

# Notes

## Preface

1. Dan Eggen, *Ashcroft Defends Anti-Terror Steps*, WASHINGTON POST, Dec. 7, 2001, at A1.
2. Editorial, *Ashcroft's Contempt*, ST. PETERSBURG TIMES, Dec. 10, 2001, at 14A.
3. Editorial, *Justice and the Attorney General*, BUFFALO NEWS, Dec. 10, 2001, at B4.
4. Theodore Roosevelt, Editorial, KANSAS CITY STAR, May 7, 1918, at 14.

## 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.
2. M. Cherif Bassiouni, *Legal Control of International Terrorism: A Policy-Oriented Assessment*, 43 HARV. INT’L L. J. 83, 84 (winter 2002).
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.
6. Michael J. Jordan, *Terrorism’s Slippery Definition Eludes UN Diplomats*, CHRISTIAN SCIENCE MONITOR, Feb. 4, 2002, at 7.
7. Alex P. Schmid, *United Nations Office for the Prevention of International Terrorism* (1992).
8. CALEB CARR, THE LESSONS OF TERROR 6 (2002).
9. WALTER REICH, *Understanding Terrorist Behavior: The Limits and*

*Opportunities of Psychological Inquiry*, in *THE ORIGINS OF TERRORISM: PSYCHOLOGIES, IDEOLOGIES, THEOLOGIES, STATES OF MIND* 272 (1998).

10. *Id.* at 274.

11. Martha Crenshaw, *The Logic of Terrorism: Terrorist Behavior as a Product of Strategic Choice*, in *THE ORIGINS OF TERRORISM* 8 (Walter Reich ed., 1998).

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.

14. *The Economic Consequences of 11 September and the Economic Dimension of Anti-Terrorism*, Draft General Report, NATO Parliamentary Assembly, Economics and Security Committee (2002).

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).

16. THOMAS AQUINAS, *SUMMA THEOLOGAE*, II-II, Q. 58, art. 1 (Benziger Brothers, ed., and Fathers of the English Dominican Province, trans., 1947).

17. WILLIAM GALSTON, *JUSTICE AND THE HUMAN GOOD* 282 (1980).

18. LEONARD W. LEVY, *ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION* 277 (1988).

19. *See, e.g.*, *United States v. Armstrong*, 208 U.S. 481 (1908); *Caldwell v. Texas*, 137 U.S. 692 (1891); *Nobles v. Georgia*, 168 U.S. 398 (1897); *Howard v. Fleming*, 191 U.S. 126 (1903).

20. *Cooper v. Aaron*, 358 U.S. 1, 17 (1958).

21. JOYCELYN M. POLLOCK, *ETHICS IN CRIME AND JUSTICE: DILEMMAS AND DECISIONS* 101 (1998) (quoting Norval Morris).

22. *Id.*

23. *Id.* at 103.

24. LEVY, *supra* note 18, at 259.

25. *Shaughnessy v. Mezei*, 345 U.S. 206, 212 (1953); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

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.

30. *Korematsu*, 323 U.S. at 223.

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.

35. *Korematsu v. U.S.*, 584 F. Supp. 1406, 1420 (N. D. Cal. 1984).

Notes to Pages  
19–32  
263

## Chapter 2

1. David C. Rapoport, *Fear and Trembling: Terrorism in Three Religious Traditions*, 78 AM. POL. SCI. REV. 658 (1984).

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.

9. Yonah Alexander, *Terrorism in the Twenty-first Century: Threats and Responses*, 12 DEPAUL BUS. L.J. 59, 79 (fall 1999).

10. The report, “Significant Terrorist Incidents, 1961–2001: A Brief Chronology,” can be found at [www.state.gov/r/pa/ho/pubs/fs/5902.htm](http://www.state.gov/r/pa/ho/pubs/fs/5902.htm).

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.

15. ALLAN GERSON AND JERRY ADLER, *THE PRICE OF TERROR: ONE BOMB, ONE PLANE, 270 LIVES: THE HISTORY-MAKING STRUGGLE FOR JUSTICE AFTER PAN AM 103* 3 (2001).

16. *Report of the President's Commission on Aviation Security and Terrorism* (May 1990).

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.

19. Harry S. Truman, *NEW YORK TIMES*, Nov. 17, 1953.

20. Majid Tehranian's article may be found in draft format at [www.toda.org/grad/mt1/global\\_terrorism.html](http://www.toda.org/grad/mt1/global_terrorism.html) (2001).

21. *Id.*

### Chapter 3

1. *Past Terrorist Targets*, *USA TODAY*, Oct. 18, 2001, at 10A.

2. Bill Keller, *Nuclear Nightmares*, *NEW YORK TIMES MAGAZINE*, May 26, 2001, at 22; BBC News, *US Terror Experts Set for UK Ports*, July 10, 2002 <<http://news.bbc.co.uk/1/hi/uk/2119071.stm>>.

3. Joel Brinkley, *Coast Guard Encounters Big Hurdles in New Effort to Screen Arriving Ships*, *NEW YORK TIMES*, Mar. 16, 2002, at A9.

4. Jay Kral, *A New Bureaucracy Takes Flight, Air-Safety Agency's First Steps Look Plodding, Inefficient*, *WALL STREET JOURNAL*, July 16, 2002, at A4.

5. Sara Kehaulani Goo, *Fledgling TSA Offers Clues*, *WASHINGTON POST*, July 22, 2002, at A13.

6. Office of the Coordinator for Counterterrorism, U.S. State Dept., *Patterns of Global Terrorism* (2002), App. A: Chronology of Significant Terrorist Incidents. Available at [www.state.gov/s/ct/rls/pgrprpt/2002/html/19990.htm](http://www.state.gov/s/ct/rls/pgrprpt/2002/html/19990.htm).

7. Peter L. Bergen, *Picking up the Pieces*, 81 FOREIGN AFFAIRS 169 (March/April 2002).

8. James Risen and David Johnston, *Agency Is under Scrutiny for Overlooked Messages*, NEW YORK TIMES, June 20, 2002, at A20; James Bramford, *Too Much, Not Enough*, WASHINGTON POST, June 2, 2002, at B1.

9. Subcommittee on Terrorism and Homeland Security, *Counterterrorism Intelligence Capabilities and Performance Prior to 9-11*, Report to the Speaker of the House of Representatives and Minority Leader (July 2002); Kathy Kiely, *House Panel Flags Intelligence Flops*, USA TODAY, July 17, 2002, at 5A.

10. John Diamond, *Shackles Loosened on U.S. Intelligence*, USA TODAY, July 9, 2002, at 8A.

11. Statement of Robert S. Mueller III, director of FBI, on *New FBI Focus*, Subcommittee for the Departments of Commerce, Justice, State, the Judiciary, and Related Agencies of the House Committee on Appropriations (June 21, 2002). Available at <<http://www.fbi.gov/congress/congress02/mueller062102.htm>>.

12. William Safire, *J. Edgar Mueller*, NEW YORK TIMES, June 3, 2002, at A15.

13. Kathy Kiely and Jim Drinkard, *Ridge Lacks Clout, Critics Say*, USA TODAY, June 6, 2002, at 4A.

14. Thomas S. Foley and Newt Gingrich, *If Congress Were Attacked*, WASHINGTON POST, Mar. 17, 2002, at B9.

15. Thom Shanker and James Risen, *Rumsfeld Weighs New Covert Acts by Military Units*, NEW YORK TIMES, Aug. 12, 2002, at A1.

16. Bergen, *supra* note 7.

17. Joe Hallett and Catherine Candisky, *Why Do People Hate America Enough to Kill?* COLUMBUS DISPATCH, Sep. 13, 2001, at 1A; Joseph S. Nye, *Why Do They Hate Us? The Reasons Are Many, The History Long 'America Represents Global Capitalism,'* BOSTON GLOBE, Sep. 16, 2001, at D1; Editorial, *Why Do They Hate Us So Much?* ST. LOUIS POST-DISPATCH, Sep. 16, 2001, at B6.

18. Fouad Ajami, *The Sentry's Solitude*, 80 FOREIGN AFFAIRS 2, 7 (Nov./Dec. 2001).

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).

21. Douglas Jehl, *Newspapers and T.V. Paint U.S. Action as a Kind of Terrorism*, NEW YORK TIMES, Nov. 11, 2001, at B5: This attitude "permeate[s] a region that sees itself as having been cheated, maligned, outsmarted and outmuscled by Westerners for much of its modern history."

22. Milton Bearden, *Afghanistan, Graveyard of Empires*, 80 FOREIGN AFFAIRS 17, 23-26 (Nov./Dec. 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.

24. Peter Tomsen, *Untying the Afghan Knot*, 25 *FLETCHER F. WORLD AFF.* 17, 19 (winter 2001).

25. Mohammad Bazzi, *Power Struggle: Tribal Divisions Threaten a New Afghan Government*, *NEWSDAY* (New York), Nov. 18, 2001, at A5; Reuters, *Five Years After Ouster, a Professor Returns to Uneasy Alliance*, *NEW YORK TIMES*, Nov. 18, 2001, at B3; *After the Taliban*, *ECONOMIST*, Oct. 6, 2001, at 17.

26. Stephen Kinzer, *Why They Don’t Know Us*, *NEW YORK TIMES*, Nov. 11, 2001, at WK5.

27. *Id.*

28. Fouad Ajami, *What the Muslim World Is Watching*, *NEW YORK TIMES MAGAZINE*, Nov. 18, 2001, at 48.

29. *Islam and the West, Never the Twain Shall Peacefully Meet?* *ECONOMIST*, Nov. 17, 2001, at 17, 19.

30. *America and the Arabs, Why Not Democracy?* *ECONOMIST*, Mar. 23, 2002, at 11.

31. Bergen, *supra* note 7.

32. *Id.*

33. *Id.*

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

35. *Islam and the West, They Can Live Together*, *ECONOMIST*, Nov. 17, 2001, at 10.

36. *U.S. to Track Visitors Deemed a Security Risk*, *WASHINGTON POST*, June 6, 2002, at A1.

37. *Id.*

38. John Kifner, *The New Power of Arab Public Opinion*, *NEW YORK TIMES*, Nov. 11, 2001, at WK1:

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.

39. *The Battle for Hearts and Minds, Relaunching the Propaganda War*, *ECONOMIST*, Nov. 10, 2001.

40. J. William Fulbright, *NEW YORKER*, May 10, 1958.

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

42. Ariel Merari, *The Readiness to Kill and Die: Suicidal Terrorism in the Middle East*, in *ORIGINS OF TERRORISM: PSYCHOLOGIES, IDEOLOGIES, THEOLOGIES, STATES OF MIND* 193–207 (Walter Reich ed., 2000).

43. *Id.*

44. *Id.* at 197.

45. Gregg Zoroya, *Her Decision to Be a Suicide Bomber*, *USA TODAY*, Apr. 22, 2002, at A1.

46. Merari, *supra* note 42, at 199.

47. *Id.* at 200.

48. Zoroya, *supra* note 45.

49. Jan Lodal, *The Price of Dominance: The New Weapons of Mass Destruction and Their Challenge to American Leadership* 95 (Council on Foreign Relations 2001).

50. Guy Gugliotta, *Report: U.S. Vulnerable to Attack*, *WASHINGTON POST*, June 25, 2002, at A2.

51. Jessica Stern, *Terrorist Motivations and Unconventional Weapons*, in *PLANNING THE UNTHINKABLE* 203 (Peter R. Lavoy et al. eds. 2000).

52. *Word for Word Early Warnings; The Surprise Was More When Than Whether or How*, *NEW YORK TIMES*, May 19, 2002, at D7.

53. Stern, *supra* note 51, at 223.

54. GARY K. BERTSCH AND WILLIAM C. POTTER, *DANGEROUS WEAPONS, DESPERATE STATES* (1999).

55. Stern, *supra* note 51.

56. William J. Broad et al., *Assessing Risks, Chemical, Biological, Even Nuclear*, *NEW YORK TIMES*, Nov. 1, 2001, at A1.

57. Christopher F. Chyba, *Toward Biological Security*, 81 *FOREIGN AFFAIRS* 122–23 (May/June 2002).

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

59. TOM MANGOLD AND JEFF GOLDBERG, *PLAGUE WARS: THE TERRIFYING REALITY OF BIOLOGICAL WARFARE* 379, 381–83 (1999).

60. *Id.* at 380, 383–86.

61. *Id.* at 380, 387–88.

62. Rick Weiss, *Clarifying the Facts and Risks of Anthrax*, *WASHINGTON POST*, Oct. 18, 2001, at A12.

63. Guy Gugliotta, *Study: Anthrax Tainted up to 5,000 Letters*, *WASHINGTON POST*, May 14, 2002, at A2.

64. *Id.*

65. Ellen Nakashima, *USPS Sees New Way to Spot Biohazards*, *WASHINGTON POST*, March 9, 2002, at A13.

66. MADELINE DREXLER, *SECRET AGENTS: THE MENACE OF EMERGING INFECTIONS* 234 (2002).

67. JEANNE GUILLEMIN, *ANTHRAX: THE INVESTIGATION OF A DEADLY OUTBREAK* (1999).

68. William J. Broad, *Sowing Death: How Japan Germ Terror Alerted the World*, *NEW YORK TIMES*, May 26, 1998, at A1.

69. *Id.*

70. *Id.*

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

*Wiped Out Smallpox, a Highly Contagious Disease That Has Killed Countless Millions. Could an Ancient Scourge, in Enemy Hands, Come Back to Haunt Us?* WASHINGTON POST MAGAZINE, Oct. 28, 2001, at Wo8.

72. *Id.*

73. *Id.*

74. *Id.* See also Ceci Connolly, *Smallpox Vaccine Program Readied: Inoculations May Surpass 500,000 under U.S. Plan*, WASHINGTON POST, July 8, 2002, at A1; Elizabeth Olson, *Panel Urges Shift of Focus in Preparing for Small Pox*, NEW YORK TIMES, Aug. 13, 2003, at A22.

75. RICHARD PRESTON, *THE HOT ZONE* (1994).

76. MANGOLD AND GOLDBERG, *supra* note 59, at 384.

77. PLANNING THE UNTHINKABLE: HOW NEW POWERS WILL USE NUCLEAR, BIOLOGICAL AND CHEMICAL WEAPONS 202–29 (Peter R. Lavoy et al. eds., 2000).

78. Chyba, *supra* note 57, at 128.

79. *Id.* at 126–28.

80. *Id.*

81. New York Times Service, *Scientists Create Virus from Scratch Using Information on Web*, OMAHA WORLD-HERALD, July 12, 2002, at 3A.

82. KEN ALIBEK, *BIOHAZARD* 275–76 (1999).

83. Bill Miller, *Bioterror Defense Bill Signed*, WASHINGTON POST, June 13, 2002, at A16.

84. Guy Gugliotta, *A First Step on U.S. Biodefense*, WASHINGTON POST, July 14, 2002, at A10.

85. Lodal, *supra* note 49, at 95–96.

86. ABC News, *Types of Chemical Weapons: A Horrific Battlefield Legacy* <<http://ABCNews.com>> (Oct. 4, 2001); National Library of Medicine, Specialized Information Services, *Chemical Warfare Agents*.

87. Timothy V. McCarthy and Jonathan B. Tucker, *Saddam's Toxic Arsenal: Chemical and Biological Weapons in the Gulf Wars*, in PLANNING THE UNTHINKABLE 47–78 (Peter R. Lavoy et al. eds. 2000).

88. Teresa Watanabe, *Cult Leader's Day in Court Arrives*, LOS ANGELES TIMES, April 24, 1996, at A8.

89. Stern, *supra* note 51, at 202–29.

90. Marlise Simons, *Money Short for Battle on Chemicals Used in War*, NEW YORK TIMES, Oct. 5, 2001, at A9.

91. James Risen and Judith Miller, *Al Qaeda Sites Point to Tests of Chemicals*, NEW YORK TIMES, Nov. 11, 2001, at B1.

92. Simons, *supra* note 90; Patrick E. Tyler, *In a Changed World, Qadaffi Is Changing, Too*, NEW YORK TIMES, Dec. 20, 2001, at B1; Chyba, *supra* note 57, at 126.

93. Patrick E. Tyler, *Russia Vows to Start Destroying Chemical Arms*, NEW YORK TIMES, Feb. 9, 2001, at A10; Judith Miller, *U.S. Warns Russia of Need to Verify Treaty Compliance*, NEW YORK TIMES, April 8, at A1; David E. Sanger, *\$10 Billion Pledge to Ex-Soviets to Dispose of Unconventional Arms*, NEW YORK TIMES, June 28, 2002, at A8.

94. Broad et al., *supra* note 56.

95. Stern, *supra* note 51, at 224.



96. Tim Weiner, *Bin Laden Asserts He Has Nuclear Arms*, NEW YORK TIMES, Nov. 10, 2001, at B4.

97. Associated Press, *Europe Tightens Security at Nuclear and Other Sensitive Areas*, NEW YORK TIMES, Oct. 25, 2001; John Tagliabue, *Threat of Nuclear Terror Has Increased, Official Says*, NEW YORK TIMES, Nov. 2, 2001, at B4.

98. Keller, *supra* note 2.

99. *Id.*; Stephen Erlanger, *Lax Nuclear Security in Russia Is Cited as Way for bin Laden to Get Arms*, NEW YORK TIMES, Nov. 12, 2001, at B1; David E. Sanger and Michael Wines, *Bush and Putin Sign Pact for Steep Nuclear Arms Cuts*, NEW YORK TIMES, May 25, 2002, at A1.

100. Douglas Frantz, *Nuclear Booty: More Smugglers Use Asia Route*, NEW YORK TIMES, Sept. 11, 2001, at A1.

101. Keller, *supra* note 2.

102. Mansoor Ijaz and R. James Woolsey, *How Secure Is Pakistan's Plutonium?* NEW YORK TIMES, Nov. 28, 2001, at A25; David E. Sanger, *Nuclear Experts in Pakistan May Have Links to al Qaeda*, NEW YORK TIMES, Dec. 9, 2001, at A1.

103. Keller, *supra* note 2.

104. *Id.*

105. Joby Warrick, *NRC Warns of Missing Radioactive Materials*, WASHINGTON POST, May 4, 2002, at A13.

106. Susan S. Hsu, *Plan Urged for 'Dirty' Explosive*, WASHINGTON POST, May 4, 2002, at B1.

107. *Id.*

108. Howard W. French, *Japanese Shipment of Nuclear Fuel Raises Security Fears*, NEW YORK TIMES, July 5, 2002, at A3.

109. Keller, *supra* note 2; Editorial, *Nuclear Reactors as Terrorist Targets*, NEW YORK TIMES, Jan. 21, 2002, at A14; Matthew L. Wald, *Suicidal Nuclear Threat Is Seen at Weapons Plants*, NEW YORK TIMES, Jan. 23, 2002, at A9; *A-Plant Drill for Guards Is Inadequate, Group Says*, NEW YORK TIMES, Dec. 17, 2001, at B6; *Security at U.S. Reactors Criticized by Congressman*, NEW YORK TIMES, Mar. 25, 2002, at A13.

110. *Pills for Nuclear Plant Radiation*, NEW YORK TIMES, June 13, 2002, at A38.

111. Matthew L. Wald, *White House Cut 93% of Funds Sought to Guard Atomic Arms*, NEW YORK TIMES, Apr. 23, 2002, at A8.

112. Jayson Blair, *Post-9/11, Questions About Security at Electric Plants*, NEW YORK TIMES, May 17, 2002, at B3; Matthew L. Wald, *Private Flights Are Halted Near Nuclear Installations*, NEW YORK TIMES, Oct. 31, 2001, at B11; John Ritter et al., *Report Card on Homeland Security*, USA TODAY, June 9, 2002 (online ed.).

113. Barton Gellman, *Cyber-Attacks by Al Qaeda Feared; Terrorists at Threshold of Using Internet as Tool of Bloodshed, Experts Say*, WASHINGTON POST, June 27, 2002, at A01.

114. *Id.*

115. Cyberterrorism, Testimony before the Special Oversight Panel on Terrorism, Committee on Armed Services, U.S. House of Representatives, May 23, 2000.

116. *Cybercrime, Cyberterrorism, Cyberwarfare: Averting an Electronic Waterloo* xii (Center for Strategic and International Studies 1998) [hereinafter *Cyberterrorism*].

117. *Cyberterrorism*, *supra* note 116.

118. *Id.* .

119. *Id.* at xiii.

120. Report of the Defense Science Board Task Force on Information Warfare—Defense (November 1996).

121. *Id.*

122. *Id.*

123. *Cyberterrorism*, *supra* note 116, at 16–17.

124. *Cyberterrorism*, *supra* note 116, at 29.

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.

126. Report of the Defense Science Board, *supra* note 120.

127. *Cyberterrorism*, *supra* note 116, at xix.

128. Available at [www.fas.org/irp/congress/2002\\_cr/51900.html](http://www.fas.org/irp/congress/2002_cr/51900.html).

129. Information Warfare and International Security, Draft Report, NATO Parliamentary Assembly, Science and Technology Committee (1999).

130. Barton Gellman, *Struggles Inside the Government Defined Campaign*, WASHINGTON POST, Dec. 20, 2001, at A01.

131. *Id.* at A7

132. David Johnston et al., *Qaeda's New Links Increase Threats from Far-Flung Sites*, NEW YORK TIMES, June 16, 2002, at A1; David Johnston, *The Warning du Jour Comes via Rumsfeld, But Worriers Abound*, HOUSTON CHRONICLE, May 22, 2002, at A23; Dana Priest and Douglass Farah, *Terror Alliance Has U.S. Worried; Hezbollah, Al Qaeda Seen Joining Forces*, WASHINGTON POST, June 30, 2002, at A1.

133. James Risen, *Qaeda Still Able to Strike the U.S., Head of CIA Says*, NEW YORK TIMES, Feb. 7, 2002, at A1.

134. *Bin Laden's Foreign Fighters: Follow the Leader*, ECONOMIST, Dec. 21, 2001, at 23.

135. Los Angeles Times, *Ashcroft: Al-Qaeda Alive in U.S.*, OMAHA WORLD-HERALD, July 12, 2002, at 8A.

#### 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.

2. *Id.* at 171.

3. *Id.* at 174.

4. *Id.* at 169 (emphasis added).

5. *Anti-Terrorism Act of 2001, Section by Section Analysis* (proposal of Att’y Gen. John Ashcroft, draft Sept. 19, 2001).

6. CONG. REC. S10990–S11060 (Oct. 25, 2001).

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).

8. 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.

13. *Frisbie v. Butler*, 1 Kirby 213 (1787).

14. *Id.* (emphasis added).

15. *Id.*

16. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

17. *Id.*

18. *Katz v. U.S.* 389 U.S. 347, 357 (1967).

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

20. 18 U.S.C. 2515.

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.

22. 18 U.S.C.S. 2518 (4).

23. *United States v. United States Dist. Court*, 407 U.S. 297, 322–3 (1972).

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.

27. Karen Branch-Brioso, *Fight Over Rights Rages On*, ST. LOUIS POST-DISPATCH, September 8, 2002, at B1.

28. *Wilson v. Arkansas*, 514 U.S. 927, 934 (1995).

29. *Dalia v. United States*, 441 U.S. 238, 247–48 (1979).

30. *Id.* at 253.

31. *United States v. Freitas*, 800 F.2d 1451, 1456 (9th Cir. 1986). The

*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)

32. See *Zadvydus v. Davis*, 533 U.S. 678 (2001); see also *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269, 108 L. Ed. 2d 222, 110 S. Ct. 1056 (1990) (the Fifth Amendment’s protections do not extend to aliens outside the territorial boundaries); *Johnson v. Eisentrager*, 339 U.S. 763, 784, 94 L. Ed. 1255, 70 S. Ct. 936 (1950) (same).

33. See *Yick Wo v. Hopkins*, *supra* note 25 (ch. 1), at 369. See also *Plyler v. Doe*, 457 U.S. 202 (1982); *Mathews v. Diaz*, 426 U.S. 67 (1976); *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953).

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.

18 U.S.C. §1963(c).

35. See Nancy Chang, *The USA Patriot Act: What’s So Patriotic About Trampling on the Bill of Rights?* <[http://www.ccr-ny.org/whatsnew/usa\\_patriot\\_act\\_2.asp](http://www.ccr-ny.org/whatsnew/usa_patriot_act_2.asp)>

36. Senator Edward Livingston, U.S. Senate Debate on the Alien and Sedition Acts of 1798.

37. Katharine Q. Seelye, *Guantánamo Bay Faces Sentence of Life as Permanent U.S. Prison* NEW YORK TIMES, Sept. 16, 2002.

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.

39. *In re All Matters Submitted to the Foreign Intelligence Surveillance Court*, 218 F. Supp. 2d 611, 615 (U.S. Dist., 2002).

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).

47. Eric Lichtblau with Adam Liptak, *On Terror and Spying, Ashcroft Expands Reach*, NEW YORK TIMES, Mar. 15, 2003.

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

1. David Abramowitz, *The President, the Congress, and Use of Force: Legal and Political Considerations in Authorizing Use of Force Against International Terrorism*, 43 HARV. INT’L L.J. 71, 73 (winter 2002).

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.

4. *A United Response*, Statement of Senator Joseph Biden, 147 CONG. REC., S9422 (September 14, 2001).

5. Abramowitz, *supra* note 1, at 77.

6. Lori Fisler Damrosch, *The Constitution under Clinton: A Critical Assessment: The Clinton Administration and War Powers*, 63 LAW & CONTEMP. PROBS. 125 (winter/spring 2000).

7. *Id.* at 131.
8. Louis Fisher, *War Powers and Foreign Affairs: Sidestepping Congress: Presidents Acting under the U.N. and N.A.T.O.* 47 CASE W. RES. L. REV. 1237 (summer 1997).
9. War Powers Resolution, Public Law 93–148, 93rd Congress, H. J. Res. 542 (November 7, 1973).
10. *Id.* at Section 5.
11. Derived from BBC News, *War on Terror, Where Next?* <[http://news.bbc.co.uk/hi/english/static/in\\_depth/world/2001/war\\_on\\_terror/what\\_next](http://news.bbc.co.uk/hi/english/static/in_depth/world/2001/war_on_terror/what_next)> (visited July 11, 2002); Peter Charles Choharis, *The Case for a Wider War Against Terrorism*, WASHINGTON POST NATIONAL WEEKLY EDITION, Jan. 14–20, 2002, at 22; Leslie Lopez, *Portrait of a Radical Network in Asia*, WALL STREET JOURNAL, Aug. 13, 2002, at A14.
12. Madeleine K. Albright, *Where Iraq Fits in the War on Terror*, NEW YORK TIMES, Sept. 13, 2002.
13. Robert J. Delahunty and John C. Yoo, *The President's Constitutional Authority to Conduct Military Operations Against Terrorist Organizations and the Nations that Harbor or Support Them*, 25 HARV. J.L. & PUB. POL'Y 487 (spring 2002).
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).
15. The White House, *Executive Order Establishing Office of Homeland Security* <<http://www.whitehouse.gov/news/releases/2001/10/20011008-2.html>> (Oct. 8, 2001).
16. *Id.*
17. Dan Eggen, *Ashcroft Plans to Reorganize Justice, Curtail Programs*, WASHINGTON POST, Nov. 9, 2001, at A17.
18. Cheryl W. Thompson, *Reorganization, Anti-Terrorism Effort Keeping INS Chief Busy*, WASHINGTON POST, Jan. 21, 2002, at A15.
19. Dan Eggen, *FBI Director to Propose 'Super Squad' for Terror; Special D.C. Unit Would Lead Investigations Worldwide*, WASHINGTON POST, May 15, 2002, at A01; Bill Miller and Dan Eggen, *FBI Memo Author Did Not Envision Sept. 11; Phoenix Agent Who Marked Warning 'Routine' Finishes Congressional Testimony*, WASHINGTON POST, May 23, 2002, at A08; Cheryl W. Thompson, *New Security Checks Swamp INS Offices; Applications Pile Up Because Workers Lack Database Access, Training*, WASHINGTON POST, May 16, 2002, at A01.
20. Susan Schmidt, *Terrorism Focus Set for FBI; Mueller's Reorganization Would Shift 480 Agents*, WASHINGTON POST, May 29, 2002, at A1.
21. *'Overriding and Urgent Mission' for New Agency*, WASHINGTON POST, June 7, 2002, at A19.
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.

23. *Testimony of Director of Central Intelligence before the Government Affairs Subcommittee* <[http://www.cia.gov/cia/public\\_affairs/speeches/2002/dci\\_speech\\_06272002.html](http://www.cia.gov/cia/public_affairs/speeches/2002/dci_speech_06272002.html)> (June 27, 2002); Robert S. Mueller, III, *Statement for the Record on Homeland Security*, Congressional Statement <<http://www.fbi.gov/congress/congress02/mueller062702.htm>> (June 27, 2002); Bill Miller and Christine Haughney, *President to Detail Security Strategy; Plan Seeks Public, Private Teamwork on Array of Threats*, WASHINGTON POST, July 16, 2002, at A01.

24. Office of Homeland Security, *The National Strategy for Homeland Security* (July 2002) <<http://www.whitehouse.gov/homeland/book/index.html>>.

25. Helen Thomas, *Bush Acting as Imperial President*, SEATTLE POST-INTELLIGENCER, July 3, 2002, at B6.

26. *Ex Parte Milligan*, 71 U.S. 2 (1866).

27. President's Military Order, 66 Fed. Reg. 57833 (Nov. 15, 2001).

28. George Lardner, Jr., *Legal Scholars Criticize Wording of Bush Order; Accused Can Be Detained Indefinitely*, WASHINGTON POST, Dec. 3, 2001, at A10.

29. President's Military Order, *supra* note 27.

30. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 287.

31. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 72 S.Ct. 863 (1952).

32. President's Address to Joint Session of Congress (Sept. 20, 2001) <<http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html>>; President's State of the Union Message (Jan. 29, 2002) <<http://www.whitehouse.gov/news/releases/2002/01/2002012911.html>>; President's Remarks at the Pentagon Marking the One Year Anniversary of September 11th (Sept. 11, 2002) <<http://www.whitehouse.gov/news/releases/2002/09/20020911.html>>; President's Remarks to the Nation Marking the One Year Anniversary of September 11th—Ellis Island (Sept. 11, 2002) <<http://www.whitehouse.gov/news/releases/2002/09/20020911-3.html>>.

33. *Supra* note 4, at S9422-23.

34. INGRID DETTER, *THE LAW OF WAR* 327-28 (2d ed. 2000).

35. Joan Biskupic and Richard Willing, *Military Tribunals: Swift Judgments in Dire Times*, USA TODAY, Nov. 15, 2001, at 1A.

36. *Id.*

37. *Excerpts from the President's Remarks on the War on Terrorism*, NEW YORK TIMES, Oct. 12, 2001, at B4; *Excerpts From Attorney General's Testimony Before Senate Judiciary Committee*, NEW YORK TIMES, Dec. 7, 2001, at B6; Katharine Q. Seelye, *Justice Department Decision to Forgo Tribunal Bypasses Pentagon*, NEW YORK TIMES, Dec. 13, 2001, at B6; William Glaberson, *U.S. Asks to Use Secret Evidence in Many Cases of Deportation*, NEW YORK TIMES, Dec. 9, 2001, at B1; Elisabeth Bumiller and Katharine Q. Seelye, *Bush Defends Wartime Call for Tribunals*, NEW YORK TIMES, Dec. 5, 2001, at A1.

38. William Glaberson, *Arguing Tribunals v. Courts-Martial, False Comparison Creates Confusion, Military Lawyers Say*, NEW YORK TIMES, Dec. 2, 2001, at B6.

39. Ruth Wedgwood, *The Law's Response to September 11<sup>th</sup>* <[http://www.carnegiecouncil.org/lib\\_pov\\_rules.html#wedgewood](http://www.carnegiecouncil.org/lib_pov_rules.html#wedgewood)>.

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

41. Glaberson, *supra* note 38.

42. Sean D. Murphy, ed., *Contemporary Practice of the United States Relating to International Law—U.S. Department of Defense Rules on Military Commissions*, 96 AM. J. INT'L L. 706, 733 (July 2002).

43. Jordan J. Paust, *Antiterrorism Military Commissions: The Ad Hoc DOD Rules of Procedure*, 23 MICH. J. INT'L L. 677–79 (spring 2002).

44. *Id.*

45. Murphy, *supra* note 41.

46. Jordan J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 MICH. J. INT'L L. 1, 11 (fall 2001).

47. Robin Toner, *Civil Liberty vs. Security: Finding a Wartime Balance*, NEW YORK TIMES, Nov. 18, 2001, at A1.

48. Carola Hoyos, *U.N. Charter and Resolutions Offer U.S. Action Legal Backing*, FINANCIAL TIMES, Oct. 8, 2001.

49. S/Res/1368 (Sept. 12, 2001); S/Res/1373 (Sept. 28, 2001).

50. Statement by NATO Secretary General, October 2, 2001, 40 I.L.M. 1268 (2001).

51. North Atlantic Treaty, April 4, 1949, Art. 5, 63 Stat. 2241, 2244, 34 U.N.T.S. 243, 246.

52. Alan Sipress and Colum Lynch, *Turkey, Britain, France to Head Peacekeeping Forces*, WASHINGTON POST, Nov. 16, 2001, at A29.

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

54. Stephen Erlanger, *So Far, Europe Breathes Easier over Free Hand Given to U.S.*, NEW YORK TIMES, Sept. 29, 2001 at B1.

55. Gregory M. Travalio, *Terrorism, International Law, and the Use of Military Force*, 18 WIS. INT'L L.J. 145, 166 (winter 2000).

56. *Id.*

57. CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 108–18 (2000).

58. Andrew D. Mitchell, *Does One Illegality Merit Another? The Law of Belligerent Reprisals in International Law*, 170 MIL. L. REV. 155 (Dec. 2001). Mitchell ultimately concludes that the potential for abuse outweighs such deterrent value.

59. *Id.* at 156–57.

60. Michael F. Noone, Jr., *Applying Just War Jus in Bello Doctrine to Reprisals: An Afghan Hypothetical*, 51 CATH. U. L. REV. 27, 28 (fall 2001).

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.

Michael Wines, *Leasing, If Not Building, an Anti-Taliban Coalition*, NEW YORK TIMES, Nov. 18, 2001, at WK3.

64. Elaine Sciolino and Neil A. Lewis, *Iran Dances a 'Ballet' with U.S.*, NEW YORK TIMES, Oct. 16, 2001, at B1. Usually, when an administration intervenes in such a case, compensation is granted to those litigants negatively affected by the government's action for foreign policy reasons.

65. Erlanger, *supra* note 54; Marc Lacey, *U.S. Envoy Looks for Change in Sudan*, NEW YORK TIMES, Nov. 18, 2001, at A8.

66. Serge Schmemmann, *Syria Is Likely to Join U.N. Security Council*, NEW YORK TIMES, Oct. 7, 2001, at A28; Christopher S. Wren, *U.S. Advises U.N. Council More Strikes Could Come*, NEW YORK TIMES, Oct. 9, 2001, at B5.

67. Hugh Dellios, *Sharon Firm on Calm Before Talks; Powell to Outline U.S. Peace Vision*, CHICAGO TRIBUNE, Nov. 19, 2001, at 3; Alan Sipress, *Powell Vows U.S. Role in Mideast*, WASHINGTON POST, Nov. 20, 2001, at A1.

68. Associated Press Poll conducted Aug. 2–6, 2002.  $N = 1,001$  adults nationwide. MoE  $\pm 3$  <[www.pollingreport.com](http://www.pollingreport.com)>; Associated Press, *Terrorist Attacks Prompt Changes in Americans' Legal Rights After Sept. 11*, DAILY RECORD (Omaha), Aug. 29, 2002, at 4.

Notes to Pages  
187–93

277

## 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).

3. Anne English French, *Trials in Times of War: Do the Bush Military Commissions Sacrifice Our Freedoms?* 63 OHIO ST. L.J. 1225 (2002/2003).

4. *Ex Parte Milligan*, 71 U.S. 2, 109; 18 L. Ed. 281, 292.

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.
9. *Watts v. Indiana*, 338 U.S. 49, 54 (1949).
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.
11. Rene Sanchez, *John Walker’s Restless Quest Is Strange Odyssey*, *WASHINGTON POST*, Jan. 14, 2002, at A1.
12. Brooke A. Masters, *American Taliban Suspect Appears in Alexandria Court*, *WASHINGTON POST*, Jan. 25, 2002, at A1; Brooke A. Masters and Patricia Davis, *Walker’s Long Trip Ends in Alexandria Jail*, *WASHINGTON POST*, Jan. 24, 2002, at A24; 18 U.S.C. §§ 2332(b), 2339; 31 C.F.R. §§ 545.201, 545.204; Exec. Ord. 13129; 50 U.S.C. §§ 1702, 1705; 18 U.S.C. § 2.
13. Brooke A. Masters and Dan Eggen, *Lindh Indicted on Conspiracy, Gun Charges*, *WASHINGTON POST*, Feb. 6, 2002, at A1.
14. Brooke A. Masters and Edward Walsh, *U.S. Taliban Fighter to Have His Rights, Rumsfeld Says*, *WASHINGTON POST*, Dec. 5, 2001, at A13.
15. Defendants Motion for a Bill of Particulars, *United States v. Lindh*, Crim. No. 02–37-A (E.D. Va. 2002); Defendant’s Motion of March 15, 2002, available at <<http://news.findlaw.com/hdocs/docs/lindh/uslindh31502mot4bop.pdf>>.
16. Naftali Bendavid, *U.S.: No Evidence Lindh Killed Agent; Prison Riot Victim Cited in Indictment*, *WASHINGTON POST*, Apr. 2, 2002, at A7.
17. Brooke A. Masters and Dan Eggen, *Walker Statements a Trial Issue; Defense Will Contest Interviews with FBI*, *WASHINGTON POST*, Jan. 17, 2002, at A14.
18. Neil A. Lewis, *Admitting He Fought in Taliban, American Agrees to 20-year Term*, *NEW YORK TIMES*, July 16, 2002, at A1.
19. Suzanne Daley, *Mysterious Life of a Suspect from France*, *NEW YORK TIMES*, Sept. 21, 2001, at B1; David Johnston and Philip Shenon, *F.B.I. Curbed Scrutiny of Man Now a Suspect in the Attacks*, *NEW YORK TIMES*, Oct. 6, 2001, at A1; Philip Shenon, *Flight School Warned F.B.I. of Suspicions*, *NEW YORK TIMES*, Dec. 22, 2001, at B1.
20. David Johnston, *Not-Guilty Plea Is Set for Man in Terror Case*, *NEW YORK TIMES*, Jan. 3, 2002, at A1.
21. Neil A. Lewis, *Moussaoui’s Defense Plan Complicates Terror Trial*, *NEW YORK TIMES*, Apr. 26, 2002, at A12; Philip Shenon, *Sept. 11 Defendant Who Wants to Represent Himself Is Busy Doing So*, *NEW YORK TIMES*, Apr. 30, 2002, at A22.

22. Philip Shenon, *Judge Agrees to New Delay in Trial in Conspiracy Case*, NEW YORK TIMES, Oct. 1, 2002, at A20.

23. *United States v. Moussaoui*, 333 F.3d 509 (4th Cir. 2003).

24. Philip Shenon, *Terror Suspect Says He Wants U.S. Destroyed*, NEW YORK TIMES, Apr. 23, 2002, at A1; Neil A. Lewis, *Defense Seeks Extensive Tests on Mental Health of Suspect*, NEW YORK TIMES, Apr. 29, 2002, at A16.

25. Philip Shenon and Benjamin Weiser, *Prosecutors Seek a Death Sentence in Terrorism Case*, NEW YORK TIMES, Mar. 19, 2002, at A1; Philip Shenon and Neil A. Lewis, *U.S. to Seek Death Penalty for Moussaoui in Terror Case*, NEW YORK TIMES, Mar. 29, 2002, at A20.

26. Adam Liptak, *A Host of Legal Questions on U.S. Action in Bomb Case*, NEW YORK TIMES, June 11, 2002.

27. Anthony Lewis, *The Silencing of Gideon's Trumpet*, NEW YORK TIMES, Apr. 20, 2003.

28. Adam Liptak et al., *After Sept. 11, a Legal Battle on the Limits of Civil Liberty*, NEW YORK TIMES, Aug. 4, 2002, at A1.

29. President's Military Order, 66 Fed. Reg. 57833 (Nov. 15, 2001).

30. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 287.

31. Michael J. Kelly, *Understanding September 11th —An International Legal Perspective on the War in Afghanistan*, 35 CREIGHTON L.REV. 283, 289-92 (2002).

32. Karen Branch-Brioso, *Fight over Rights Rages On*, ST. LOUIS POST-DISPATCH, Sept. 8, 2002, at B1.

33. *Id.*

34. Neil A. Lewis, *Detention Upheld in Enemy Combatant Case*, NEW YORK TIMES, Jan. 9, 2003.

35. Tom Jackson, *Judges Uphold U.S. Detention of Hamdi*, WASHINGTON POST, Jan. 9, 2003, at A1.

36. *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003).

37. *Id.*

38. *Id.*

39. Jess Braven, *Judge Declares Padilla Has Right to Counsel*, WALL STREET JOURNAL, Dec. 4, 2002.

40. *Padilla v. Rumsfeld*, 243 F. Supp.2d 42 (S.D.N.Y. 2003).

41. Braven, *supra* note 1.

42. Charles Lane, *In Terror War, 2nd Track for Suspects; Those Designated 'Combatants' Lose Legal Protections*, WASHINGTON POST, Dec. 1, 2002, at A1.

43. *Ex Parte Quirin*, 317 U.S. 1 (1942).

44. Diane F. Orentlicher and Robert Kogod Goldman, *The Military Tribunal Order: When Justice Goes to War: Prosecuting Terrorists Before Military Commissions*, 25 HARV. J.L. & PUB. POL'Y 653, 657 (spring 2002):

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.

46. Presidential Order Transferring Custody of Ali Saleh Kahlah al-Marri from the Department of Justice to the Department of Defense (June 23, 2003), *Al-Marri v. Bush*, No. 03 CV 1220 (C.D. Ill. 2003) <<http://news.findlaw.com/cnn/docs/almarri/almarri62303exord.pdf>>.

47. Respondent's Motion to Dismiss or Transfer Petition for Writ of Habeas Corpus, *Al-Marri v. Bush*, No. 03 CV 1220 (C.D. Ill. 2003) <<http://news.findlaw.com/cnn/docs/almarri/almarribush71603gmot.pdf>>.

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/usujaama828ozind.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*

(W.D. NY 2002); grand jury indictment of May 2002 available at <<http://news.findlaw.com/hdocs/docs/terrorism/ussattaro40902ind.pdf>>.

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.

51. United States v. Battle, Ford, Bilal, Al Saoub and Lewis, No. CR 02-399 HA (D. Or 2002); grand jury indictment of Oct. 31, 2002, available at <<http://news.findlaw.com/hdocs/docs/terrorism/usbattle100302ind.pdf>>; Associated Press, *Malaysia to Deport 5th Oregon Suspect*, NEW YORK TIMES, Oct. 8, 2002, at A15.

52. Eric Lichtblau, *4 in U.S. Charged in Post-9/11 Plan to Join al Qaeda*, NEW YORK TIMES, Oct. 5, 2002, at A1.

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).

58. David Cole, *Opinion, Fight Terrorism Fairly*, NEW YORK TIMES, Oct. 19, 2002, at A17.

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."

60. Humanitarian Law Project v. Reno, 9 F. Supp. 2d 1176 (C.D. Cal. 1998).

61. *Id.* at 1180-81.

62. *Id.* at 1204.

63. Greg Winter, *Judge Drops Case Against 7 Tied to Group Called Terrorist*, LOS ANGELES TIMES, June 24, 2002, at A13.

64. Greg Winter, *Fund-Raising; Aiding Friend or Iranian Foe is Issue in Case*, LOS ANGELES TIMES, Mar. 22, 2002, at A13.

65. Winter, *supra* note 63.
66. Attorney General's Press Conference, Department of Justice (Nov. 14, 2003) <[http://www.usdoj.gov/ag/speeches/2001/agcrisisremarks11\\_14.htm](http://www.usdoj.gov/ag/speeches/2001/agcrisisremarks11_14.htm)>.
67. Susan Sachs, *Judge Rejects U.S. Policy of Secret Hearings*, NEW YORK TIMES, May 30, 2002, at A21.
68. American Civil Liberties Union, *ACLU Joins in FOIA Request for Information on Detainees, Says Government Has Refused to Answer Previous Inquiries* <<http://www.aclu.org/news/2001/n102901a.html>> (Oct. 29, 2001); Amy Goldstein, *A Deliberate Strategy of Disruption; Massive, Secretive Detention Effort Aimed Mainly at Preventing More Terror*, WASHINGTON POST, Nov. 4, 2001, at A01; *In First Lawsuit Filed Regarding Mass Detentions, Civil Liberties Groups Demand Release of Essential Information Under FOIA*. American Civil Liberties Union <<http://www.aclu.org/news/2001/n120501b.html>> (Dec. 5, 2001).
69. Liptak et al., *supra* note 28.
70. Neil A. Lewis, *Judge Orders U.S. to Release Names of 9/11 Detainees*, NEW YORK TIMES, Aug. 3, 2002, at A1; Linda Greenhouse, *Judicial Restraint; The Imperial Presidency vs. The Imperial Judiciary*, NEW YORK TIMES, Sept. 8, 2002, at D3.
71. Steve Fainaru and Dan Eggen, *Judge Rules U.S. Must Release Detainees' Names*, WASHINGTON POST, Aug. 3, 2002, at A1.
72. Steve Fainaru, *U.S. Deported 131 Pakistanis In Secret Airlift; Diplomatic Issues Cited; No Terror Ties Found*, WASHINGTON POST, July 10, 2002, at A1.
73. Josh Meyer, *Bar Assn. Assails U.S. on Detainees*, LOS ANGELES TIMES, Aug. 14, 2002, at 1.
74. *Detroit Free Press v. Ashcroft*, 195 F. Supp. 2nd 937 (E.D. Mich. 2002).
75. *Detroit Free Press v. Ashcroft*, 2002 U.S. App. LEXIS 17646 (6th Cir. 2002).
76. *Id.*
77. Sachs, *supra* note 67.
78. *Id.*
79. *Appeals Panel Upholds Ruling for Open Court*, NEW YORK TIMES, June 19, 2002, at A19.
80. Susan Sachs, *Ashcroft Petitions Justices for Secrecy in Deportations*, NEW YORK TIMES, June 22, 2002, at A9.
81. *Supreme Court Allows Secrecy to Stand in Deportation Cases*, NEW YORK TIMES, June 29, 2002, at A10.
82. *North Jersey Media Group, Inc, et al. v. Ashcroft*, No. 02-2524 (3rd Cir. 2002) <<http://news.findlaw.com/hdocs/docs/terrorism/ashnjmg108020pn.pdf>>.
83. Adam Liptak and Robert Hanley, *Court Upholds Secret Hearings on Deportation*, NEW YORK TIMES, Oct. 9, 2002, at A1.
84. *Id.*
85. *Id.*

86. Inspector General, Department of Justice, Report on the September 11th Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11<sup>th</sup> Attacks (April 2003).

87. Eric Lichtblau, *Ashcroft Seeks More Power to Pursue Terror Suspects*, NEW YORK TIMES, June 6, 2003, at A1.

88. Benjamin Weiser, *Judge Rules Against U.S. on Material Witness Law*, NEW YORK TIMES, May 1, 2002, at A10 (emphasis added); Steve Fainaru and Amy Goldstein, *Judge Rejects Jailing of Material Witnesses; Ruling Imperils Tool in Sept. 11 Probe*, WASHINGTON POST, May 1, 2002, at A1.

89. Steve Fainaru, *Judge: U.S. May Jail Material Witnesses; N.Y. Ruling Conflicts with Decision in Prior Case in Same Federal Court*, WASHINGTON POST, July 12, 2002, at A12.

90. Margaret Graham Tebo, *Courts Wrestle with Keeping Secret Detainees*, ABA JOURNAL, Sept. 2002, at 46.

91. Editorial, *At What Cost?* ST. LOUIS POST-DISPATCH, May 6, 2002, at B6.

92. Washington Post, *Nearly Half of 'Material Witnesses' Haven't Testified*, OMAHA WORLD-HERALD, Nov. 24, 2002, at 16A.

93. *Newshour with Jim Lehrer: The Detainees*, by Jeffrey Kaye (PBS television broadcast, Jan. 22, 2003) <[http://www.pbs.org/newshour/bb/military/jan-june03/detainees\\_1-22.html](http://www.pbs.org/newshour/bb/military/jan-june03/detainees_1-22.html)>.

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."

96. William Glaberson, *Critics' Attack on Tribunals Turns to Law Among Nations*, NEW YORK TIMES, Dec. 26, 2001, at B1.

97. Military Order, *supra* note 29.

98. Thom Shanker and Katharine Q. Seelye, *The Geneva Conventions, Who Is a Prisoner of War? You Could Look It Up. Maybe*, NEW YORK TIMES, March 10, 2002, at D9.

99. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287.

100. *Chambers v. Florida*, 309 U.S. 227, 241 (1940).

101. *Mapp v. Ohio*, 367 U.S. 643, 648 (1961) (quoting *Weeks v. United States*, 232 U.S. 383, 393 (1914)).

102. *Miranda v. Arizona*, 384 U.S. 436, 457-58 (1966).

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.

104. *Rosen v. United States*, 161 U.S. 29, 40 (1896).

105. *Gideon v. Wainwright*, 372 U.S. 335, 344–5 (1963) (quoting *Powell v. Alabama*, 287 U.S. 45, 68–69) (1932).

106. *New York Times*, *New Power in Terror Inquiries Put to Use*, OMAHA WORLD-HERALD, Nov. 24, 2002, at 16A.

107. *Feds Get Wide Wiretap Authority* (CBS News) <<http://www.cbsnews.com/stories/2002/08/23/attack/printable519606.shtml>> (Nov. 18, 2002).

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.

117. Statement of Senator Patrick Leahy during Senate floor debate on Patriot Act, CONG. REC. S10990–S11060 (Oct. 25, 2001).

118. *Supra* note 108, at 744.

119. Joint Investigation into September 11: Third Public Hearing, statement of Eleanor Hill, Sept. 20, 2002.

120. *Id.*

121. *Supra* note 111, at 614.

122. *Id.* at 617.

123. Military Order, *supra* note 29.

124. Katharine Q. Seelye, *Government Sets Rules for Military on War Tribunals*, NEW YORK TIMES, Mar. 21, 2002, at A1; see Military Commission Order No. 1 (Dept. of Defense, Mar. 21, 2002) <<http://defenselink.mil/news/mar2002/d20020321ord.pdf>>.

125. *Coalition of Clergy v. Bush*, 189 F. Supp. 2d 1036 (D. Ca. 2002).

126. Neil A. Lewis, *Judge Rebuffs Detainees at Guantanamo*, NEW YORK TIMES, Aug. 1, 2002, at A20.

127. *Lauritzen v. Larsen*, 345 U.S. 571 (1952) (“a ship is constructively a floating part of the flag-state”); U.N. Convention on the Law of the Sea, Art. 91 & 92, 21 I.L.M. 1261 (1982).

128. Sarah Lyall, *Death Penalty Ruled Out for Two British Detainees*, NEW YORK TIMES, July 23, 2003, at A4.

129. Harvey Rishikof, *A New Court for Terrorism*, NEW YORK TIMES, June 8, 2002, at A15.

130. *Id.*

131. *Id.*



132. WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* (1998).
133. *Olmstead v. United States*, 277 U.S. 438, 478 (1928).
134. William H. Rehnquist, Remarks of the Chief Justice of the United States, 47 *DRAKE L.R.* 201–208 (1999) (delivering the Dwight D. Opperman Lecture at Drake University School of Law, Sept. 18, 1998).
135. Adam Cohen, *Justice Rehnquist's Ominous History of Wartime Freedom*, *NEW YORK TIMES*, Sept. 22, 2002.
136. *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).
137. Rehnquist, *supra* note 132.

### Chapter 7

1. *Ex Parte Merryman* 17 F. Cas. 144 (D. Md. 1861).
2. Abraham Lincoln, Letter to Matthew Birchard (June 29, 1863), in *COLLECTED WORKS OF ABRAHAM LINCOLN* 6:302 (Roy P. Basler ed., 1953).
3. Woodrow Wilson, Speech, Chicago (Jan. 31, 1916), in *PRESIDENT WILSON'S STATE PAPERS AND ADDRESSES* 181–82 (Albert Shaw ed., 1917).
4. Editorial, *Justice Deformed: War and the Constitution*, *NEW YORK TIMES*, Dec. 2, 2001, at 14.
5. Laura Parker, Kevin Johnson, and Toni Locy, *Secure Often Means Secret*, *USA TODAY*, May 16, 2002, at 1A.

Notes to Pages  
234–41  
285