

Marwan holds dual citizenship with the United States and Saudi Arabia. While in Syria, which he had voluntarily entered, he surrendered to Syrian rebel forces, allegedly while fighting with ISIS forces. Marwan was turned over to the U.S. military, who transferred him to a U.S. military detention facility within the “Green Zone” in Iraq. He has been held in U.S. military custody for seven months without being charged in any forum. He has been declared an “enemy combatant” by the Secretary of Defense. Marwan denies that he was an enemy combatant fighting with ISIS, and claims that he was in Syria with press credentials documenting the Syrian conflict. The DoJ has determined that there is insufficient evidence to charge Marwan in a federal civilian court. The President and Secretaries of State and Defense have now decided to transfer Marwan to Jordan, an ally of the U.S., and to allow the Jordanian government to adjudicate Marwan’s case. The DoJ has taken the position that Marwan can be transferred to Jordan, and that he has received an appropriate habeas proceeding because, in being turned over to the Jordanians, he is being “released” from U.S. military custody.

Marwan has not yet been provided a Combatant Status Review Tribunal (CSRT). What process is due him, if any, before a transfer to a foreign country? Has he been properly declared an enemy combatant, i.e., is the United States in an “armed conflict” with ISIS? Does the 2001 Authorization for Use of Military Force (AUMF) cover any

such conflict? Regarding his right to a habeas proceeding as a U.S. citizen, does it matter that the military facility in which he is held (and where the proceeding would be conducted) is within the Green Zone which is frequently under attack by Shia insurgents? (Consider the discussion in *Hamdi II*, at Dycus 889-895, about modifications to habeas proceedings under certain circumstances).

The U.S. has diplomatic control over the Green Zone, which is revocable by Iraq upon a reasonable period of notice. Also, assume for this fact pattern that the U.S. does not have treaty, MLAT, or extradition agreements with Jordan, Syria, or Iraq.

If you conclude that a transfer to Jordan is permissible, would it affect your conclusion that the European Court of Human Rights and the International Criminal Court have opined that the Jordanians torture detainees believed to have been involved in terrorism, and the U.S. intelligence community has been advised of the ECHR/ICC position?

How if at all does your analysis change about entitlement to a habeas proceeding if Marwan is not a U.S. citizen?

## **QUESTION 2 (TARGETED KILLING)**

Hawsawi is a financier (funds supplier and money-launderer) for the Haqqani Network (HN), which is a guerilla insurgent group based in Pakistan which is in armed conflict with the U.S. and the government of Afghanistan. The HN from time-to-time coordinates attacks in Afghanistan with Al Qaeda. The HN has also sheltered AQ fighters in towns under HN control. Hawsawi collects and manages funds contributed to the HN, and provides funds and resources to HN fighters and their families. Hawsawi periodically coordinates with the chief financiers for AQ, ISIS, and associated forces, and this coordination includes discussions about impending attacks on U.S. and coalition forces. Recently, funds provided by Hawsawi supported an HN squad that attacked a U.S. Special Forces base in Kandahar, Afghanistan, killing and wounding a number of U.S. soldiers.

Immediately after the Special Forces attack, Hawsawi moved to Turkmenistan, which is outside the zone of the Afghanistan armed conflict. Turkmenistan and the U.S. do not maintain diplomatic relations, and there is little or no communication between the two countries about international terrorism, national security, and counterintelligence. Because of the lack of communication, capture of Hawsawi in Turkmenistan does not appear feasible.

Hawsawi always travels with two of his wives and seven of his children, along with personal aides and staffers, some of whom (but not all) are aware of, and aid and abet, Hawsawi's terror financing activities. Hawsawi attended undergraduate and

graduate school in the United States, and during that time became a naturalized U.S. citizen.

Assume for purposes of this question that applicable U.S. law is set forth in the 2013 U.S. Policy Standards (Dycus 392-94).

May the President authorize a drone strike/targeted killing of Hawsawi? What are the applicable provisions of U.S. law and policy, human rights law (HRL), international humanitarian law (IHL), and the EO 12,333 ban on assassinations? If you feel you need additional facts, identify these facts.

Is Hawsawi a senior operational leader of al Qaeda and associated forces? If a drone strike can be authorized, could the U.S. military strike Hawsawi's compound, which would contain Hawsawi, his lieutenants, other HN fighters, but also Hawsawi's family, and the families of many of the fighters, along with non-belligerent staff (cooks, teachers, mechanics, etc.). Planners advise that there is an alternative strike opportunity within a narrow window between Hawsawi leaving his armored vehicle, and entering his living quarters, which would still involve a significant risk of "unintentionally" killing family members and non-belligerent members of Hawsawi's entourage. Is the latter a better option, or is there no difference in the strike options?

Would it change your conclusion and/or analysis if you were aware that in addition to providing funds, food, clothing, etc., to HN fighters, Hawsawi also provides automatic weapons, improvised explosive devices (IEDs), rocket launchers, and other explosives to the HN?

### **QUESTION 3** **(FISA: AGENT OF A FOREIGN POWER)**

Agents and attorneys from the FBIHQ Counterterrorism Division have opened an investigation into a U.S. Congressman and two members of his staff, who are believed to be acting as agents of a foreign government, Russia.

The investigation has disclosed that the Congressman and his staffers have traveled to Russia on personal funds to avoid the scrutiny associated with government-paid travel expenses. They have made 5-6 trips to the country over the last two years, and have filed false calendar reports advising that the Congressman was in the U.S. during these trips (which reports have been provided to FBI agents in response to a subpoena). While in the foreign country, the targets engage in "tradecraft," that is, evasive movements and communications designed to avoid U.S. intelligence. The targets meet with Russian intelligence officials, and provide information on various confidential (not classified but sensitive) matters involving U.S. policies and personnel (such as which legislators and executive branch officials are favorable to Russia, and which are not).

The targets also provide compromising information on U.S. personnel that can be used to influence those persons to take positions favorable to Russia. The Congressman also provides, at times through the two staffers, Russian officials with information on U.S. military capabilities, which he obtains through membership on the House armed services Committee (see 18 U.S.C. § 794).

The Congressman and staffers take cash from Russian operatives to compensate the Congressman and the staffers for the information provided. The amounts received on each trip for each target are substantially in excess of \$10,000 per target, and the funds are carried back to the U.S. from Russia on the targets' persons, without filing the requisite CMIR form. (Assume the transport of funds without reporting are felony violations of 31 U.S.C. § 5316.)

The Congressman promises to take actions (and does) to assist the Russian government in achieving certain policy objectives, such as removing sanctions on the country imposed by the U.S., lifting travel restrictions on Russian personnel, implementing favorable trade agreements for Russia, removing the U.S. from mutual defense pacts, and supporting unpopular (in the U.S.) military actions by Russia (such as in the Ukraine, Georgia, Crimea, etc.). The Congressman accepts campaign contributions from Russian officials, he also accepts additional cash from Russian operatives, which he deposits in a political action committee (PAC) fund set up in a nominee name (to disguise its connection to him), and uses this cash for himself, and to reward other Congresspersons who support his efforts on behalf of Russia. (Assume these are felony campaign finance violations.) Also, federal law prohibits receipt of anything of value from a foreign government in support of a campaign or election to a federal office.

Is the evidence sufficient to obtain FISA orders for electronic surveillance and searches on the basis that the Congressman and his staffers are agents of a foreign power (Dycus 618, 623-24)? Are any of the targets' actions protected by the First Amendment? Assume that Russia engages in foreign counterintelligence within the U.S., and also engages in international terrorism in the form of assassinations, human rights abuses, and paramilitary operations in violation of U.N. Conventions.

Rather than use of FISA, is criminal prosecution of the Congressman and staff an easier option (include discussion of the benefit of continuing intelligence collection through FISA)?

#### **QUESTION 4** **(MILITARY INVOLVEMENT IN DOMESTIC MATTERS, POSSE** **COMITATUS, INSURRECTION ACT)**

There is a general election pending within the week. Chicago, Illinois, is in a state of unrest. In the past week, there have been several shootings by police, in which three (3) protesting citizens have been killed. Protests are intensifying, centered on the downtown Chicago area, and specifically around the courthouse. The courthouse is a federal facility, maintained by the General Services Administration (GSA). GSA also

hosts state courtrooms, such that both federal and state courts are operated from this common facility.

Some protesters are spiraling out of control, angered at police use of force but also opposing the re-election of a President believed to support police abuses and suppression of freedoms of expression, assembly, and ballot access. Some of the protests have devolved into looting, arson of business locations, and attacks on police and federal protective officials. Overall, though, the protests are peaceful and respectful.

The President, on the ballot for re-election, wishes to respond aggressively to the situation in Chicago. He orders the Sec'y of Defense to deploy 100 active duty troops from a nearby military base to Chicago, to assist in "restoring order." He also has the Sec'y of Defense/Sec'y of the Army deploy the DC National Guard to Chicago to assist the active duty military in controlling what he regards as an "insurrection." At the request of the Governor of Illinois, the Governor of New York sends 100 New York National Guard troops to Chicago. These Guard troops are not deputized by the President or Defense officials.

On orders from the President, some active duty U.S. military are deployed to set up roadblocks on major roadways into Chicago, with orders to stop travelers from entering the downtown area if they are doing so to join the protests. These soldiers are also forcibly dispersing protesters from protest areas, and are also searching vehicles for firearms, explosive devices, and other weapons (without warrants). The President also orders the use of military helicopters for low flyovers, again to disperse protesters.

Protest leaders and influencers are being detained and taken to off-site locations. The detentions are conducted by SWAT equipped personnel in dark clothing with no personal identifications, or identifying insignia. Several whistleblowers (from the Defense Department) come forward to advise that the personnel carrying out the detentions are active duty troops from military intelligence units. The Defense Dept. denied responsibility for the detentions, but says that if they were involved, the actions were permissible intelligence-gathering.

As battles between Chicago PD and some protesters intensify, the Chief Judge with overall building management responsibility for the courthouse announces that the courthouse is being closed for the foreseeable future. All bond hearings (including for arrested protestors), pretrial proceedings, and trials are postponed. The closure affects all federal cases in the Northern District of Illinois, and also state court proceedings for a four-county area served by the state courts operating in Chicago.

With the court closures, the President is considering a declaration of martial law for the entire Chicago area. The Sec'y of Defense is selecting a military tribunal to try criminal offenses in the area that may be under martial law.

On Election Day, the President deploys active duty troops to various voting precincts to keep protesters away, and to allow access to voting booths only to registered voters who can prove registration.

Are any of the actions of the active-duty troops, and/or the DC Guard, violations of the Posse Comitatus Act, or are otherwise impermissible? Are there any provisions of the Insurrection Act (Dycus 1191-93) that may authorize the actions of the military?

Can the NY National Guard in their Title 32 capacity assist Chicago PD in searching vehicles, arresting looters and arsonists, and in taking other law enforcement actions?

Are conditions in existence such that the President may declare martial law (Dycus 1210-12)? Has civilian government ceased operations in the relevant area (although the courts are closed, Chicago PD is engaged and the Mayor's emergency management operations are functioning)? Can the President convene a military tribunal to try criminal offenses while the courthouse is closed?

## **QUESTION 5 (MATERIAL SUPPORT)**

As an associate at a large Washington, D.C., law firm, you have been asked, considering your familiarity with counterterrorism law and policy, to advise a group of senior partners about several matters. Your firm has been approached by an intermediary foreign government to take certain actions on behalf of a designated foreign terror organization (FTO). Your partners ask you about the legality of these actions.

Can the firm represent the FTO in an action to delist the FTO? Would the provision of legal services constitute material support? If the firm undertakes the delisting on a *pro bono* basis, would that constitute the provision of material support in the value of the legal services?

The FTO asks your firm to lobby the Executive Branch of the U.S. Government and the U.S. Congress to change policies that impact the FTO, such as stopping all military aid to the State of Israel, and to cease providing arms to coalition countries fighting the FTO. Can the firm accept funds from the FTO for these lobbying efforts? Would those funds be subject to seizure as property of the FTO?

The FTO asks your firm to undertake post-conviction representation of one of the FTO's spiritual leaders who is serving a prison sentence in the U.S. for conspiracy to use weapons of mass destruction. Can the firm undertake the representation, knowing the clear association between the spiritual leader and the FTO? Can your firm pass on inspirational communications from the leader to the FTO, which communications have been received in attorney-client-privileged settings in the prison?

Can your firm organize and fund a series of benefit dinners to support the families of deceased or incarcerated FTO members? Can the firm seek to unblock or “unfreeze” seized FTO funds, arguing that the fees are needed to pay your firm’s legal fees?

Would any advice you would have provided change if you learn that one of your senior partners has been in direct communication with a senior commander of the military wing of the FTO, and the partner is receiving guidance and direction on all of the legal matters involved in the foregoing (and is providing that advice to fellow partner members of the managing committee)?

### **QUESTION 6 (SAFEGUARDING NATIONAL SECURITY INFORMATION)**

Kevin Jordan is a former employee of the National Reconnaissance Office (NRO), a member of the Intelligence Community in charge of deploying and managing the U.S. network of “spy” satellites. Jordan worked at NRO for ten years, and he resigned “on bad terms,” asserting that he was passed over for deserved promotions and that his advice on operational issues was disregarded.

While Jordan held a top-secret clearance, he never signed a non-disclosure agreement (due to a failure by NRO to follow up). NRO did promulgate regulations that required pre-publication review and approval of any writings containing classified information, and/or information that would harm the national security and/or the functions and operations of the NRO. According to NRO HR personnel, the existence of the pre-publication review regulation and others was communicated to all staff in an all-hands memorandum, and was also disseminated in writing to all staff who were retiring or resigning.

After resigning, Jordan began writing what he termed an “expose” of contract irregularities, fraud, kickbacks, Foreign Corrupt Practices Act (FCPA) violations, and other alleged “criminal violations.” He alleged that design, construction, and launch contracts for new satellites were being let to companies associated with a particular political party, without competitive bidding or compliance with the Federal Acquisition Regulations (FAR). Some of the companies receiving contracts, according to Jordan, had foreign shareholders, some of whom Jordan believed were connected to foreign intelligence services. He also claimed that the contract recipients were paying kickbacks to high-level NRO administrators, and he identified purchases by these administrators of luxury real estate, second homes in resort areas, expensive automobiles, and trips to exotic locations.

Jordan within weeks of his resignation had completed a text comprised of ten (10) chapters. He did not submit his manuscript to NRO, but provided a copy to his literary agent, claiming to a former associate still employed at NRO that Jordan wished to protect

his work from being seized by the government. Jordan also claimed his agent was working on proofing and editing the text.

Several weeks after obtaining the manuscript, the agent submitted Chapter 1 of the text to the N.Y. Times, Huffpost, the Daily Beast, Politico, and other media, all of which promptly published the material. The NRO though DoJ immediately demanded that the media cease and desist any further publication. The NRO also issued a statement that although the contract details had not been classified, foreign nations including Iran, Russia, and China were actively searching for contract particulars, and that publication of the information would and did cause significant damage to the national security of the U.S., and would harm the operations of the NRO as an agency of the U.S. Government. Despite the warning from DoJ, and the NRO statement, the agent sent out Chapters 2 and 3, and the media immediately published those chapters, citing the public interest.

After the publication of the first three chapters, the agent sent Jordan \$25,000 for each chapter, for a total of \$75,000. Jordan placed the funds in a “nominee” bank account (i.e., one not in his name), presumably to protect against seizure or forfeiture of the funds.

Can the U.S. stop (enjoin) further publication of Jordan’s book? [consider *Snepp v. U.S.*, 444 U.S. 507 (1980), *Edgar v. Haines*, 2 F. 4<sup>th</sup> 298 (4<sup>th</sup> Cir. 2021)] Can the U.S. recover the \$75,000 paid to Jordan, and obtain a constructive trust on any future payments? Does Jordan have criminal liability under the Espionage Act for his conduct (or other statutes, such as money laundering), especially after the publication of the NRO statement? (Assume that whistleblower protection statutes are not applicable.)

Can the U.S. enjoin the literary agent, and the media companies, from further publication? Do these parties have criminal exposure under the Espionage Act?