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**COUNTERTERRORISM
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*Second
Edition*



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Counterterrorism



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To our teachers

Preface

Throughout our history this nation has faced a variety of serious threats to its security. Terrorism—both homegrown and international—is only the latest. This book addresses the relatively recent development of law and policy concerning counterterrorism, part of the larger field of national security law.

The law of counterterrorism actually began to take shape long before 9/11. The League of Nations adopted a convention for the prevention and punishment of terrorism in 1937, although it never came into force. Domestic terrorist attacks became a serious concern in states around the world—from Northern Ireland to Algeria to Sri Lanka and elsewhere—after World War II. The United Nations General Assembly approved the first of many conventions addressing a variety of international terrorist threats in 1963, and the Security Council adopted the first of a succession of resolutions targeting terrorists and terrorist activities in 1989. The United States launched a military retaliation against Libya for the terrorist bombing of a Berlin night club in 1986. The bombings of the World Trade Center in 1993 and of the Alfred P. Murrah Building in Oklahoma City in 1995 led to revisions in FBI Guidelines for investigation and helped spur enactment of the Anti-Terrorism Act and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214. Terrorist attacks on U.S. embassies in East Africa in 1998 and on the U.S.S. *Cole* in Yemen in 2000 focused even greater attention from lawyers and policy makers on this growing threat.

By revealing the vulnerability of the American homeland, the attacks by Al Qaeda on the World Trade Center and the Pentagon on September 11, 2001, created a new sense of fear and urgency that have led in turn to a number of extraordinary legal measures designed to counter terrorism. These have included military detention of terrorist suspects who earlier might have been charged under the criminal laws, dramatically increased foreign intelligence surveillance, coercive interrogation of terrorist suspects, a revival of military commissions, and an expanded use of classified evidence in criminal cases, among many other initiatives. These developments have been accompanied by presidential orders, legislation, and numerous court challenges.

In this book we provide both content and an analytical framework to give teachers and students a good grounding in this still-maturing field. Here we can identify several basic themes. The most important is the continuing primacy of checks and balances in our government. We see persistent evidence of the distinction Justice Jackson drew in *The Steel Seizure Case* between “the President’s power to act without congressional

authority [and to] . . . act contrary to an Act of Congress.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 n.2 (1952) (Jackson, J., concurring). After a period of hesitancy, the courts have reasserted their role in interpreting the law, increasingly affording access to the judicial process, insisting on due process, and recognizing the primacy of statutory law—even in this field so closely tied to national security. Congress has also awakened to a more aggressive role in overseeing and regulating counterterrorism efforts. The shifting balance of executive “law” and execution, statutory law and oversight, and judicial gatekeeping and interpretation offers deep insights into the way law can work to protect us from terrorists without sacrificing the very values of liberty and democracy that terrorists seek to destroy. Users of the casebook will find these broad themes reflected in every chapter.

This study of counterterrorism law is both comprehensive and self-contained. We have organized the materials in this book into functional categories in order to facilitate study and to help put new developments in the field into perspective. This is not a “how-to-do-it” course, however. Rather, it is a collection of resources to help bright students and citizens reflect intensively on how to protect national security under the rule of law; whether civil rights and liberties must be traded for security, and, if so, how much; and what roles each of the three branches of government should play in making these decisions and trade-offs. A key to using this casebook successfully is therefore not mastery of the nuances of each functional subject but recognition of the themes they share.

Another key to success is active incorporation of new materials as they are reported in the media and a growing number of online sources that monitor the field. Given the dynamic quality of counterterrorism law, it is virtually certain that breaking news will supply opportunities to rehearse and apply principles addressed in the book. To aid in this effort the authors will provide significant new teaching materials—judicial opinions, statutes, executive orders, and the like—on a Web site maintained by Aspen Publishers.

We remind readers that counterterrorism law is only a subset of the larger and equally dynamic field of national security law. That broader field includes war, foreign affairs, covert operations, emergency powers, and the protection of state secrets. While this book focuses strictly on counterterrorism law, we hope that you will explore the larger and, in many ways, even richer subject of national security law as well.

Our most important goal here is to encourage you to help create new ways to make this nation both secure and free under law. We hope you find these materials interesting and provocative, and we welcome your comments.

Stephen Dycus
William C. Banks
Peter Raven-Hansen

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Acknowledgments

This book builds on work the authors began together in the late 1980s with Arthur L. Berney, now Professor Emeritus at Boston College Law School. It owes a great debt to friends, colleagues, and professionals in the national security field who have shared their ideas and experience in the years since. This is also a better book because of the contributions of several generations of law students who, in and out of the classroom, have taught us a lot about teaching.

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Editors' Note

In general we have adhered to the rules for citation of authority followed by most lawyers and courts. They are set out in *The Bluebook: A Uniform System of Citation* (19th ed. 2010). For reasons of economy we have omitted without notation many citations within excerpted materials, and we have removed almost all parallel citations. We have, on the other hand, sought to provide citations that will enable readers to locate and review original sources. We have included URLs for many materials available online, but not for those easily located by a Google search.

To make it easier to refer back to materials where they were originally published, we have preserved original footnote numbers in all excerpted materials. Editors' footnotes are numbered consecutively throughout each chapter. Additions to quoted or excerpted materials are enclosed in brackets.

Counterterrorism Law

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