

CHAPTER 17

Law and Terrorism

“The laws will thus not be silent in time of war, but they will speak with a somewhat different voice.”

— Chief Justice
William Rehnquist,
U.S. Supreme
Court

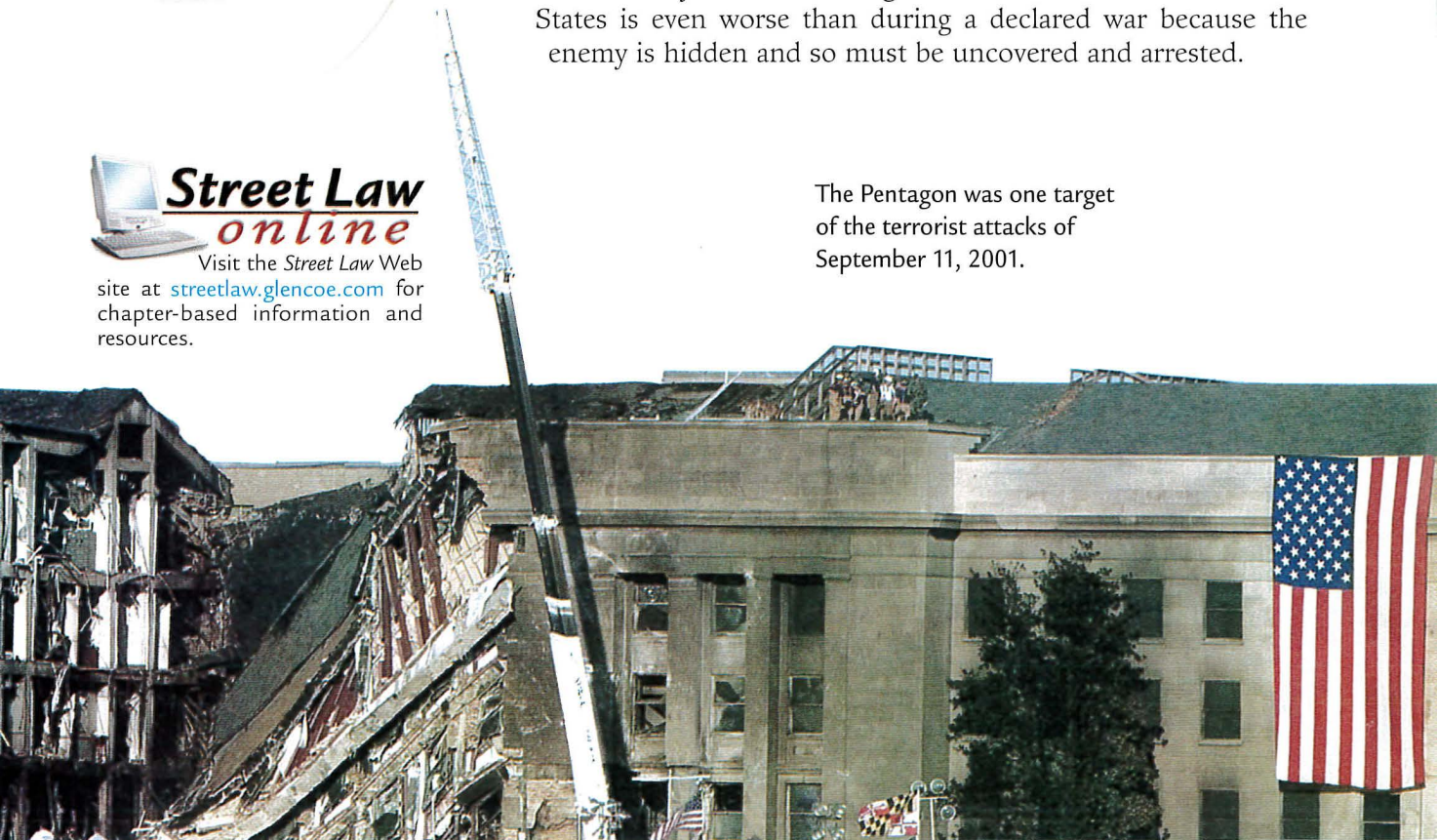
The rise of the problem of terrorism at the end of the twentieth and the beginning of the twenty-first century led President George W. Bush, Congress, state legislatures, and mayors to institute many new laws and policies. Law enforcement officials from the U.S. attorney general and the directors of the FBI and CIA to local police have all become involved in what is sometimes called “the war on terrorism.”

Civil liberties groups and others have challenged many of these laws and executive actions, saying they go too far in restricting individual rights at a time when the country is not officially at war. Proponents of antiterrorism measures say that these measures are warranted. They claim the danger from terrorism to the United States is even worse than during a declared war because the enemy is hidden and so must be uncovered and arrested.

The Pentagon was one target of the terrorist attacks of September 11, 2001.

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The Law in Times of War

The horrific events of September 11, 2001, shook U.S. society and its people to their core. These were the largest attacks on U.S. soil since World War II. The fact that the attacks were the result of terrorism made people feel especially vulnerable. As a result of the attacks, Congress passed many new federal laws and made changes to existing laws.

President George W. Bush declared a “war on terrorism.” He requested a number of new powers to enable the executive branch to find those who committed these acts of terrorism and to prevent future attacks. At the urging of President Bush, Congress passed a law called the *USA Patriot Act* in 2001. The act was intended to combat terrorism by tracing the sources of money that fund terrorist acts, finding and detaining terrorists who entered the country as immigrants, and intercepting communications among terrorist groups. The act expanded the powers of certain law enforcement and intelligence agencies such as the Department of Justice, the Federal Bureau of Investigation (FBI), and the Central Intelligence Agency (CIA). The act enabled these groups to share information among themselves, track communications on the Internet, install telephone and computer wiretaps, obtain search warrants for voice mail and e-mail messages, and access personal, educational, medical, and financial information. In 2002, Congress created the Department of Homeland Security to better coordinate antiterrorism activities across the government.

The expanded powers allowed by the *USA Patriot Act* raised key questions for U.S. society: Do these measures infringe on the rights of citizens? How much freedom and privacy are we willing to give up so that we may be more secure?

In past times of crisis, the U.S. government has taken away some of the rights of citizens, and courts have upheld some of these measures. During the Civil War, for example, President Lincoln suspended the right of prisoners to seek a *habeas corpus* petition, a legal means by which prisoners may challenge the constitutionality of their imprisonment in court. During World War I, the federal government restricted citizens’ rights to criticize U.S. involvement in the war, either verbally or in writing. During World War II, the government removed more than 100,000 people of Japanese heritage, most of whom were U.S. citizens, from their homes and detained them in camps. Much of their personal property, including homes and businesses, was never returned to them. However, in 1988 the U.S. government formally apologized for the detention of Japanese Americans, and Congress approved a reparations payment for surviving detainees.



As wartime hysteria mounted, the U.S. government rounded up thousands of people of Japanese ancestry, most of whom were U.S. citizens, and forced them into internment camps during World War II. *Does the government have the right today to relocate or keep a group such as noncitizens in detention?*

Problem 17.1

- a. Is the war on terrorism similar to other wars when rights have been restricted? How is it the same? How is it different?
 - b. Assume you were the president after the September 11, 2001 attacks. What special powers would you want?
 - c. Assume you were the leader of a civil liberties organization. What civil rights would you fight hardest to protect?
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Surveillance and Searches

Since September 11, 2001, the government has had more power to conduct surveillance against ordinary people, much of which is provided for in the *USA Patriot Act*. Passengers in airports, for example, often have to open all of their luggage or submit to searches of their clothes, shoes, and persons. The act gives the government broader powers to intercept Internet or telephone communications of people it believes to be engaged in terrorist-related crimes.

The Case of . . .

The Sneak and Peek Search

U.S. law usually requires that a search warrant, based on probable cause, be obtained before a person's home is searched. A law enforcement officer is supposed to give the person whose premises are searched a receipt for any items that are taken as part of the search.

Maria Ramirez is originally from a country where there has been some terrorist activity against U.S. citizens. Federal officers see her at a restaurant in Chicago talking to people who are suspected of terrorism, though they have not been arrested. Federal agents come to her apartment when she is not there and look through all her letters and computer files. They make copies of some documents. The government agents do not inform her that they searched her apartment or copied documents until two weeks later.



A sneak and peek search

Problem 17.2

- a. What reasons might the federal agents give for not obtaining a warrant and presenting it to Maria?
 - b. What arguments might Maria give that she should have been informed of the search?
 - c. If you were writing the law, would you allow sneak and peek searches like this in cases of suspected terrorism, or make them illegal?
-

The act enables law enforcement officials to call on a special court called the Foreign Intelligence Surveillance Act Court—whose records and rulings are kept completely secret—to authorize wiretaps to help gather evidence to prosecute terrorists. This court was originally set up in 1978 to authorize surveillance to gather foreign intelligence, not evidence for domestic criminal trials. For that reason, this court is not required by law to obey the rules that ordinary courts must observe to protect the rights of alleged criminals. For example, the Foreign Intelligence Surveillance Act Court can approve wiretaps to monitor an individual’s communications even if the government has not proven that there is probable cause to believe the individual is involved in criminal activity.

Before the *USA Patriot Act*, evidence gathered using such wiretaps could not be used in criminal trials. In 2003, the U.S. Supreme Court let stand a lower-court ruling allowing evidence authorized secretly by the Foreign Intelligence Surveillance Act Court to be used in criminal trials. In addition, in some cases under the *USA Patriot Act*, the government can delay notifying people whose premises have been searched until after the search has taken place.

Problem 17.3

- a. On a scale from one to five, with one meaning that you strongly agree and five meaning that you strongly disagree, indicate where you stand on the following statement:

“In a time of heightened concern about domestic terrorism and national security, the government should be allowed to do whatever it believes is necessary to uncover and arrest terrorists.”

- b. Using the same scale, take a stand on each of the following statements. In each case, assume that Congress has proposed laws giving the federal government the power to take the following actions:
- Look at everyone’s e-mail at work.
 - Look at everyone’s e-mail at home.
 - Install surveillance cameras on all public streets.
 - Plant small cameras in the homes of suspected terrorists.
 - Monitor everyone’s video rental records.
 - Check the travel records of people coming into the country.
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Detention and Interrogation

As a result of the September 11, 2001 attacks, many people suspected of terrorism have been detained inside the United States. Most have been noncitizens. Under most federal laws, noncitizens can be detained for only 24 hours without being formally charged with a crime. However, the *USA Patriot Act* allows noncitizens suspected of terrorist



The U.S. government held people suspected of being involved in terrorist activities at a U.S. military base in Cuba. *What information do you think the U.S. government wanted from the prisoners?*

activity to be detained without being formally charged with an offense for as long as it takes to either prove that the detainees are not involved in terrorism or to gather enough evidence to press charges. Many of the detained are Arab or Muslim people who were called in for questioning after the September 11 attacks.

Problem 17.4

Achmed, 26, is a university student from a country in the Middle East. He is in the United States on a student visa. He goes to his state's motor vehicle administration office to renew his driver's license. Since the September 11, 2001 attacks, federal law enforcement officials have been stationed around this facility to help gather information

on possible terrorists. Achmed is pulled out of line and questioned about when and why he entered the United States. His answers sound suspicious to the officers, and they decide to detain him while they investigate his background further. He is not allowed to talk to anyone outside the detention facility, including his family or a lawyer. He is held for four months and then is released without having been charged with a crime.

- a. If you were a government official charged with locating possible terrorists, what reasons would you give for detaining Achmed?
- b. Should the government be allowed to detain people for these reasons?
- c. Were Achmed's rights violated? If so, how?

Unlawful Combatants

A number of people who were detained and interrogated after the September 11, 2001 attacks were called "unlawful combatants" by the U.S. government. This term refers to people who have fought against the United States but not in the context of a conflict between two internationally recognized governments. Some of these people were from a number of foreign countries and were suspected of being involved in terrorist activities in the United States and abroad. Others were believed to have direct ties to al-Qaeda, the terrorist group based in Afghanistan and responsible for the September 11, 2001 attacks. They were rounded up by the U.S. forces who entered Afghanistan to bring down al-Qaeda and its operations.

These unlawful combatants were brought to a U.S. military base in Guantánamo Bay, Cuba. The government argued that because this

base was not on U.S. soil, the prisoners there need not be accorded the same rights as people in the United States who have been arrested for committing a crime. In addition, the government said it did not have to guarantee the detainees' rights under international treaties such as the Geneva Convention because the United States had not formally declared war on Afghanistan, and because the detainees were terrorists and not soldiers fighting under a legitimate foreign government. The people detained in Guantánamo Bay were questioned extensively and held in cells that critics called "small cages." During their detention, they were not allowed to see lawyers. The U.S. government said that it held these detainees under humane conditions and that torture was not used to get information from the prisoners. Torture is illegal under both U.S. law and international law through the U.N. Convention Against Torture, which the United States signed and ratified.

Rights at Trial

A person charged with terrorism could be tried in a U.S. court, where he or she would be guaranteed the full rights provided to other criminal defendants, including the right to a jury, right to a lawyer, and right to a public trial. However, various groups have voiced a number of arguments against trying terrorists in a regular criminal court. The U.S. government has argued that trying a suspected terrorist in a regular criminal court allows the defendant to use the trial as a political platform to attack the government publicly. Some defendants' rights groups say that it is impossible to guarantee a defendant in a terrorist case a fair trial in the United States because public opinion is so strong against alleged terrorists. The government also worries that such public trials might help terrorist groups learn what information the government has about them.

The U.S. government has proposed trying suspected terrorists, including unlawful combatants, in a military tribunal rather than a criminal court. Under rules issued in 2002, these tribunals—unlike criminal courts—can meet in secret and can allow hearsay as evidence. These tribunals, which consist of three or more judges, can convict defendants and authorize the death penalty if two-thirds of the judges vote that the defendant is guilty. There is no procedure to appeal a decision by a military tribunal.

Problem 17.5

In 2002, the U.S. military in Afghanistan captured Jackson, a U.S. citizen, as he was fighting there against the United States. Along with others designated as unlawful combatants, he was brought to Guantánamo Bay, Cuba. His request for a lawyer was denied. After three months in detention, he was told he will have to stand trial for terrorism. Should he be tried in a U.S. criminal court or in a military tribunal? Which would the U.S. government prefer? Which would Jackson prefer? Give your reasons.

