Notes

Preface

Chapter 1
1. For example, the sweeping legislation and “alphabet soup” programs of President Franklin D. Roosevelt’s New Deal appeared, at the time, the optimal solution to reinvigorate an economy in the grips of the Great Depression. In retrospect, however, this unprecedented governmental intervention was much more than a temporary economic palliative, for it signaled a drastic and, in some respects, enduring change in the government’s relationship to the governed.

3. Id. at 86.
4. Alex P. Schmid, The Response Problem as a Definition Problem, in Western Responses to Terrorism 7, 8 (Alex P. Schmid and Ronald P. Crelinsten eds., 1993).
5. The U.S. government has employed this definition of terrorism for statistical and analytical purposes since 1983.
9. Walter Reich, Understanding Terrorist Behavior: The Limits and

10. Id. at 274.


12. Among the costs of terrorism, Crenshaw includes punitive government reaction, loss of popular support, and the risk that terrorist activities may be perceived as elitist because they are often carried out without the participation of the masses. However, the advantages include getting the attention of the public and relevant government organizations, setting the stage for revolt by undermining government authority, and potentially provoking repressive governmental responses that increase popular support for the terrorists’ goals. Id. at 16–20.

13. Id. at 24.


15. According to Greek mythology, Dike was the daughter of Themis and Zeus and is known as the goddess of justice (in contrast to her mother, who was given the title of goddess of divine justice).


22. Id.

23. Id. at 103.

24. Levy, supra note 18, at 259.


26. Korematsu v. United States, 323 U.S. 214 (1944). Although Korematsu’s case focuses on the internment of Japanese American citizens during World War II, there is incontrovertible evidence that both German Americans and Italian Americans endured similar harassment and restrictions on their freedom based solely on their nationalities.

27. This order was issued after the United States was at war with Japan and was apparently designed to protect against espionage and sabotage of national security and defense initiatives.

28. See http://www.jainternment.org/camps/detention.html. This
Web site, maintained by the National Asian American Telecommunications Association, documents the Japanese internment experience through historical documents, video clips, and photos.

29. There was no evidence to suggest that Korematsu was in any way disloyal to the United States or involved in espionage or sabotage activities.

31. Id. at 242.
32. Id. at 245–46.
33. A writ of coram nobis is a remedy by which a court can correct errors in criminal convictions where other remedies are not available. In Korematsu’s case, since the Supreme Court had finally confirmed his conviction, he faced a tremendous uphill battle of proving that there had been outrageous and obvious governmental misconduct.
34. Such evidence included U.S. government intelligence reports that concluded that mass internment of Japanese Americans would serve no useful military or nonmilitary purpose.

Chapter 2

2. Id. at 670.
3. REICH, supra note 9 (ch. 1), at 264. This ideology, of course, seems hauntingly similar to modern-day terrorist statements and justifications.
4. Rapoport, supra note 1, at 666.
5. REICH, supra note 9 (ch. 1), at 265.
6. Id. at 266.
7. The report designates seven countries as state sponsors of terrorism: Cuba, Iran, Iraq, Libya, North Korea, Syria, and Sudan. Inclusion on this terrorist list imposes four main sets of U.S. sanctions: a ban on arms-related exports and sales, controls over exports of other items that could enhance military capability, prohibitions on economic assistance, and miscellaneous financial aid restrictions.
8. Likely targets for recruitment also include disaffected Americans, particularly those with extensive criminal histories, who may have a motive to seek revenge against America and its justice system. American law enforcement identifies this as the most pernicious form of recruitment because American terrorists could ostensibly “blend in” to American society and go undetected until they unleash a deadly attack. This reality pinpoints precisely why a counterterrorism program focusing on ethnicity as a basis for suspicion will be short-sighted and ineffectual.
11. The Department of State had confirmed that between 10 and 14
American citizens were onboard the ship. Fortunately, at the time of the hijacking, the majority of the 680 passengers had already disembarked at a previous port and were expected to reboard the ship at a later port of call.

12. There were conflicting reports concerning whether the Italian government had information about the killing during conversations with the captain prior to the release of the ship. The U.S. government’s suspicion that Italy agreed to allow the hijackers safe passage with full knowledge that a vicious crime had been committed aboard led to increased tension and distrust between the two governments.

13. The *Achille Lauro* Hijacking (B), Kennedy School of Government Case Program, Case #864.0 (1988).

14. Abul Abbas was eventually convicted in absentia in an Italian court and remained a fugitive from justice for 18 years until his capture in April 2003 by U.S. Special Forces in Iraq after the toppling of Saddam Hussein’s regime.


17. Later, at the end of the trial, prosecutors dropped the lesser charges of conspiracy and contravention of the act. Dropping the conspiracy charge was significant because it, at minimum, suggested that there was insufficient evidence to demonstrate that others were involved in the bombing. The families of the American victims had hoped that the trial would produce evidence of the Libyan government’s involvement.

18. Although Yousef was a fugitive at the time of the trial, he was subsequently apprehended, tried, convicted, and sentenced to life in prison in 1997.


20. Majid Tehranian’s article may be found in draft format at www.toda.org/grad/mtt/global_terrorism.html (2001).

21. Id.


19. Id. at 5–12.

20. The minority view is actually a radicalized version of the already conservative form of Wahabbi Islamic clericism that controls religious life in Saudi Arabia. Examples of how wildly out of touch Wahabbi clerics are include the continued declaration only twenty years ago by the head of the sect that the earth was flat because the Koran told him that was so and the recent fatwah against the Japanese children’s toy Pokémon trading cards. *Fresh Air: Interview with Newsweek Correspondent Christopher Dickey* (NPR radio broadcast, Nov. 13, 2001).


23. *The Propaganda War—It Is Needed to Sustain the Immediate Battle, But Also to Win the Peace*, ECONOMIST, Oct. 6, 2001, at 11. After some initial stumbles in the communication strategy—such as President Bush’s early reference to the coming conflict as a “crusade” and Italian prime minister Berlusconi’s remarks about Christian superiority and the need to “occidentalise” the Middle East (*A Battle on Many Fronts*, ECONOMIST, Oct. 6, 2001, at 16)—the concerted effort to signal increased sensitivity appears to be coming together.


27. *Id.*


32. *Id.*

33. *Id.*

34. *America and the Arabs, supra* note 30.


37. *Id.*


It is on just this Arab—or, better, Islamic—street that President Bush must fight in his war against Osama bin Laden and his terrorists, a battleground for the public’s mood that may ultimately be more important than the mountains and deserts of Afghanistan. . . . And in this conflict, Mr. bin Laden has an edge in weaponry—the vocabulary with which to define the conflict. For what he seeks to do is cast this the cataclysmic clash of civilizations: Islam against the West, believer against infidel.


41. *Judges* 16:29, 30 (emphasis added).

43. Id.

44. Id. at 197.


47. Id. at 200.


58. Stern, *supra* note 51, at 221.


60. Id. at 380, 383–86.

61. Id. at 380, 387–88.


64. Id.


69. Id.

70. Id.

71. Shannon Brownlee, *Clear and Present Danger: We Thought We’d*

72. Id.
73. Id.
79. Id. at 126–28.
80. Id.
94. Broad et al., *supra* note 56.


104. Id.


107. Id.


114. Id.


117. Cyberterrorism, supra note 116.

118. Id.

119. Id. at xiii.


121. Id.

122. Id.


125. Cyberterrorism, supra note 116, at 36. The report offers as an example the possibility that, prior to launching an attack against Saudi Arabia, Iran could trigger viruses and time bombs previously planted in the electronic inventory systems in the United States. Because the United States would be hampered by the technological confusion and operational delays, it would be unable to immediately deploy reinforcements to the region, thereby giving Iran a tactical, and possibly decisive, advantage.


127. Cyberterrorism, supra note 116, at xix.


131. Id. at A7


Chapter 4

1. SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS, 94TH CONG., 2D SESS., INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS, BK. II, FINAL RPT., NO. 94–755, AT 165.


7. The Combating Terrorism Act authorized, among other things, more wiretap and surveillance authority to law enforcement officials. According to one of the bill’s sponsors, Senator Orrin Hatch, “It is essential that we give our law enforcement authorities every possible tool to search out and bring to justice those individuals who have brought such indiscriminate death into our backyard.” Statement of Senator Orrin Hatch during floor debate of the Combating Terrorism Act, Cong. Rec. S9362–87 (Sept. 13, 2001).


9. Id.

10. Edmund Burke, Speech on Conciliation with the Colonies (March 22, 1775).

11. Levy, supra note 18 (ch. 1), at 143.

12. Id. at 146.


14. Id. (emphasis added).

15. Id.


17. Id.


19. Id. at 358–59 (quoting Beck v. Ohio, 379 U.S. 89, 97).


21. The list of felonies is quite lengthy and includes espionage, bribery, presidential assassination, mail and wire fraud, murder, kidnapping, extortion, and robbery. Essentially, Congress sought to limit authorization for intrusive surveillance practices to serious crimes.


24. A “U.S. person” is defined as a “citizen of the United States, an alien lawfully admitted for permanent residence, and unincorporated association a substantial number of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association which is a foreign power.”

25. This section amends 18 U.S.C. 3121 et seq., which establishes standards for the use of pen registers and trap and trace devices on telephonic communications.

26. Supra note 5.


30. Id. at 253.

31. United States v. Freitas, 800 F.2d 1451, 1456 (9th Cir. 1986).
Freitas court further concluded that notice should be provided “within a reasonable, but short, time subsequent to the surreptitious entry. Such time should not exceed seven days except upon a strong showing of necessity.” Cf. United States v. Villegas, 899 F.2d 1324 (2nd. Cir. 1990). In Villegas, the court reasoned that

two limitations on the issuance of warrants for covert-entry searches for intangibles are appropriate. First, the court should not allow the officers to dispense with advance or contemporaneous notice of the search unless they have made a showing of reasonable necessity for the delay. Second, if a delay in notice is to be allowed, the court should nonetheless require the officers to give the appropriate person notice of the search within a reasonable time after the covert entry. What constitutes a reasonable time will depend on the circumstances of each individual case. We would, however, agree with the Freitas court that as an initial matter, the issuing court should not authorize a notice delay of longer than seven days. (United States v. Villegas, at 1337; citations omitted)


34. Indeed, many criminal forfeiture provisions contain what is known as a “relation back” provision, which converts unlawfully acquired proceeds to the government’s possession at the time the unlawful act is committed. For example, the RICO forfeiture statute reads, in pertinent part:

All right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (l) that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.


38. It is noteworthy that several of the Patriot Act provisions authorizing expansive government surveillance powers contain sunset clauses, which means that the provisions will expire on December 31, 2005, unless renewed by Congress. Ironically, many of the provisions lack reporting or other legislative oversight requirements, arguably leaving Congress with no reasonable basis to measure the implementation and impact of these provisions.
40. Id. at 616.
41. Id. at 620.
42. Notwithstanding the “wall” requirement, in September 2000, the government confessed that, in at least seventy-five instances, there had been inappropriate dissemination of foreign intelligence information to criminal investigators.
43. Supra note 39, at 623 (emphasis added).
44. Id.
45. Id. at 625. This FISA court ruling and the first ever FISA appellate court opinion are more fully explored in chapter 6, under the section “Non-Article III Courts.”
46. Statement of Senator Patrick Leahy hailing the release of the FISA court opinion (Aug. 23, 2002).
48. Fact Sheet on Murkowski Legislation.
49. Inspector General, Department of Justice, Report to Congress on Implementation of Section 1001 of the USA PATRIOT Act, at 6 (July 17, 2003).

Chapter 5

2. Id.
3. Authorization for Use of Military Force, S.J. Res. 23, 107th Congress, 115 Stat. 224 (2001). This joint resolution was passed by the Senate 98–0 and the House 420–1 on September 14 and signed by the president on September 18.
5. Abramowitz, supra note 1, at 77.
7. Id. at 131.


10. Id. at Section 5.


14. For more information on this point, see Michael J. Kelly, Time Warp to 1945—Resurrection of the Reprisal and Anticipatory Self-Defense Doctrines in International Law, 13 FLA. ST. UNIV. J. TRANSNAT’L. L. & POL’Y 1 (fall 2003).


16. Id.


22. Dan Eggen and Dana Priest, Intelligence Powers Set for New Agency; Department Would Shape Response to Threats, WASHINGTON POST, June 8, 2002, at A01.


29. President’s Military Order, supra note 27.


33. Supra note 4, at S9422–23.


36. Id.


40. SENATE COMMITTEE ON FOREIGN RELATIONS, 82ND CONG., REPORT ON THE GENEVA CONVENTIONS FOR THE PROTECTION OF WAR VICTIMS (Comm. Print 1955).


44. Id.

45. Murphy, *supra* note 41.


53. President’s Message to Joint Session of Congress Responding to the Terrorist Attacks of September 11th, PUB. PAPERS (Sept. 24, 2001).


56. Id.


59. Id. at 156–57.


61. Id.

62. Id. at 30.

63. The incentive package to Pakistan in exchange for rekindling an old alliance was expensive but necessary in the grand scheme:
Since [September 11], Washington has rescheduled $396 million of Islamabad’s debt; approved a $300 million line of credit for prospective investors in Pakistan; and offered $73 million to patrol Pakistani borders and $34 million to fight drug trafficking. On November 15th, Washington gave Pakistan $600 million in foreign aid to address the impact of a terror-induced global recession.


**Chapter 6**

1. Jess Braven, *White House Seeks to Expand Indefinite Detentions in Brigs*, WALL STREET JOURNAL, Aug. 8, 2002:

Stung by the courtroom circus that yet another accused terrorist, Zacarias Moussaoui, has created, and the aggressive defense marshaled by John Walker Lindh before he plea-bargained his way out of a possible life sentence, the Bush administration is preparing to expand its policy of indefinitely detaining in U.S. military jails people it designates as “enemy combatants.” Such prisoners—whether Americans or foreigners captured in the U.S.—aren’t afforded the same constitutional rights as criminal defendants, or even the limited rights allowed in military tribunals. . . . Officials said they selected brigs in South Carolina and Virginia [for Hamdi and Padilla] partly because they fall under the jurisdiction of courts that are more conservative and presumably more sympathetic to the administration.

2. Ex Parte Milligan, 71 U.S. 2, 121; 18 L. Ed. 281, 295 (1866).


5. *Id.* at 115–16; 18 L. Ed. 281, 294.
6. Id.
7. Id. at 131; 18 L. Ed. 281, 299.
8. Id. at 125; 18 L. Ed. 281, 297.
10. The case of the alleged “shoe bomber” Richard Reid is not discussed here as it raises no new significant issues not already raised in the Lindh and Moussaoui cases. The divergent areas of the Reid indictment relate to his actions on board an aircraft—namely attempting to detonate an explosive contained in the sole of his shoe. His case was heard before the federal district court in Boston and was resolved with an agreement giving him sixty years to life in exchange for a plea of guilty. Reid admitted he attended terrorist training camps in Afghanistan and was a follower of Osama bin Laden. See Reid indictment and legal documents at <http://news.findlaw.com/legalnews/us/terrorism/cases/index2.html>; Associated Press, Venting Hate; Voicing Regret, Staying Loyal to bin Laden, NEWSDAY (New York), Oct. 5, 2002, at A4.
33. Id.
37. Id.
38. Id.
41. Braven, supra note 1.
43. Ex Parte Quirin, 317 U.S. 1 (1942).

Much like the Supreme Court’s validation of President Roosevelt’s decision to intern American citizens of Japanese descent during World War II, Quirin has long been criticized as an abdication of independent judicial judgment during war time and an unwar-
ranted surrender of constitutional rights. Even the author of the Court’s opinion, Chief Justice Stone, reportedly had grave misgivings about the judgment he penned.

45. Adam Liptak, Accord Suggests U.S. Prefers to Avoid Courts, NEW YORK TIMES, July 16, 2002, at A14:

Legal scholars found it hard to identify a rationale that would call for an ordinary criminal prosecution of Mr. Lindh but military detention of Mr. Padilla and Mr. Hamdi. The search for a unifying principle becomes even more difficult if Zacarias Moussaoui and Richard C. Reid are added to the mix. . . . Efforts to distinguish the treatment of these prisoners on consistent grounds tend to fail. The distinguishing factor is not citizenship: Mr. Moussaoui is French, and Mr. Reid is British; the others claim American citizenship. Nor is it the place of arrest: Mr. Lindh and Mr. Hamdi were captured in Afghanistan, the others in the United States. Nor is it the nature of the central criminal charge: Mr. Moussaoui, Mr. Reid and Mr. Padilla are accused of attempting or conspiring to commit terrorist acts, the others of fighting on the wrong side abroad.

“You do worry about equal treatment and having a consistent theory about who ends up where,” said Ruth Wedgwood, a law professor at Yale. The only factor that seems to explain the disparity in how the men were treated is time. The later detentions were military, suggesting that the government may now view ordinary trials as more trouble than they are worth.


48. For the sake of brevity and to reduce repetitiveness of issues, the federal indictments of James Ujaama in Seattle in August 2002 for allegedly planning to create a training camp in Oregon, and the four foreign nationals arrested in Detroit for alleged conspiracy to obtain weaponry and intelligence and create safe houses and fake IDs, are not discussed. However, for further reading on these cases, see Timothy Egan, Riddle in Seattle: Is Man Held by U.S. a Terrorist or Just a Hustler? NEW YORK TIMES, Oct. 6, 2002, at A24; United States v. Ujaama (W.D. Wash. 2002); grand jury indictment available at <http://news.findlaw.com/hdocs/docs/terrorism/usujaama82802ind.pdf>; Danny Hakim, 4 Are Charged with Belonging to a Terror Cell, NEW YORK TIMES, Aug. 29, 2002, at A1.

49. United States v. Goba, Mosed, Taher, Galeb, Al-Bakri and Alwan

50. One of the defendants, Faysal Galab, entered a plea agreement on January 10, 2003, with prosecutors. In exchange for dropping his indictment to a lesser charge, he supplied information on the other five cell members and agreed to testify against them, admitting attending the al Farooq terrorist training camp in Afghanistan with them, and was told afterward to deny it. Robert F. Worth, Accused Member of Terror Cell Near Buffalo Agrees to Guilty Plea, NEW YORK TIMES, Jan. 11, 2003, at A9.


53. Id.

54. The president’s order designating al-Marri an enemy combatant, supra note 46, only states that he is associated with al Qaeda, is “engaged in conduct that constituted hostile and war-like acts . . . that had the aim to cause injury to . . . the United States,” possesses intelligence that would aid the United States in its war on terror, and represents a continuing grave danger to American national security.

55. Lane, supra note 42.

56. 18 U.S.C. §2339A.

57. Id. at (b).


59. Id.:

America has had these kinds of laws before. In the McCarthy era, Congress and the states passed numerous statutes that made it a crime to have an association with the Communist Party. But the Supreme Court repeatedly ruled that only those individuals who specifically intended to further the party’s unlawful ends could be punished. Guilt by association, the court proclaimed, is “alien to the traditions of a free society and to the First Amendment itself.”


61. Id. at 1180–81.

62. Id. at 1204.


65. Winter, supra note 63.
69. Liptak et al., supra note 28.
76. Id.
77. Sachs, supra note 67.
78. Id.
81. Supreme Court Allows Secrecy to Stand in Deportation Cases, NEW YORK TIMES, June 29, 2002, at A10.
84. Id.
85. Id.


94. Geneva Convention, supra note 30.

95. Thom Shanker and Katharine Q. Seelye, Behind-the-Scenes Class Led Bush to Reverse Himself on Applying Geneva Conventions, NEW YORK TIMES, Feb. 22, 2002, at A12: “By denying captives full Geneva protections, the administration said, it could more thoroughly interrogate them to uncover future terrorist plots, bring a wide array of charges against them, try them before military tribunals and administer the death penalty.”


97. Military Order, supra note 29.


103. Although there are variations among jurisdictions, the Miranda warning is generally expressed as follows:

You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to speak
to an attorney and to have an attorney present during any questioning. If you cannot afford a lawyer, one will be provided for you at government expense.

108. In re Sealed Case No. 02–001, 310 F.3d 717, 731 (U.S. App., 2002).
109. Id. at 734.
110. Id. at 746.
111. In re All Matters Submitted to the Foreign Intelligence Surveillance Court, 218 F.Supp. 2d 611, 614 (U.S. Dist., 2002).
112. Supra note 108, at 734.
113. Id.
114. Id. at 730.
115. Supra note 111, at 625.
116. Id. at 621.
118. Supra note 108, at 744.
120. Id.
121. Supra note 111, at 614.
122. Id. at 617.
123. Military Order, supra note 29.
129. Harvey Rishikof, A New Court for Terrorism, NEW YORK TIMES, June 8, 2002, at A15.
130. Id.
131. Id.


137. Rehnquist, supra note 132.

Chapter 7

1. Ex Parte Merryman 17 F. Cas. 144 (D. Md. 1861).


5. Laura Parker, Kevin Johnson, and Toni Locy, Secure Often Means Secret, USA Today, May 16, 2002, at 1A.