CONTENTS

Preface xxv
Acknowledgments xxvii
Editors’ Note xxix

PART I INTRODUCTION 1

CHAPTER 1 ■ DEFINING TERRORISM AND COUNTERTERRORISM 3

A. Seeking a Definition of Terrorism: A Brief Sketch 4
   Notes and Questions 7

B. Defining Terrorism in International Law 11
   Almog v. Arab Bank 11
   Saperstein v. The Palestinian Authority 21
   Notes and Questions 24

PART II AUTHORITIES AND LIMITS IN THE WAR ON TERRORISTS 29

CHAPTER 2 ■ THE EXTRATERRITORIAL REACH OF U.S. LAW 31

A. Extraterritorial Reach of Constitutional Rights 31
   Reid v. Covert 32
   United States v. Verdugo-Urquidez 35
   Notes and Questions 41
   Hernandez v. United States 44
   Notes and Questions 49

B. Extraterritorial Effect of U.S. Statutes 50
   Kiobel v. Royal Dutch Petroleum Co. 50
   Notes and Questions 57

xi
CHAPTER 3 ▪ WAGING WAR ON TERRORISTS

A. International Law Regarding the Right to Wage War (jus ad bellum) 64
   Charter of the United Nations 65
   Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America) 67
   Notes and Questions 71

B. The President’s Defensive War Power 74
   The Prize Cases 75
   Notes and Questions 78

C. Statutory Authorization and Limits 84
   Bas v. Tingy 85
   Notes and Questions 88

D. Defending Against Al Qaeda and the Islamic State 91
   1. War in Afghanistan 91
      Authorization for Use of Military Force 91
      Notes and Questions 93
   2. A New Terrorist Threat: The Islamic State 95
      Notes and Questions 97

CHAPTER 4 ▪ INTERNATIONAL HUMANITARIAN LAW (JUS IN BELLO) 101

A. Authorities for Jus in Bello 103
   1. When Does IHL Apply? 103
      Common Article 2 103
      Common Article 3 104
      Notes and Questions 105
      Case Study: Counterterrorism and IHL 106
   2. IHL for the Victims of War — The 1949 Geneva Conventions 106
      Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949 (Geneva III) 107
      Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949 (Geneva IV) 109
   3. IHL Revised: The Geneva Protocols Additional 110
      Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977 (Additional Protocol I) 111
   4. The International Criminal Court 120
      Rome Statute of the International Criminal Court 120
      Notes and Questions 122

B. Applying IHL — Targeting in Armed Conflict 123
   Public Committee Against Torture in Israel v. Israel 124
   Notes and Questions 133
CHAPTER 5  ■  TARGETING TERRORISTS  139

A. Targeted Killing by the United States After 9/11  140

B. Targeted Killing and Human Rights Law  142
   Convention for the Protection of Human Rights and Fundamental Freedoms  142
   Case Study: The Gibraltar Killings  143
   Notes and Questions  144

C. Targeted Killing and International Humanitarian Law  146
   Public Committee Against Torture in Israel v. Israel  146
   U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities  147
   Notes and Questions  149

D. U.S. Law and the Targeting of U.S. Citizens  152
   Executive Order No. 12,333, United States Intelligence Activities  152
   Department of Justice, White Paper: Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa’ida or an Associated Force  153
   U.S. Department of Justice, Office of Legal Counsel, Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaqi  159
   Notes and Questions  161

PART III  ■  DETECTING TERRORIST THREATS  167

CHAPTER 6  ■  INTRODUCING INTELLIGENCE OPERATIONS  169

A. The Intelligence Cycle  170
   Select Committee to Study Governmental Operations with Respect to Intelligence Activities (Church Committee), Foreign and Military Intelligence  170
   Notes and Questions  172

B. How is Intelligence Collected?—The “INTS”  172
   Marshall Curtis Erwin, Intelligence Issues for Congress  173
   National Research Council, Bulk Collection of Signals Intelligence: Technical Options  175
   Notes and Questions  178

C. Covert Actions  179

D. Authority for Intelligence Activities  180
   1. Statutory Authorities  180
      a. The DNI  180
      b. The CIA  182
2. Presidential Authorities
   Executive Order No. 12,333, United States Intelligence Activities
   Notes and Questions
   a. Authority for the Order
   b. Deciding on Intelligence Operations
   c. The Internal Executive Branch Process for Approving Intelligence Operations
   d. Conducting Intelligence Operations
   e. Overseeing Intelligence Operation Decisions

E. Intelligence Reorganization After 9/11
   1. The Director of National Intelligence (DNI)—An Intelligence Czar?
   2. Budget Authority
   3. The New Structure for National Intelligence
      Notes and Questions

F. Sharing Collected Intelligence
   Notes and Questions

CHAPTER 7 ■ THE FOURTH AMENDMENT AND COUNTERTERRORISM

A. The Fourth Amendment Framework

B. A National Security Exception?
   Foreign Intelligence Surveillance Act of 1977
   United States v. United States District Court (Keith)
   Notes and Questions

C. A Foreign Intelligence Exception?
   In re Directives [Redacted Text] Pursuant to Section 105B of the Foreign Intelligence Surveillance Act
   Notes and Questions

D. The Impact of New Technology
   United States v. Jones
   Notes and Questions

E. Surveillance Abroad
   In re Terrorist Bombings of U.S. Embassies in East Africa (Fourth Amendment Challenges)
   Notes and Questions
CHAPTER 8  ■  CONGRESSIONAL AUTHORITY FOR FOREIGN INTELLIGENCE SURVEILLANCE 261

A. The Foreign Intelligence Surveillance Act: Core Requirements and Procedures 262
   United States v. Rosen 264
   Notes and Questions 271
   a. Title III Warrants for Ordinary Criminal Investigations 271
   b. The Scope of FISA Electronic Surveillance and Physical Searches 272
   c. The FISA Application Process for Electronic Surveillance or a Physical Search 275
   d. Constitutional Concerns 279

B. FISA, Law Enforcement, and the Fourth Amendment 281
   In re Sealed Case Nos. 02-001, 02-002 283
   Notes and Questions 287

C. FISA Trends 287

D. Reforming FISA by Reforming the FISA Court? 288
   American Civil Liberties Union v. Clapper 289
   Designation of Judges, 50 U.S.C. §1803 290
   Notes and Questions 291

CHAPTER 9  ■  PROGRAMMATIC ELECTRONIC SURVEILLANCE FOR FOREIGN INTELLIGENCE 295

A. Case Study: The Terrorist Surveillance Program 296
   Letter from William E. Moschella, Assistant Attorney General, to the Honorable Pat Roberts, Chairman, Senate Select Committee on Intelligence, et al. 297
   Notes and Questions 301

B. The FISA Amendments Act and the Future of Programmatic Surveillance 305
   1. The Statutory Framework of the FAA 305
   2. How 702 Collection Has Worked 308
      Privacy and Civil Liberties Oversight Board, Report on the Surveillance Program Operated Pursuant to Section 702 of the Foreign Intelligence Surveillance Act 308
      NSA Director of Civil Liberties and Privacy Office, NSA’s Implementation of Foreign Intelligence Surveillance Act Section 702 310
   3. Legal Analysis of 702 Collection 313
      [Case Title Redacted] 314
      Notes and Questions 328
      a. The Case Title Redacted Opinion 328
      b. Amended Procedures and Reforms 332
CHAPTER 10   THIRD-PARTY RECORDS — TARGETED COLLECTION 335

A. The Third-Party Doctrine 335
   1. Origins of the Doctrine 335
      Smith v. Maryland 336
      Notes and Questions 340
   2. Applications of the Third-Party Doctrine 342
      a. Telephone Conversations 342
      b. E-mail Content 342
      c. E-mail Headers, Addressing Information, and URLs 343
      d. Text Messages 345
      e. Locational Data 345
      f. Telephony Metadata 347
   3. Requiem for the Third-Party Doctrine? 348
      Jones v. United States 348
      Notes and Questions 348

B. Techniques and Authorities for Collecting Third-Party Records 349
   Doe v. Ashcroft (Doe I) 352
   Notes and Questions 365

CHAPTER 11   BULK COLLECTION AND DATA MINING 371

A. Bulk Collection in the Intelligence Process 372
   National Research Council, Committee on Responding to
   Section 5(d) of Presidential Policy Directive 28 (PPD-28), Bulk
   Collection of Signals Intelligence: Technical Options 372

B. Legal Authority for Bulk Collection 372
   American Civil Liberties Union v. Clapper 373
   In re Application of the Federal Bureau of Investigation 384
   Notes and Questions 388
   Access to Certain Business Records for Foreign Intelligence
   and International Terrorism Investigations 393
   Notes and Questions 396

C. Connecting the Dots — Data Mining 397
   Notes and Questions 398

CHAPTER 12   SCREENING FOR SECURITY 403

A. Checkpoint Searches 404
   United States v. Saboonchi 405
   Notes and Questions 415

B. Watchlisting 420
   Ibrahim v. Department of Homeland Security 423
   Notes and Questions 432
PART IV  DETAINING TERRORIST SUSPECTS  457

CHAPTER 13  ■  HABEAS CORPUS: THE STRUCTURE OF THE SUSPENSION CLAUSE  459

A. The Origins of the Suspension Clause  460
B. The Habeas Corpus Statute(s)  462
   Habeas Corpus, 28 U.S.C. §§2241-2255  463
   Notes and Questions  464
C. Suspending the Writ  465
   Ex parte Milligan  466
   Notes and Questions  467
D. The Effects of a Valid Suspension  474
   Hamdi v. Rumsfeld  475
   Notes and Questions  482

CHAPTER 14  ■  HABEAS CORPUS: THE SCOPE OF THE SUSPENSION CLAUSE  485

A. Territorial Scope of the Suspension Clause  485
   Boumediene v. Bush  488
   Notes and Questions  499
B. Review Required by the Suspension Clause  502
   Boumediene v. Bush  503
   Notes and Questions  511

CHAPTER 15  ■  MILITARY DETENTION OF U.S. PERSONS  515

A. The Internment Camps and the Non-Detention Act  515
   Alien Enemy Act of 1798  515
   Korematsu v. United States  517
   Notes and Questions  522
B. Military Detention of U.S. Persons Captured Overseas 526
   *Hamdi v. Rumsfeld* 527
   Notes and Questions 540

C. Military Detention of U.S. Persons Captured in the United States 543
   1. José Padilla 543
      Notes and Questions 547

**CHAPTER 16 ▶ MILITARY DETENTION OF NON-U.S. PERSONS** 551

A. Substantive Authority to Detain Non-U.S. Persons 552
   *Al-Bihani v. Obama* 553
   Notes and Questions 557
   *Hedges v. Obama* 561
   Notes and Questions 566

B. The Process for Proving Detainability 568
   1. The Burden of Proof and Role of Hearsay Evidence 568
   2. The Relevance of “Conditional Probability Analysis” 569
   3. The “Presumption of Regularity” 570
      Notes and Questions 572

C. The Next Generation of Guantánamo Litigation 575
   *Aamer v. Obama* 575
   Notes and Questions 578

D. “Closing” Guantánamo 579
   Notes and Questions 581

**CHAPTER 17 ▶ PREVENTIVE DETENTION** 583

A. Constitutional and Statutory Limits on Preventive Detention 584
   Non-Detention Act, 18 U.S.C. 4001 586
   Notes and Questions 586

B. “Spitting on the Sidewalk”: Pretextual(?) Criminal Detention 588
   Notes and Questions 588

C. The Post-9/11 Roundup of “High Interest” Detainees 589
   *Turkmen v. Hasty* 590
   Notes and Questions 604
PART V  INTERROGATING TERRORIST SUSPECTS  619

CHAPTER 18  INTERROGATING TERRORIST SUSPECTS  621

A. When is Interrogation Torture?  622
   Senate Select Committee on Intelligence, Committee Study of the Central Intelligence Agency’s Detention and Interrogation Program (SSCI Study)  624
   Notes and Questions  626

B. The Legal Standards and Their Application  628
   United States v. Charles Emmanuel  628
   Notes and Questions  635
   a. The Convention Against Torture  635
      Torture Act, 18 U.S.C. §2340  636
   b. Incorporating the Geneva Conventions  637
      War Crimes Act, 18 U.S.C. §2441  638
   c. Domestic Law on Torture  639

CHAPTER 19  CASE STUDY OF COERCIVE INTERROGATION OF DETAINEES IN U.S. CUSTODY AFTER 9/11  647

A. The Evolving History of U.S. Interrogation of Suspected Terrorists  647

B. Applying the Interrogation Laws  652
   Senate Select Committee on Intelligence, Committee Study of the Central Intelligence Agency’s Detention and Interrogation Program (SSCI Study)  652
   Notes and Questions  664
   a. The SSCI Study  664
   b. Legality Under International Law  667
   c. Domestic Law  669
   d. Responsibility for Abuse  670
   e. Criminal Liability  671
   f. Civil Liability  674
PART VI  PROSECUTING THREATS TO NATIONAL SECURITY  

CHAPTER 20  ■  CRIMINALIZING TERRORISM AND MATERIAL SUPPORT  

A. Treason and Sedition  
   United States v. Rahman  
   Notes and Questions  

B. Material Support Crimes  
   Holder v. Humanitarian Law Project  
   Notes and Questions  

C. The Long Arm of the Law: Extraterritorial Criminal Jurisdiction  
   United States v. Bin Laden  
   Notes and Questions  

CHAPTER 21  ■  THE PROCEDURAL PATH TO TERRORISM TRIALS  

A. National Security Criminal Procedure: Miranda, Presentment, and Speedy Trial  
   U.S. Department of Justice, Federal Bureau of Investigation, Custodial Interrogation for Public Safety and Intelligence-Gathering Purposes of Operational Terrorists Inside the United States  
   Notes and Questions  
   United States v. Abdulmutallab  
   Notes and Questions  
   United States v. Ghailani  
   Notes and Questions  

B. Coerced Evidence  
   United States v. Ghailani  
   United States v. Ghailani  
   Notes and Questions  

CHAPTER 22  ■  SECRET EVIDENCE IN CRIMINAL TRIALS  

A. The Classified Information Procedures Act  
   Classified Information Procedures Act, 18 U.S.C. app. III §§1-16  
   United States v. Lee  
   Notes and Questions
B. Using “Silent” Witnesses to Introduce Secret Evidence 762
   United States v. Abu Ali 762
   United States v. Rosen 768
   Notes and Questions 772
C. Access to Secret Exculpatory Testimony 775
   United States v. Moussaoui 775
   Notes and Questions 781
D. Do We Need a National Security Court? 784
   Notes and Questions 785

CHAPTER 23 ■ TRIAL BY MILITARY COMMISSION 789
A. Trial by Military Commission Before 9/11 790
   Ex parte Milligan 790
   Ex parte Quirin 791
   Notes and Questions 794
B. Trial by Military Commission After 9/11: The First Phrase 796
   Legality of the Use of Military Commissions to Try Terrorists 796
   Notes and Questions 803
C. Military Commissions After Hamdan 804
   Al Bahlul v. United States (Al Bahlul II) 806
   Notes and Questions 820

PART VII ■ HOMELAND SECURITY 827

CHAPTER 24 ■ HOMELAND SECURITY 829
A. Worst-Case Scenario: A Plague on Your City 829
   Thomas V. Inglesby, Rita Grossman & Tara O'Toole, A Plague on Your City: Observations from TOPOFF 829
   Notes and Questions 832
B. The Federal Response Role 835
   1. Stafford Act Authorities 836
   2. The Homeland Security Act and Related Directives 837
   3. DHS Response Plans 838
      Notes and Questions 839
C. First Responders: The State and Local Responses

The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States

Notes and Questions

D. Responding to Biological Threats

1. Government Responses to Contagious Diseases — In General

Notes and Questions

2. State Measures to Prevent the Spread of Disease

Model State Emergency Health Powers Act

Notes and Questions

3. Federal Public Health Authorities

Public Health Service Act, 42 U.S.C. §§201 to 300mm-61

Interstate Quarantine Regulations, 42 C.F.R. pt. 70

Case Study: The 2014 Ebola Virus Epidemic

Notes and Questions

CHAPTER 25 ■ THE MILITARY’S DOMESTIC ROLE

A. The Traditional Role of the Military in American Society

1. The Posse Comitatus Act as a Background Principle

Bissonette v. Haig

Notes and Questions

2. Exceptions to the Posse Comitatus Act

Insurrection Act, 10 U.S.C. §§331-335

Military Cooperation with Civilian Law Enforcement Officials, 10 U.S.C. §§371-382

Notes and Questions

Case Study: Raid on the Branch Davidians

B. The Military’s Intelligence Role in Homeland Security

1. Military Domestic Surveillance During the Vietnam War

Laird v. Tatum

Notes and Questions

2. Domestic Use of Military Intelligence Today

Notes and Questions

C. The Military’s Role in Responding to Domestic Terrorist Attacks

1. Leading or Supporting Role?

2. Controlling Authorities

3. Organizing for a Response

4. New Rules After 9/11?

Notes and Questions

D. Martial Law: When Planning Fails

Ex parte Milligan

Notes and Questions
PART VIII NONCRIMINAL SANCTIONS AGAINST TERRORISTS AND THEIR SUPPORTERS

CHAPTER 26 ★ PUBLIC SANCTIONS AGAINST TERRORISTS AND THEIR SUPPORTERS

A. International Sanctions 891
   1. Developing a Consensus Among Nations to Fight Terrorism 891
      a. The United States Reaches Out 891
      b. International Commitment to Counterterrorism 892
         United Nations Global Counter-Terrorism Strategy, G.A. Res. 60/288 893
   2. Compulsory Actions by International Organizations 894
      Case Study: Listing and Unlisting Kadi 895
      Notes and Questions 897
   3. Treaties Specifically Addressing Terrorism 899
      International Convention for the Suppression of the Financing of Terrorism 900
      Notes and Questions 903
   4. Other Forms of International Cooperation 904

B. Domestic Sanctions 904
   1. Designation of Foreign Terrorist Organizations 905
      People’s Mojahedin Organization of Iran v. United States Department of State (PMOI V) 905
      Notes and Questions 911
   2. Designation of Specially Designated Global Terrorists 912
      Kadi v. Geithner 914
      Notes and Questions 921
   3. Other Domestic Economic Sanctions Against State Sponsors of Terrorism 924
      Notes and Questions 925

CHAPTER 27 ★ SUING TERRORISTS AND THEIR SUPPORTERS 927

A. Suing Terrorists and Their Non-State Supporters 927
   Anti-Terrorism Act, 18 U.S.C. §§2331-2339D 928
   Boim v. Holy Land Foundation for Relief and Development (Boim III) 929
   Notes and Questions 936

B. Suits Against State Sponsors of Terrorism 940
   Gates v. Syrian Arab Republic 941
   Notes and Questions 946