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# **COUNTERTERRORISM LAW**

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*To our teachers*

# PREFACE

Throughout our history this nation has faced a variety of serious threats. The asymmetric threat of international terrorism 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 was not invented after September 11, 2001, however. Even in 1990, when we published the first edition of *National Security Law* (with Arthur L. Berney), we addressed the military retaliation for the terrorist bombing of a Berlin night club in 1986, the use of classified evidence in criminal cases, the government's powers of detention, "civil defense," foreign intelligence surveillance, and a domestic military response to a terrorist incident. The bombing of the World Trade Center in 1993 and of the Alfred P. Murrah Building in Oklahoma City in 1995 led to revisions in the FBI Guidelines for investigation and helped spur enactment of the Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214. Each of these developments was treated in the second edition of *National Security Law*, which appeared in 1997.

Before 9/11, however, counterterrorism law was still too immature to form a coherent intellectual discipline. The field has only taken shape in the years since the attacks on the World Trade Center and the Pentagon. And while counterterrorism law continues to evolve at a rapid pace, we believe it has advanced enough to warrant separate treatment. In this book we provide both an analytical framework and content to give teachers and students a good grounding in this still-maturing field.

In the developments in counterterrorism law since 9/11, 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 counterterrorist 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.

The materials presented in this book and the issues they raise are as challenging as they are important. A comprehensive Teacher’s Manual, available to adopters in late 2007, will provide helpful analysis, as well as guidance in planning courses.

Finally, 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 is to encourage you to help find new ways to make this nation both secure and free under law. These materials are designed to advance that goal. We hope you find them interesting and provocative, and we welcome your comments.

*Stephen Dycus*  
*William C. Banks*  
*Peter Raven-Hansen*

May 2007

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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* (18th ed. 2005). 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. 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.

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