Law, Liberty, and the Pursuit of Terrorism

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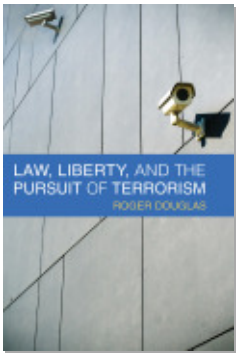

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Notes

INTRODUCTION

1. Those who regret this omission should read Donohue 2007.
2. Human Rights (Parliamentary Scrutiny) Act 2011 (Cth), s 8. (Failure to do so does not invalidate legislation.)

CHAPTER 1

The epigraphs at the beginning of this chapter are from United States Department of Defense, Office of the Assistant Secretary of Defense (Public Affairs) 2002; and O'Sullivan 2006.

1. Kahneman, Slovic, and Tversky 1982, 163–78, 465–66.
2. Sunstein 2007, 523.
3. Ibid.
4. Marks 2006, 584.
5. Roach and Trotter 2005, 1033.
6. Vermeule 2005.
7. Mueller 2006, 13–48.
8. Lord Lloyd of Berwick 1996, 2:90.
9. United States, FBI 2002.
10. United States, FBI 2006, 4; Global Terrorism Database nd, GTD Ids 200202040010, 200607280004.
11. Global Terrorism Database.
12. United States, Department of State, 2003, 2004, 2006, 2007, 2008. Statistics for 2004 and earlier are derived from a different methodology and use a different definition ("international terrorism") to the methodology and definition ("terrorism") used in 2005 and subsequently: see United States, Department of State, 2007.
13. Torrance 1986, 243–44; http://www.start.umd.edu. The two indeterminate cases involved attacks from unknown sources on one government and one private target.
14. Major 2010, 2:547–85.
15. CSIS 2009, 8.
16. For example, there were bomb attacks against gas pipelines and wellheads, but such acts were noteworthy for their rarity (ibid., 8).
17. CSIS 2006, 1; 2007, 2.
18. The motives for a 1984 attack that killed the wife of a family court judge are not known, but if it was intended to intimidate the court (which seems unlikely), it would be the most recent attack (see K. Baker 2006, 308). The Global Terrorism Database

lists several other incidents, none of which seem to fall within the broad category of "public violence." One was an indiscriminate gun massacre. The database reports an incident in which six Turks were allegedly killed by an anti-Turkish group, but that incident turns out to have been an explosion in a post office in which no one was killed, and it was possibly not even deliberate. The killing of a Greek consul that is among the incidents listed was treated by the police as nonpolitical. There were two fatal attacks on police, neither of which was accompanied by any statement by the perpetrator or by police claims that it was political. The other incidents involved private individuals and unknown motives.

19. K. Baker 2006, 214.

20. Lord Lloyd of Berwick 1996, 2:108. A different source, Conflict Archive on the Internet, gives slightly different figures ("Northern Ireland Violence" 2009).

21. Lord Lloyd of Berwick 1996, 2:11–12.

22. "Northern Ireland Violence" 2009.

23. Ibid. Estimates in the annual editions of *Patterns of Global Terrorism* are similar but slightly different.

24. Donohue 2007, 184.

25. Ibid., 207 (21 deaths in Birmingham); Lord Lloyd of Berwick 1996, 1:1 (22 Birmingham deaths).

26. A thirteenth incident listed in the database was a fire at a nightclub, which caused 37 deaths but does not appear to have had any "collective interest" element.

27. In one of these, a gunman at the Libyan embassy responded to an anti-Gaddafi demonstration by shooting at the demonstrators, injuring several and killing a police officer.

28. Lord Lloyd of Berwick 1996, 2:29. The incident is included in the Global Terrorism Database as an incident involving no deaths. (The hostage was killed before British forces attacked the embassy in their successful attempt to free the hostages, and when listing number of deaths, the database does not include terrorists who have died in an attack.)

29. United Kingdom, Security Service, 2013b.

30. United States, Department of State, 2004, 56.

31. United Kingdom, Security Service, 2013a.

32. United States, Federal Bureau of Investigation, 2006.

33. For a comprehensive list, see Difo 2010.

34. *United States v Reid* 02-cr-10013 (D Mass 2003), Government's Sentencing Memorandum.

35. See complaint in *United States v Abdulmuttalab* 2:09-mj-30526, document 1.

36. *United States v Shahzad* 1:10-mj-00928, document 1.

37. See, e.g., *United States v Abu Ali* 528 F 3d 210, 221–26 (4th Cir 2008); *United States v Shareef* 06-cr-00919 (ND Ill), affidavit of Jared Ruddy; *United States v DeFreitas* cr-00543 (ED NY), document 1 (complaint), [28]; United States, Department of Justice, 2009.

38. Manningham-Buller 2011.

39. Australian Broadcasting Corporation 2008; Sturcke 2009 (7 aircraft). Manningham-Buller (2011) gives the number as "up to a dozen"; Difo (2010, 20) gives the figure of "up to 10."

40. *R v Ibrahim* [2008] EWCA Crim 880, [4], [11]–[15]; "London Glasgow Terrorist Attacks" 2008.

41. Details of the planned attacks on infrastructure are provided in a case involving a Canadian who had been involved in the plan, albeit at the periphery: see *R v Khawaja* [2008] OJ No 4244; 2008 ON C LEXIS 4226; *R v Barot* [2007] EWCA Crim 1119, [5].

42. Friscolanti, Gatehouse, and Gillis 2006.

43. See, generally, the account of the plot in *R v Khalid* [2009] OJ No 3513; 2009 ON C LEXIS 3117.

44. Mohammed Mansour Jabarah, one of those involved, later pleaded guilty, with the plea and sentence remaining secret until the government rescinded the cooperation agreement (Center on Law and Security 2010, 45).

45. See *R v Benbrika* [2009] VSC 21; (2009) 222 FLR 433; *R v Kent* [2009] VSC 375; *R v Touma* [2008] NSWSC 1475; Munro 2010, 1.

46. Keenan 2008, 18–28; Cumming and Masters 2012.

47. *R v Barot* [2007] EWCA Crim 1119, [5]. See Cumming and Masters 2012 for a discussion of the New Zealand trial, which turned on the question of how far behaviour and intercepted conversations were to be taken at face value.

48. Barros and Proença 2005, 299–300; Enders and Sandler 2005, 261–62; Masters 2008.

49. Enders and Sandler 2005.

50. Reinares 2004 (examining the changing backgrounds of ETA terrorists); Pape 2003 (describing suicide bombers as once young, uneducated, socially isolated, and male but more recently better educated, older, more likely than earlier to be married, integrated, and female).

51. For example, compare the conclusions as to the nature of Islamic terrorism that were drawn by Barros and Proença (2005) on the basis of a sample of observations from 1979–2002 with the finding by Enders and Sandler (2005, 275) that in response to post-9/11 attacks on al-Qaeda, there had been a substitution effect whereby bombings were replacing hostage taking.

52. Enders and Sandler 2005, 261, 262.

53. OECD 2005, 19, 35.

54. Ibid.

55. Ibid., 35; United States, General Accounting Office, 2004, 22.

56. OECD 2005, 19, 22. In Australia, some insurers offer insurance for residential housing (which is not covered by the government compensation scheme) subject to a CBRN exemption, but residential housing is not otherwise subject to a terrorism exemption (Australia 2006, 60–61).

57. See, e.g., United States, General Accounting Office, 2004, 14–15 (on the US Treasury's conclusion that there was no need to bring group life insurance within the Terrorism Risk Insurance Act of 2002).

58. OECD 2005, 19, 40; Australia 2006, 26–27.

59. OECD 2005, 41 (citing two studies yielding slightly different estimates); Australia 2006, 25–26.

60. Australia 2006, 27

61. Terrorism Risk Insurance Act of 2002, 15 USC § 6701 note. For details of rules implementing the TRIA, see United States, General Accounting Office, 2004; Terrorism Insurance Act 2004 (Cth).

62. United States, General Accounting Office, 2004, 27–30; OECD 2005, 14, 33–34, 36–37. The authors of the report emphasise the problems posed by the dynamic

nature of modern terrorism. They may, however, underestimate the degree to which terror becomes institutionalised. After all, the 9/11 attack reflects the union of two prior bin Laden obsessions.

63. OECD 2005, 32–33.

64. Use of the term *free* here is not intended to imply that such markets are to be preferred to those in which there has been government intervention. Indeed, the persistence of apparently reluctant government involvement in the provision of terrorism insurance suggests that some kind of government role is essential if terrorism insurance is to be provided.

65. Australia 2006, 8.

66. United States, General Accounting Office, 2004, 25–26.

67. Ibid.

68. OECD 2005, 42–43; Australia 2006, 9 (providing a more recent—and therefore slightly different—summary to that provided by the OECD report).

69. Australia 2006, 2–4 (Australia: A$10 billion), 8 (Belgium: €2 billion), 10 (Germany: €10 billion; Netherlands: €1 billion), 13 (the US government is responsible for 85 percent of losses in excess of insurers' responsibilities).

70. United States, General Accounting Office, 2004, 24.

71. Australia 2006, 35.

72. Ibid., 40.

73. Goldsmith 2007, 71–74.

74. Ibid., 74.

75. Manningham-Buller 2011.

76. Mueller 2006, 35–36.

77. United Kingdom, *House of Commons Hansard*, 14 December 1999, col 157.

78. United States, House of Representatives, Judiciary Committee, 2001, 289.

79. Canada, *House of Commons Hansard*, 16 October 2001, [10.15].

80. Phil Goff, in *New Zealand Parliamentary Debates* 603, 1062.

81. Darryl Williams, in Australia, *Commonwealth Parliamentary Debates*, 12 March 2002, 1040–42.

82. Homeland Security Presidential Directive-3, http://www.dhs.gov/xabout/laws/gc_1214508631313.shtm.

83. United States, Homeland Security Advisory Council, 2009, appendix C.

84. United Kingdom, Home Office, 2012.

85. United Kingdom, Security Service, 2012.

86. An inquiry by the United Kingdom Intelligence and Security Committee into the 7/7 attack acknowledged that threat alerts could be based only on information available to MI5 and that MI5 had had no evidence about the intentions of the group responsible for the attacks. It recommended that the meaning of alerts be clarified so that it was clear that they were based only on information before MI5 (United Kingdom, Intelligence and Security Committee, 2006). In its 2006–7 *Report to Parliament*, ASIO, also noting the problems posed by unstructured extremist groups, reported that in addition to following up leads (the "knowns"), it was also devoting resources to identify the unknowns (ASIO 2007, 23).

87. ASIO 2007, 3.

88. Ibid., 3.

89. ASIO 2003, 3; 2004, 24.

90. United Kingdom, Security Service, 2013.
91. CSIS 2003.
92. Ibid.
93. ASIO 2006, 18.
94. NZSIS 2002, 5.
95. NZSIS 2004, 11.
96. NZSIS 2005, 6, 10–11.
97. NZSIS 2006, 6, 11, 12.
98. ASIO, Director-general, 2007 (bullet points and references omitted).
99. *ABC News* poll, September 2001, terror10.
100. *Fox News*/Opinion Dynamics polls, October 2001, June 2002, terror9, 8.
101. Harris Interactive poll, June 2007, http://www.angus-reid.com/polls/index.cfm/fuseaction/viewItem/itemID/16244.
102. EKOS/*CBS News* polls, February–March 2003 (available from www.ekos.com).
103. Angus Reid poll, November 2010.
104. COMPAS poll, July 18, 2005, 4, 5 (available from www.compas.ca).
105. Newspoll, January 2003.
106. ANU Poll 2009.

CHAPTER 2

1. Bush 2010, 128.
2. Canada, *House of Commons Hansard*, 16 October 2001, 10.15 am.
3. See Mueller 2006, 35–36, for some egregious examples.
4. Lum et al. 2006.
5. See, for instance, Roach 2009, 131–34.
6. Huddy et al. 2002, 420, 431.
7. Ibid., 420, 431.
8. Viscusi and Zeckhauser 2006, 103–6.
9. Pew Research Center survey, September 2001, terror10 (55% necessary, 33% unnecessary); *CBS News*/*New York Times* poll, September 2001, terror10 (74% give up, 21% no); *Newsweek* poll, September 2001 (63% necessary, 32% not necessary); *Los Angeles Times* poll, August 2002, terror7 (49% necessary to give up, 33% government will go too far); *Fox News*/Opinion Dynamics polls, July 2005, January 2006, May 2006, terror4 (64, 61, and 54% willing to give up some personal freedom). Cf. Pew Research Center polls, September 2006, December–January 2006, terror3; Ipsos/McClatchy poll, January 2010, terror.
10. Pew Research Center survey, September 2001, terror10; *CBS News* polls, November 2002–August 2006, terror3; *CBS News*/*New York Times* poll, September 2008 (see also November 2006), terror2.
11. Associated Press poll, August 2002, terror7; Associated Press poll, September 2003, terror6; *CBS News* poll, January 2006; *Fox News*/Opinion Dynamics poll, January 2006, terror4 (two-thirds concerned lest liberties be restricted).
12. YouGov/*Daily Telegraph* poll, July 2005, http://www.angus-reid.com/polls/index.cfm/fuseaction/viewItem/itemID/8049.
13. YouGov poll, June 2008, http://www.angus-reid.com/polls/32480.
14. Shapiro and Steinzor 2006, 100–102; Obama 2010, 19; United Kingdom, Privy

Counsellor Review Committee, 2003; Varghese 2003. Cf. Walker 2006, 1142–44 (with qualifications); Whitaker 2003, 263 (some pro-security measures facilitated by 9/11 attack, but they were in the pipeline anyway).

15. Powe 2009, 348.
16. Ramraj 2009.
17. Boyne 2004, 67–72.
18. Roach 2008, 17–18.
19. Schwartz 2009, 426.
20. Converse 1964.
21. Alford et al. 2005; Haidt 2012.
22. Alford et al. 2005; Hatemi et al. 2011. See generally Haidt 2012.
23. Eysenck 1954.
24. Gastil et al. 2005.

CHAPTER 3

1. Cited and translated in Gewald 2007, 91–92.
2. Evidence of qualified enthusiasm for freedom fighters comes from Article 2(a) of the Arab Convention for the Suppression of Terrorism, adopted by the Council of Arab Ministers of Justice (Cairo, April 1998): "All cases of struggle by whatever means, including armed struggle, against foreign occupation and aggression for liberation and self-determination, in accordance with the principles of international law, shall not be regarded as an offence. This provision shall not apply to any act prejudicing the territorial integrity of any Arab state." Palestinian freedom fighters are praiseworthy; Kurdish ones are not.
3. The convention was adopted at New York on 9 December 1999.
4. Convention for the Suppression of Unlawful Seizure of Aircraft, adopted at the Hague on 16 December 1970; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, adopted at Montreal on 23 September 1971; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations on 14 December 1973; International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations on 17 December 1979; Convention on the Physical Protection of Nuclear Material, adopted at Vienna on 3 March 1980; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary for the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, adopted at Montreal on 24 February 1988; Convention for the Suppression of Unlawful Acts and the Safety of Maritime Navigation, adopted at Rome on 10 March 1988; Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, adopted at Rome on 10 March 1988; International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December 1997.
5. See, e.g., Cassese 2006; Watkin 2004, 14–17. Di Filippo (2008) assumes that there is still considerable disagreement but that this does not pose an insuperable obstacle to agreeing on a core definition.
6. For a comprehensive discussion of this issue, see Saul 2006.

7. Geneva Conventions Act 1957 (Cth); Geneva Convention Act, RSC 1985, c G-3; Geneva Conventions Act 1957 (NZ); Geneva Conventions Act 1957 (UK), c 52. The United States legislation did not reproduce the conventions but made it an offence to commit a grave breach of the conventions (18 USC § 2441).

8. "'Terrorism' means the use of violence for political ends and includes any use of violence for the purpose of putting the public or any section of the public in fear." For a discussion of earlier emergency legislation aimed at Irish political violence, see Donohue 2007.

9. For details of the successive emergency acts, see Donohue 2007, chapters 5 and 6.

10. It was loosely based on a definition used in the United States by the FBI (Lord Carlile of Berriew 2007, 3). Legislation governing insurance against the risk of terrorism antedates the 2000 act and contains a different definition: "'Acts of terrorism' means acts of persons acting on behalf of, or in connection with, any organisation which carries out activities directed towards the overthrowing or influencing, by force or violence, of Her Majesty's government in the United Kingdom or any other government de jure or de facto" (Reinsurance (Acts of Terrorism) Act 1993 (UK), c 18, s 2(2)). The combined effect of Article 12 of Council Directive 2004/83/EC and the European Communities Act 1972 (UK, c 68) is that terrorism is grounds for refusing refugee status only insofar as it falls within Article 1F of the Refugee Convention. For the purposes of the Immigration, Asylum and Nationality Act 2006 (UK, c 13, s 54), *terrorism* must be read accordingly and (more or less) limited to "the use for political ends of fear induced by violence" (*Al-Sirri v Secretary of State for the Home Department* [2009] EWCA Civ 222, [13]–[18], [28]–[32]).

11. 25 October 1978, PL 95–511, § 101(c), 92 Stat 1783, 1784, codified at 50 USCS § 1801(c).

12. See also other, almost identical definitions: 44 USCS § 921(22) (relaxes standards for proving profit when disposer of firearms supplies them to terrorists: definition of "terrorism" substantively identical except that it applies only to people who are not US nationals or permanent residents); 49 USCS § 44703(g)(3) (airman certificates: definition of "acts of terrorism" substantively identical except for lack of geographical limitations). See, too, EO 13224, 66 FR 49079 § 3(d), and 31 CFR § 594.311 ("terrorism" for the purposes of the Global Terrorism Sanctions Regulations), each of which defines terrorism to also include acts dangerous to property or infrastructure. Section 2331 of Title 18 of the United States Code (29 October 1992, PL 102–572, § 1003(a)(3), 106 Stat 4521; amended by, 26 October 2001, PL 107–56 § 802, 115 Stat 376 (adding definition of "domestic terrorism")) includes a definition similar to but slightly broader than the FISA definition, for the purposes of legislation giving victims of international terrorism the right to sue; domestic terrorism is defined slightly more narrowly. Section 3077 of Title 18 provides that for the purposes of chapter 204 (Rewards for Information Concerning Terrorist Acts and Espionage), "'act of terrorism' means an act of domestic or international terrorism as defined in section 2331." This definition of "act of terrorism" is itself incorporated by reference elsewhere: see, e.g., 6 USCS § 488f (protection from civil liability for reporting a reasonable belief that a person seeking to purchase or transfer ammonium nitrate for an "act of terrorism"). The Homeland Security Act of 2002 included a definition of terrorism that was substantively identical except in that it extended to acts destructive to infrastructure or key resources (Act, 25

November 2002, PL 107–296, § 2, 116 Stat 2140; 6 USCS § 101). See also 6 USCS § 1104 (immunity for reports of "covered activity," which includes (§ 1104(d)(2)(B)) "an act of terrorism" as defined by 18 USCS § 3077).

13. 22 December 1987, PL 100–204, Title I, Part B, § 140, 101 Stat 137, codified at 22 USC § 2656f(d). Subsequent amendments to the act have not affected the definitions. The definition of terrorism coincides with a definition adopted by the State Department in 1984: see Schmid 2005, 376.

14. 29 November 1990; PL 101–649 § 601(a), 104 Stat 5011; am by Act, 26 October 2001; PL 104–32 § 411(1), 115 Stat 345; 8 USCS § 1182(a)(3)(B)(iii).

15. 29 October 1992, PL 102–572, § 1003(a)(3), 106 Stat 4521; am by Act, 26 October 2001, PL 107–56 § 802, 115 Stat 376 (adding definition of "domestic terrorism"); 18 USCS § 2332.

16. 24 April 1996, PL 104–132, § 702, 110 Stat 1293; 18 USCS § 2332b(g)(5)(A).

17. 26 October 2001, PL 107–56, § 802, 115 Stat 376; 18 USC § 2331(5).

18. 26 November 2002, PL 107–297, § 102, 116 Stat 2322; am by Act, 22 December 2005, PL 109–144, 119 Stat 2660; 26 December 2007, PL 110–160, 121 Stat 1839.

19. Australian Security Intelligence Organization Act 1979 (Cth), s 4.

20. Customs (Prohibited Imports) Regulations 1956 (Cth), reg 4a(1a), as amended by the Customs (Prohibited Imports) Amendment Regulations 1983 (Cth) (SR 331/1983).

21. Australian Security Intelligence Organization Act 1979 (Cth), s 4, as amended by the Australian Security Intelligence Organization Amendment Act 1986 (Cth), s 3(e).

22. Customs (Prohibited Imports) Regulations 1956 (Cth), reg 4a(1a), as amended by the Customs (Prohibited Imports) Amendment Regulations 1983 (Cth) (SR 403/1995), reg 3, item 3.4.

23. Criminal Code 1995 (Cth), s 100.1, added by Suppression of the Financing of Terrorism Act 2002 (Cth), Sch 1, item 2.

24. International Terrorism (Emergency Powers) Act 1987 (NZ), s 4. "International terrorist emergency" means "a situation in which any person is threatening, causing, or attempting to cause" death or serious injury to a person or the destruction of or serious damage or serious injury to property, the environment, or "any animal" "in order to coerce, deter, or intimidate" governments or bodies of people "for the purpose of furthering, outside New Zealand, any political aim."

25. Immigration Act, RSC 1985, c I-2, ss 19(1)(e)(iv)(C), 19(1)(f)(ii), (iii)(B) (am 1992, c 49, s 11(2)). In *Suresh v Canada (Minister of Citizenship and Immigration)* (2002 SCC 1; [2002] 1 SCR 3), the Canadian Supreme Court acknowledged the ongoing debate about what "terrorism" meant, but it concluded that the definition in Article 2(1)(b) of the International Convention for the Suppression of Terrorism caught "the essence of what the world understands by 'terrorism'"(at [98]) and that, interpreted thus, the term was not unconstitutionally vague. The current immigration legislation leaves the term undefined (Immigration and Refugee Protection Act SC 2001, c 27, s 35). For a summary of judicial interpretations of what the term meant, see Bhabba 2003, 103–9.

26. Criminal Code, RSC 1985, c C-46, s 83.01, added by Anti-terrorism Act, SC 2001, c 41, s 4.

27. Criminal Code, RSC 1985, c C-46, s 83.01, definition of "terrorist activity," par (a). An act falls within this paragraph if it "is committed in or outside Canada" and, "if committed in Canada," if it "is one of the [listed] offences." The offences are confined

to offences that are "referred to" in section 7 of the code and that have varying degrees of extraterritorial effect under that section.

28. The discussion that follows is based on the definitions in the comprehensive counterterror legislation passed since 2000. New Zealand's two pre-2000 definitions remain in force in relation to "international emergencies" and immigration, and the United Kingdom's insurance-related definition of terrorism is still in force. Given their narrow range of application, these definitions are not discussed in the text.

29. Australia, s 100.1(2)(a), (ba), (c); Canada, par (b)(ii)(A), (B); New Zealand, s 5(3)(a); United Kingdom, s 1(2)(a), (c). These and subsequent references are to the standard definitions. Canadian references refer to the paragraph in the definition contained in the definition section of the relevant legislation, namely, section 83.01(1) of the Criminal Code (definition of "terrorist activity"). Australian, New Zealand, and UK references are to the relevant sections of the Criminal Code Act 1995 (Cth), the Terrorism Suppression Act 2002 (NZ), and the Terrorism Act 2000 (UK, c 11).

30. Australia, s 100.1(d); Canada, par (b)(ii)(C); New Zealand, s 5(3)(b); United Kingdom, s 1(2)(d). There is one respect in which the definitions appear to vary. Unlike the UK, Canadian, and Australian definitions, the New Zealand definition does not expressly include behaviour that endangers life, except insofar as it provides that serious interference with infrastructure constitutes a terrorist act if it is likely to endanger life (Terrorism Suppression Act 2002 (NZ), s 5(3)(c)). An indiscriminate violent attack that endangered life would fall within the "serious risk to the health or safety of a population" category, but it is not clear that a targeted attack would do so.

31. For example, as a result of the combined effect of Criminal Code, RSC 1985, c C-46, ss 83.01 (definition), 7(3) (referring to specified violent offences including those in section 66, where the victim is an internationally protected person) and 266 (making assault an offence), assault, even when triable summarily, can constitute a terrorist activity if committed against an internationally protected person. Similar reasoning would apply in New Zealand.

32. Australia, s 100.1(2)(b), (e); United Kingdom, s 1(2)(b), (e).

33. Compare, however, the very broad definition of situations capable of constituting an international terrorist emergency, in International Terrorism (Emergency Powers) Act 1987 (NZ), s 2. For the purpose of the Immigration Act 1987 (NZ), the category "act of terrorism" included acts involving the use of explosives or incendiary devices that cause or are likely to cause damage to buildings, installations, or vehicles (s 2(1), definition of "act of terrorism," par (b)).

34. Canada, par (b)(ii)(D); NZ s 5(2)(c).

35. Canada, par (b)(ii)(E); NZ ss 5(2)(d), 5(2)(e).

36. Article 3 of the Terrorist Bombing Convention provides that the convention shall not apply to the commission of one or more offences as set forth in the convention where the offender and the victims are nationals of the state in which the offence takes place and the alleged offender is present in that state and where the state was the political target of the attack. Under section 4(1) of the Terrorism Suppression Act, the category "act against a specified convention" extends to an offence against a convention only if the convention "applies" in relation to it.

37. United Kingdom, s 1(1); Australia, s 100.1.

38. Canada, s 83.01, definition of "terrorist activity," par (b).

39. 50 USCS § 1801(c).

40. See, e.g., Douglas 2010, 299–301.
41. 18 USCS § 2332b(5)(A).
42. Terrorism Act 2006 (UK), c 11, s 34.
43. Australia, s 100.1(1), definition of "terrorist act," par (c).
44. Canada, par (b)(i)(B).
45. Canada, s 83.01(1)(b)(i)(B).
46. New Zealand, s 5(2)(b).
47. Terrorism Act 2000 (UK), c 11, s 1(c), amended by Counter-terrorism Act 2008 (UK), s 75(1).
48. Criminal Code, s 83.01(1), definition of "terrorist activity," par (b)(i)(A); Terrorism Suppression Act 2002 (NZ), s 5(2); Criminal Code Act 1995 (Cth), s 100.1, definition of "terrorism," par (b). Unlike the other three definitions, the Australian definition requires that the act be done with the intention of advancing a cause. Little turns on this: under the Code's definition of intention, people have the requisite intention if they act, believing that their conduct will have a particular effect in the ordinary course of events, notwithstanding that they who would also prefer that it didn't: s 5.2(c).
49. Canada, par (b)(ii)(E).
50. Australia, s 100.1(2A).
51. New Zealand, ss 5(3)(d), 5(5).
52. As to whether and when terrorism might constitute "armed conflict" and as to what activities international law might permit, see, e.g., Watkin 2004.
53. This is the result of the combined effects of Criminal Code sections 83.01(1) para (a) (definition of "terrorist activity") and 7(3.72) (which refers to ss 431.2 and 431.2(3), exempting such acts in the same manner as the proviso to the general definition).
54. Terrorism Suppression Act 2002 (NZ), ss 4(1), 5(1)(c), 5(4).
55. Lord Bach, in United Kingdom, *House of Lords Hansard*, 16 May 2000, col 241.
56. Ibid., col 244.
57. Ibid., col 244.
58. Quoted in *R v Gul* [2012] EWCA Crim 280, [11].
59. See ibid., [27]–[60].
60. Australia, Senate, Legal and Constitutional Legislation Committee, 2002, 103.
61. *R v Khawaja* 2006 OJ No 4245; (2006) 214 CCC (3d) 399, [58].
62. [2007] JSCC No 31776, *Bulletin of Proceedings* 502 (5 April 2007).
63. *United States v Nadarajah* [2009] OJ No 946; (2009) OR (3d) 514.
64. *R v Ahmad* 2009 CanLII 84774; 257 CCC (3d) 135, [94]–[136].
65. *R v Khawaja* 2011 ONCA 862; 103 OR (3d) 321, [118]–[135].
66. *United States v Sriskandarajah* 2010 ONCA 857; 109 OR (3d) 680; *United States v Nadarajah* 2010 ONCA 859; 109 OR (3d) 662.
67. *R v Khawaja* [2011] JSCC No 34103 (special leave); 2012 SCC 69; *Sriskandarajah v United States* [2011] JSCC No 34009, 34013 (special leave); 2012 SCC 70.
68. See the speeches of Scott Reid (CA) and Peter MacKay (PC/DR) in Canada, *House of Commons Hansard*, 26 November 2001, 12.25 and 1.30 pm.
69. Michel Bellehumeur, in Canada, *House of Commons Hansard*, 26 November 2001, 12.45 pm ("The numerous witnesses who appeared before the committee, some 60, 70 or 80 of them, and a number of groups, told us that [the definition] was too broad"); Australia, Senate, Legal and Constitutional Legislation Committee, 2002, 32–39; Keith

Locke (Green), in *New Zealand Parliamentary Debates*, 8 October 2002, 1071 ("virtually all of the 150 public submissions oppose the bill").

CHAPTER 4

1. Quoted in Weaver and Pallitto 2005, 86.
2. Herman 2006, 73.
3. Quoted in N. V. Baker 2006, 152.
4. Crimes Act 1914 (Cth) (hereinafter CAA), s 3E(1), (2); 3F(1)(d). As to the difference between these standards, and for examples of New Zealand's use of multiple standards, see New Zealand Law Commission 2007, 56–59.
5. Terrorism Act 2000 (UK), c 11, Sch 5, cl 1(5).
6. Donohue 2008, 187–95, 201–5.
7. 18 USC § 2518(3), (5).
8. 18 USC § 2518(8)(d).
9. 18 USC § 2518(7) (emergencies), (11) (impracticality).
10. 18 USC § 2703(a)–(d).
11. Regulation of Investigatory Powers Act 2000 (UK), c 23 (hereinafter RIPA), s 5.
12. RIPA, s 17.
13. Criminal Code, RSC 1985, c C-46 (hereinafter CCC), ss 186(1)(a), 196; on the legislation's antecedents, see Rahamim 2004.
14. Crimes Act 1961 (NZ), ss 312C(1), 312CB(1), 312CD(1).
15. CCC ss 185(1.1), 186(1.1), 196(5).
16. Search and Surveillance Act 2012 (NZ), ss 51(a), 53, 59, 61(1)(c), (2), (3).
17. CAA, ss 3E(1), (2); 3F(1)(d) (CA); Telecommunications (Interception and Access) Act 1979 (Cth) (hereinafter T(IA)A), ss 46(1)(d) (interception of a service), 46A(1)(d) (named person).
18. T(IA)A, ss 46(2), 46A(2).
19. T(IA)A, s 116.
20. Surveillance Devices Act 2004 (Cth), ss 14(1), 16.
21. RIPA, s 22.
22. CCC, s 487.012.
23. CCC, s 487.013.
24. CAA, ss 3ZQL-3ZQP.
25. New Zealand Law Commission 2007, 291, 294–95.
26. Search and Surveillance Act 2012 (NZ), ss 70, 71, 108.
27. Terrorism Act 2000 (UK), c 11, ss 44–45.
28. May 2011, 15–19.
29. Terrorism Act 2000 (Remedial) Order 2011, SI 201/631. Inelegantly, the order achieved its purposes by providing that the act was to have effect as if sections 44–47(g) had been repealed and as if several new sections had been added. The Protection of Freedoms Act 2012 (c 9, ss 59–63) repealed the order and amended the Terrorism Act 2000 so that the narrower powers are now part of that act. Section 47A of the amended act limits the circumstances in which authorisations may be made.
30. CAA, ss 3UB-3UK.
31. CCC, s 83.28.

32. 50 USC § 436 (authorized investigative agencies may obtain financial information for investigations, inquiries, and security determinations).

33. 12 USC § 3414 (1978) (financial institutions); 18 USC § 2709 (1986) (communications service providers); 50 USC § 436 (1994) (financial, consumer credit, or travel agencies, in relation to government employees with access to classified information); 15 USC § 1681u (1996) (consumer credit agencies); 15 USC § 1681v (1996) (consumer credit agencies).

34. 12 USC § 3414(a)(5)(A); 15 USC §§ 1681u(d)(1); 18 USC § 2709(b)(1) .

35. 12 USC § 3414(a) (financial records); 15 USC § 1681v (consumer reports).

36. Foreign Intelligence Surveillance Act of 1978, PL 95–511, 92 Stat 1783 (FISA).

37. 50 USC §§ 1809(a) (prohibition), 1801(f) (definition). On the significance of the general exclusion of radio communications, see Wittes 2008, 234–35, 241–42.

38. 50 USC § 1801(j).

39. 50 USC § 1801(a).

40. 50 USC § 1801(e).

41. 50 USC §§ 1802(a) (communications interception), 1822(a)(1) (searches), 1842(a)(1) (pen registers etc.)

42. 50 USC § 1803. As to the court, see Wittes 2008, 219–20, 226–27.

43. 50 USC §§ 1804 (interception), 1823(a) (searches), 1842(c) (pen registers), 1861(a) (business records).

44. 50 USC § 1801(h).

45. 50 USC §§ 1805(a) (interception), 1824(a) (searches), 1842(d) (pen registers, trap and trace devices), 1861(c) (business records).

46. The circumstances of the amendments are discussed later in this chapter. See generally Schwartz 2009, 412–17.

47. 50 USC § 1881a.

48. 50 USC §§ 1881b, 1881c.

49. 50 USC § 1881d.

50. Apparent inconsistency in this book in my spelling of *organization* in relation to the name of the ASIO is deliberate. Following an amendment to the early legislation, it is now spelled with an *s* in that name, in line with modern Australian usage.

51. Sections 25(1) and 25A of the Australian Security Intelligence Organisation Act (hereinafter ASIO Act) "will substantially assist the collection of intelligence . . . in respect of a matter that is important in relation to security" (search warrants, computer access warrants). In relation to warrants for named persons, the attorney-general must be satisfied that "the person is engaged in, or reasonably suspected by the Director-General of being engaged in, or of being likely to engage in, activities prejudicial to security" and that interception "will, or is likely to assist the Organisation in carrying out its function of obtaining information relating to security" (T(IA)A, s 9A(1)). See also T(IA)A, ss 9, 10 (telecommunications interception), 11A–11C (interception to gather foreign intelligence), 109 (stored communications), 175–79 (communications records); ASIO Act, ss 26(3) (listening devices), 26B(2), 26C(2) (tracking devices), 27(2), 27A(3) (postal articles), 34A–34ZZ (questioning); Canadian Security Intelligence Service Act, RS 1985, c C-23 (hereinafter CSIS Act), s 21(2) (warrant "required to enable the Service to investigate a threat to the security of Canada or to perform its functions"; also a "last resort" requirement and details of previous applications to be given and taken into account); New Zealand Security Intelligence Service Act 1969 (NZ) (hereinafter NZSIS Act), s 4A(3) (warrant necessary "for the detection of activi-

ties prejudicial to security" or for "gathering foreign intelligence material essential to security"; "last resort," proportionality, and minimisation requirements exist (ss 4F, 4G); Government Communications Security Bureau Act 2003 (NZ), s 7(2) (use of interception device to intercept foreign communications); Security Service Act 1989 (UK), c 5, s 3 (warrants for entry and interference with property needed and may be issued if the secretary thinks they are "necessary to obtain information which . . . is likely to be of substantial value in assisting the Service to discharge any of its functions"). Surveillance is governed by RIPA.

52. NZSIS Act, ss 4A, 5A.

53. CSIS Act, s 21.

54. The inspector-general of security and intelligence (Australia, New Zealand) or intelligence services commissioner (United Kingdom).

55. For more details, see *Kennedy v United Kingdom* [2010] ECHR 682; (2011) 52 EHRR 4, [21]–[98].

56. ASIO Act, s 18(3)(a) ("information relates or appears to relate to the commission . . . of an indictable offence"); CSIS Act, s 19 ("may be used in the investigation or prosecution of an alleged contravention").

57. NZSIS Act, ss 12A(1), 4(1)(a).

58. *Parkin v O'Sullivan* [2006] FCA 1413; (2006) 162 FCR 444; *Charkaoui v Canada (Citizenship and Immigration)* 2008 SCC 38; [2008] 2 SCR 326 (a charter-based decision).

59. See Laberge 2009, 111–12; Intelligence Services Act 2001 (Cth), ss 6–10A (minister may authorise Australian foreign intelligence agencies); National Defence Act, RSC 1985, c N-5, s 273.65 (minister may authorise the Communications Security Establishment to intercept "private communications" in the course of targeting foreign entities located outside Canada); Government Communications Security Bureau Act 2003 (NZ), ss 14–24 (minister may authorise); Intelligence Services Act 1994 (UK), c 13, ss 5–7 (secretary may authorise).

60. 26 October 2001, PL 107–56, 115 Stat 272 (hereinafter USAPA). The original short title of the act—"Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001"—was later amended to permit the act to be cited as the USA Patriot Act (PL 109–177, Title 1, § 101, 120 Stat 194).

61. USAPA § 215.

62. Donohue 2006, 1090–91.

63. USAPA § 218.

64. McCarthy 2002, 443–45.

65. USAPA § 206.

66. USAPA § 207.

67. USAPA § 505.

68. USAPA § 212, further amended by the Homeland Security Act of 2002, PL 107–296, § 225(d)(1), 116 Stat 2157.

69. USAPA § 209.

70. USAPA § 210.

71. USAPA § 216. As to its implications, see Ashdown 2006, 795–97.

72. USAPA § 219. As to the implications of this, see Ashdown 2006, 790.

73. USAPA § 220.

74. USAPA § 203(b).

75. USAPA § 203(d).

76. USAPA § 202(a)(1).
77. Donohue 2006, 1107.
78. Howell 2004, 1170–71.
79. N. V. Baker 2006, 150–51.
80. Kerr 2003, 672.
81. Howell 2004, 1152, 1159–66.
82. Contrast sections 103, 352, 156, and 155 of the administration's draft bill "to combat terrorism and defend the Nation against terrorist acts, and for other purposes," the Anti-Terrorism Act of 2001, with sections 203, 213, 215, and 216 of the Patriot Act. Section 105 of the Anti-Terrorism Act did not appear in the Patriot Act, even in an amended form. For more details, see Howell 2004, 1179–99.
83. Howell 2004, 1179–1200.
84. USAPA § 224.
85. Herman 2006, 82–85.
86. USA Patriot Improvement and Reauthorization Act of 2005, 9 March 2005, PL 109–177 (hereinafter PIRA), Title I, § 102(a), 120 Stat 194.
87. PIRA, Title I, § 114, 120 Stat 210.
88. PIRA, Title I, §§ 102(b), 106(f)(2), 106(g), 120 Stat 194, 195, 198.
89. 19 December 2009, PL 111–118, Div B, § 1004(a), 123 Stat 3470.
90. Henning and Liu 2009, 6–7, 14–15.
91. 27 February 2010, PL 111–141, § 1(a), 124 Stat 37.
92. PATRIOT Sunsets Extension Act of 2011.
93. Donohue 2008, 201–2.
94. Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003 (Cth).
95. See Australia, Senate, Legal and Constitutional Legislation Committee, 2005, 3–6 (citing rationales given for the bill).
96. CAA, s 3ZQN, added by Anti-Terrorism Act (No 2) 2005 (Cth), Sch 6, item 1.
97. CAA, ss 3UA–3UK, added by Anti-Terrorism Act (No 2) 2005 (Cth), Sch 5, item 10.
98. Anti-terrorism Act, SC 2001, c 41, ss 5–8.
99. Crimes Amendment Act (No 2) 2003 (NZ), s 8.
100. *Hamed v R* [2011] NZSC 27.
101. Video Camera Surveillance (Temporary Measures) Act (NZ) 2011; Cumming and Masters 2012.
102. See, e.g., New Zealand, House of Representatives Justice and Electoral Committee, 2010, which makes no references to the possible relevance of terrorism to the bill or vice versa.
103. Donohue 2006, 1075–77, 1080–88.
104. Grabosky 1989, 47–65.
105. Canada, Commission of Inquiry, 1981, 1:363–95.
106. Assistant Attorney General to Majority Leader, US Senate, 14 May 2009, 30 April 2010, 29 April 2011.
107. Difo 2010, 3.
108. United States, Department of Justice, Office of the Inspector General, 2010, 12–16, 26.
109. Ibid.
110. Ibid., 81–89.

111. Ibid., 33.
112. Ibid., 89–104.
113. Ibid., 45–50.
114. Ibid., 122–29.
115. Ibid., 34–43.
116. Ibid., 137–55.
117. Ibid., 156.
118. Ibid., 166.
119. Ibid., 165–85.
120. United States, Offices of Inspector General, 2009.
121. Ibid., 7, 16, 23.
122. Ibid., 17.
123. Seifert 2007, 18–21; Michaels 2008, 910.
124. Michaels 2008, 911–17.
125. United States, Offices of Inspector General, 2009, 6; see Aid 2009, 287–88, 290, 292–95, for details.
126. United States, Offices of Inspector General, 2009, 6–7.
127. Ibid., 10–14.
128. Ibid., 19–23.
129. Ibid., 27–30.
130. Ibid., 30–31.
131. 5 August 2007, PL 110–55, 121 Stat 552.
132. PL 110–55, § 2, 121 Stat 552, adding § 105A (50 USC § 1805a).
133. PL 110–55, § 2, 121 Stat 552, adding § 105B (50 USC § 1805b).
134. 10 July 2008, PL 110–261, 122 Stat 2436.
135. In the final Senate vote, there were 60 yeas (43 Republicans, 16 Democrats, 1 independent) and 28 nays (all Democrats); see also Aid 2009, 292–95.
136. FISA Amendments Act of 2008, PL 110–261, § 112, 122 Stat 2459, coded as 50 USC § 1812.
137. FISA Amendments Act of 2008, PL 110–261, § 202, 122 Stat 2467, coded as 50 USC § 1885–1885a.
138. Lord Carlile of Berriew 2009, 28–31; United Kingdom, Home Office, 2010, 41–42.
139. Donohue 2008, 197–198.
140. Gibson 2010, 9, 11.
141. Australia, Inspector-General of Intelligence and Security, *Annual Reports 2001–2002—2008–2009*.
142. Ibid., *2001–2002*, 35; *2004–5*, 19 (no interception had actually taken place).
143. Goldsmith 2007, 181.
144. Electronic Privacy Information Center 2007; Assistant Attorney General to Majority Leader, US Senate, 14 May 2009, 30 April 2010, 29 April 2011. In 2008, substantial modifications were required in only two cases.
145. Ashdown 2006.
146. See, e.g., the authorities cited in *In the matter of Kevork* 634 F Supp 1002, 1012 (CD Cal 1985).
147. *United States v United States District Court (Keith)* 407 US 297, 322 (1972).
148. *In re Sealed Case No 02–001* 310 F 3d 717, 722–28 (FISCR 2002); for a critical review of the case, see Hoffman 2003.

149. *In re Sealed Case No 02–001*, 728–34.
150. Ibid., 735.
151. *United States v Truong Dinh Hung* 629 F 2d 908 (4th Cir 1980).
152. *In re Sealed Case No 02–001*, 743.
153. Ibid., 743.
154. Ibid., 745 (citing *Vernonia School District 47J v Acton* 515 US 636, 653 (1995)).
155. Ibid., 746.
156. *United States v Hammoud* 381 F 3d 316, 334 (4th Cir 2004); *United States v Warsame* 547 F Supp 2d 982 (D Minn 2008).
157. *United States v Holy Land Foundation* 2007 US Dist LEXIS 50239, 21 (ND Tex 2007); *United States of America v Mubayyid* 521 F Supp 2d 125 (D Mass 2007); *United States v Islamic American Relief Agency* 2009 US Dist LEXIS 118505 (WD Mo 2009).
158. *United States of America v Abu-Jihaad* 531 F Supp 2d 299 (D Conn 2008), aff'd *United States v Abu-Jihaad* 630 F 3d 102 (2d Cir 2011) (a material assistance case); *In re Directives Pursuant to Section 105B of the Foreign Intelligence Surveillance Act* 551 F 3d 1004 (FISCR 2008); *United States v Schnewer* 2008 US Dist LEXIS 112001 (D NJ 2008); *United States v Ahmed* 2009 US Dist LEXIS 12007, 30 (ND Ga 2009); *United States v Kashmiri* 2010 US Dist LEXIS 119470 (ND Ill 2010).
159. 504 F Supp 2d 1023 (D Ore 2007).
160. The court had, however, received briefs filed by the ACLU and the National Association of Defense Lawyers, as amici curiae: see *In re Sealed Case No 02–001* 310 F 3d 717, 719 (FISCR 2002).
161. *Mayfield v United States* 599 F 3d 964 (9th Cir 2010).
162. See *United States v Abu-Jihaad* 630 F 3d 102 (2d Cir 2011) and the cases cited therein.
163. *Doe v Ashcroft* 334 F Supp 2d 471 (SD NY 2004).
164. *Doe v Gonzales* 386 F Supp 2d 66 (D Conn 2005).
165. *Doe I v Gonzales* 449 F 3d 415 (2d Cir 2006).
166. *Doe v Gonzales* 500 F Supp 2d 379 (SD NY 2007).
167. *John Doe Inc v Mukasey* 549 F 3d 861 (2d Cir 2008).
168. *John Doe v Holder* 665 F Supp 2d 517 (SD NY 2009).
169. *American Civil Liberties Union v National Security Agency* 438 F Supp 2d 754 (ED Mich 2006).
170. *American Civil Liberties Union v National Security Agency* 493 F 3d 644 (6th Cir 2007).
171. *American Civil Liberties Union v National Security Agency* 128 S Ct 1334 (2008).
172. *Al-Haramain Islamic Foundation v Bush* 507 F 3d 1190 (9th Cir 2007).
173. *In re National Security Agency Telecommunications Records Litigation* 564 F Supp 2d 1109, 1121 (ND Cal 2008); *In re National Security Agency Telecommunications Records Litigation* 595 F Supp 2d 1077 (ND Cal 2009); *In re National Security Agency Telecommunications Records Litigation* 700 F Supp 2d 1182 (ND Cal 2010), rev'd, 2012 US App LEXIS 16379 (9th Cir 2012).
174. There were dozens of such cases, including *Jewel v National Security Agency* 2010 US Dist LEXIS 5110, 4 (ND Cal).
175. 439 F Supp 2d 974 (ND Cal 2006).
176. *In re National Security Agency Telecommunications Records Litigation* 630 F Supp 2d 1092, 1094 (ND Cal 2009).
177. Ibid., 1102 (ND Cal 2009), motion for leave to file motion to dismiss denied; *In*

re National Security Agency Telecommunications Records Litigation 2009 US Dist LEXIS 62640 (ND Cal 2009).

178. 2009 US Dist LEXIS 64621 (ND Cal, 2009).

179. Ibid., 10–13, aff'd, 669 F 3d 928 (9th Cir 2011).

180. Ibid., 25.

181. *Amnesty International v McConnell* 646 F Supp 2d 633 (SD NY 2009).

182. *Amnesty International v Clapper* 638 F 3d 118 (2d Cir 2011), reh'g, en banc, denied, 667 F 3d 163, 172 (2d Cir 2011).

183. *Clapper v Director of National Intelligence* 133 S Ct 1138 (2013).

184. *Amnesty International v Clapper* 667 F 3d 163, 172 (2d Cir 2011).

185. See *MacWade v Kelly* 460 F 3d 260 (2d Cir 2006) (subways); *Cassidy v Chertoff* 471 F 3d 67 (2d Cir 2006) (ferries).

186. *MacWade v Kelly*, 273–75 (2d Cir 2006); *Cassidy v Chertoff*, 84–87.

187. In a nonterrorism case, *Kennedy v United Kingdom*, the ECtHR found that RIPA was consistent with the ECHR, given its provisions for independent adjudication and supervision.

188. *R (Gillan) v Metropolitan Police Commissioner* [2003] EWHC 2545 (Admin).

189. *R (Gillan) v Metropolitan Police Commissioner* [2004] EWCA (Civ) 1067; [2005] QB 388.

190. *R (Gillan) v Commissioner of Police of the Metropolis* [2006] UKHL 12; [2006] 2 AC 307.

191. *Gillan v the United Kingdom* [2010] ECHR 28; (2010) 50 EHRR 45.

192. Ibid., [35], Lord Bingham, with whom Lords Hope, Scott, Walker, and Brown agreed.

193. Ibid., [63].

194. See, e.g., ibid., [67] (Lord Scott), [78]–[81] (Lord Brown).

195. See United Kingdom, Home Office, 2010, 37; *Gillan v the United Kingdom*, Application 4158/05, unreported 12 January 2010, [45]: there were 46 arrests for terrorism offences of people in vehicles in 2005–6, 14 in 2006–7, and 34 in 2007–8, compared with about 250, 246, and 665 arrests for other offences.

196. *Kennedy v United Kingdom* [2010] ECHR 682; (2011) EHRR 4

197. *Hunt v R* [2010] NZCA 528.

198. *Hamed v R* [2011] NZSC 101, [196].

199. Haggerty and Grazso 2005.

200. Fletcher 1989.

201. Huddy et al. 2002, 419, 428–29.

202. *Los Angeles Times* poll, 13–14 September 2001, terror11; *Newsweek* poll, September 2001; Harris poll, September 2001, terror10.

203. Harris poll, February 2006 (reporting earlier polls), terror5.

204. Center for Survey Research poll, August 2005, terror5; CNN/*USA Today*/Gallup poll, January 2006; *Fox News*/Opinion Dynamics poll, January 2006, terror4.

205. *Fox News*/Opinion Dynamics poll, May 2006; *USA Today* poll, May 2006; *ABC News*/*Washington Post* poll, March 2006; *CBS News* poll, February 2006; Harris poll, February 2006; CNN/*USA Today*/Gallup poll, February 2006; *CBS News*/*New York Times* poll, January 2006—all at terror4.

206. Harris poll, February 2006, terror4.

207. *CBS News* poll, May 2006, terror4.

208. ICM/BBC poll, 26 May 2004, http://www.angus-reid.com/polls/24381.

209. YouGov/*Sun* poll, October 2010.

210. Fletcher 1989.

211. Strategic Counsel poll/CTV/*Globe and Mail* 14 August 2005, http://www.angus-reid.com/polls/16395.

212. ASSDA, Australian Survey of Social Attitudes (2007), v123, v124, weighted by v656.

213. *CBS News* poll, February 2006; *Fox News*/Opinion Dynamics poll, February 2006, terror4.

214. *Newsweek* poll, May 2006, terror4.

215. Hetherington and Suhay 2012.

216. ASSDA, Australian Survey of Social Attitudes (2007), cross-tabulation of v123 and v124 with v539, weighted by v656.

CHAPTER 5

1. Posner 2008, 246.

2. Poole 2010, 92.

3. *Reynolds v United States* 345 US 1 (1953). See generally Chesney 2007b, 1270–97.

4. But the state secrets doctrine applies much more broadly in relation to civil than criminal cases: see *Mohamed v Jeppesen Dataplan* 614 F 3d 1070, 1077 (n 3) (9th Cir, en banc, 2010), cert denied, 131 S Ct 2442 (2011).

5. Weaver and Pallitto 2005, 87.

6. *United States v Nixon* 418 US 683 (1974).

7. *Conway v Rimmer* [1968] UKHL 2; [1968] AC 910; *Sankey v Whitlam* [1978] HCA 43; (1978) 142 CLR 1. See also *Canada (Attorney-General) v Ribic* 2003 FCA 246; [2005] 1 FCR 33.

8. Canada Evidence Act, RSC 1985, c-5 (hereinafter CAE), s 37 (after objection on public interest grounds, the court shall prohibit disclosure unless (1) disclosure would not encroach on the specified public interest (s 37(4.1)) or (2) disclosure would encroach but "the public interest in disclosure outweighs in importance the specified public interest," in which case, "after considering both the public interest in disclosure and the form of and conditions to disclosure that are most likely to limit any encroachment upon the specified public interest resulting from disclosure," the court may order disclosure of all or some of the information, in various forms and subject to conditions (s 37(5)). See also Evidence Act 2006 (NZ), s 70 ("information that relates to matters of State must not be disclosed in a proceeding if the Judge considers that the public interest in the communication or information being disclosed in the proceeding is outweighed by the public interest in withholding the communication or information").

9. CAE, s 38.13. The validity of this section insofar as it applies to nonfederal courts is unclear: see *Canada (Attorney General) v Almalki* 2010 FC 1106, [23], [46]–[51] (summarising the state of the relevant constitutional litigation, but proceeding on the basis that the legislation was constitutional).

10. CAE, s 38.14.

11. Canada, House of Commons, Standing Committee on Public Safety and National Security and Subcommittee on the Review of the Anti-terrorism Act , 2007.

12. National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth) (hereinafter NSIA), ss 31(8), 38L(8). Disclosure is likely to prejudice national security

only if "there is a real, and not merely a remote, remote possibility" that disclosure will have this effect (s 17).

13. *R v Lodhi* [2006] NSWSC 571, [109]; (2006) 163 A Crim R 448; *Watson v AWB* [2009] FCA 1047, [51]; (2009) 259 ALR 524; *Canada (Attorney General) v Almalki*, [70].

14. Weaver and Pallitto 2005, 101.

15. See Rosenthal 2003, 189, 198; Zuckerman 1994, 705, 718–19 (but cf. criminal cases, discussed at 720–22); *Sankey v Whitlam* (1978) 142 CLR 1, 46 (Gibbs CJ, generally limiting inspection to cases where there has been a provisional decision that the document should be disclosed), 96 (Mason J, inspection when "appropriate"), 110 (Aickin J, concluding that courts should inspect), 110 (order, declaring court had read documents); *Burmah Oil v Bank of England* [1979] UKHL 4; [1980] AC 1090; *Air Canada v Secretary of State for Trade* [1983] 2 AC 394; *Goguen v Gibson* [1983] 2 FC 463; 7 DLR (4th) 144 (FCA: inspection will depend on the likelihood that it would alter the court's view of where the public interest immunity balance lies). In *Canada (Attorney General) v Khawaja* 2007 FC 490; [2008] 1 FCR 547, Justice Mosely read the redacted sections in the 1,700 pages of contested documents, at [29]; see also *Parkin v O'Sullivan* (2009) 260 ALR 503, where Justice Sundberg read the documents at issue).

16. Classified Information Procedures Act of 1980, PL 96–456 (hereinafter CIPA), § 3, 94 Stat 2025, codified in 18 USC App, as amended by PL 100–690, Title VII, § 7020(G), 102 Stat 4396.

17. CAE, s 38.01 ("sensitive" or "potentially injurious" information); NSIA, ss 24, 25, 38D, 38E (national security information defined at ss 8–11; see also s 17).

18. NSIA, ss 39, 39A. As to the US, see CIPA, § 5 (the act applies only to material that has been classified, according to § 1(a)). The procedures established under the act provide that "the government may obtain information by any lawful means concerning the trustworthiness of persons associated with the defense and may bring such information to the attention of the court for the court's consideration in framing an appropriate protective order pursuant to Section 3 of the Act" (Security Procedures Established Pursuant to PL 96–456, 94 Stat 2025, by the Chief Justice of the United States for the Protection of Classified Information (2012), par 5). In noncriminal cases, protective orders may require that counsel for nongovernment parties be security-cleared: see, e.g., the protective order issued in *Bismullah v Gates* 2007 US App LEXIS (DC Cir 2007). See generally Turner and Schulhofer 2005, 25–28.

19. It was used by the Security Intelligence Review Committee in its review of security decisions: see Forcese and Waldman 2007, 7–10 (for its operation).

20. Special Immigration Appeals Commission Act 1997 (UK), c 68 (hereinafter SIAC), s 6; Terrorism Act 2000 (UK), c 11, Sch 3, cl 7 (hereinafter TA); Proscribed Organisations Appeals Commission (Procedure) Rules SI 2001/1286 (hereinafter POAC), rr 9–10; Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 2004/1861 (hereinafter ETR), Sch 2, r 8; Civil Procedure Rules SI 1998/3132 (hereinafter CPR), rr 76.23–76.25 (control orders), rr 80.19–80.21 (notices according to the Terrorism Prevention and Investigation Measures Act 2011).

21. Immigration and Refugee Protection Act, SC 2001, c 27 (hereinafter IRPA), ss 85–85.6 (as amended by An Act to Amend the Immigration and Refugee Protection Act (Certificate and Special Advocate) and to Make a Consequential Amendment to Another Act, SC 2008, c 3, s 4).

22. Forcese and Waldman 2007, 49–50; Immigration Act 2009 (NZ), ss 263–70.

23. *R v H; R v C* [2004] UKHL 3; [2004] 2 AC 134. See also *Secretary of State for the*

Home Department v AHK [2009] EWCA Civ 287, [97]–[99] (providing examples, but emphasising that the procedure is adopted as a last resort); *Al Rawi v Security Service* [2010] EWHC 1496 (QB) (for purpose of a public interest immunity inquiry in civil claim arising out of alleged torture); *R v Lodhi* [2006] NSWSC 586 (where the court nonetheless considered that such an order was not required in the circumstances of the case).

24. *Canada (Attorney General) v Khawaja* 2007 FC 463; [2008] 1 FCR 621, [47]–[57]; *Canadian Security Intelligence Service Act (Re)* 2008 FC 300; [2010] 1 SCR 44, [3]; *Canada (Attorney General) v Almalki* 2010 FC 1106, [29]. But in *Harkat (Re)* 2010 FC 1242, Justice Noël considered that special advocates provided better protection (at [155]).

25. *Hepting v AT&T* 439 F Supp 2d 974 (ND Cal 2006); *Leghaei v Director-General of Security* [2005] FCA 1576, [84] (in the absence of an application from counsel, no appointment was made).

26. The court may permit such communications, but this power is rarely used, partly because of doubts that permission would be forthcoming and partly lest such an application "give away to the opposing party the parts of the closed evidence in relation to which the controlled person does not have an explanation" (United Kingdom, Parliament, Joint Committee on Human Rights, 2007, 53). Most communications seem to have been one-way communications from the advocate (Forcese and Waldman 2007, 35).

27. *Almrei (Re)* 2009 FC 1263; [2009] FCJ No 1579, [487]; *Harkat (Re)* 2010 FC 1242, [67], and see [79] and [139] for other respects in which the Canadian system allows greater powers to special advocates and therefore greater disclosure. See generally Forcese (n.d., chap. 10).

28. See, e.g., *United States v Sattar* 395 F Supp 2d 79 (SD NY 2005) (a case where a radical lawyer was found to have communicated confidential information to her client).

29. See, e.g., *R v Khazaal* [2006] NSWSC 1061, [34]. See also *R v Khazaal* [2006] NSWSC 1335, for an example of how even honest lawyers can make mistakes that lead to their not recognising that information is confidential.

30. They have normally been used in Australian terrorism prosecutions: *R v Khazaal* [2006] NSWSC 1061, [34]; *R v Thomas* [2006] VSC 18, [7]; *R v Benbrika (Ruling 1)* [2007] VSC 141, Order 5. As to their use in Canada, see *Harkat (Re)* 2010 FC 1242, [77].

31. CIPA, §§ 4 (pretrial discovery; also redacted document), 6(c)(1) (evidence); CAE, s 38.06(2); NSIA, ss 26(2), 31(2), 38F(2), 38L(2). As to applications of the CIPA procedure, see Turner and Schulhofer 2005, 20, 23, 24–25.

32. Townley 2007, 223–27; *R v Lodhi* [2006] NSWSC 571; (2006) 163 A Crim R 448.

33. Turner and Schulhofer 2005, 41–45.

34. *United States v Reynolds* 345 US 1, 11 (1953); *General Dynamics v United States* 131 S Ct 1900 (2011).

35. *Carnduff v Rock* [2001] 1 WLR 1786 (CA); but cf. *Secretary of State for the Home Department v A* [2010] EWHC 42 (Admin), an administrative law case, where Justice Silber observed that his decision would mean that the government would be exposed to a damages claim. In defending the claim, it would not be permitted to rely on the closed evidence, since this would interfere with the claimants' right to a fair trial and would be inconsistent with the decision in *Secretary of State for the Home Department v AF* [2009] UKHL 28; [2010] AC 269. He took comfort from the fact that the damages that would be awarded would be small, since the government had acted in good faith. He did not advert to the possibility that the claim might be dismissed as an abuse of process, on

the grounds that its commitment to protecting national security would mean that the government would be unable to present its defence.

36. *Al Rawi v Security Service* [2011] UKSC 34, [50] (Lord Dyson).

37. *Al Rawi v Security Service* [2009] EWHC 2959.

38. *Al Rawi v Security Service* [2010] EWCA (Civ) 482; [2011] UKSC 34.

39. *Al Rawi v Security Service* [2011] UKSC 34, [44] (Lord Dyson), [74] (Lord Hope), [78] (Lord Brown).

40. Ibid. [75] (Lord Hope, doubtful), [84] (Lord Brown, disagreeing), [98] (Lord Kerr, doubtful), [112]–[113] (Lord Mance (with whom Lady Hale agreed, concluding that it should be possible).

41. Ibid. [86]–[87].

42. *Canada (Attorney General) v Almalki* 2010 FC 1106, [64].

43. "Protective Order and Procedures for Counsel Access to Detainees at the United States Naval Base in Guantanamo Bay, Cuba," *In re Guantanamo Bay Detainee Litigation* Case 1:08-mc-00442-TFH, document 409, filed 09.11.08 (Protective Order 08).

44. *Al Rawi v Security Service* [2010] EWCA Civ 482; [2010] 3 WLR 1069, [33] (cases "where a wider public interest is engaged"); see also, to similar effect, [59], [61], [64], [65]. Cf. *Al Rawi v Security Service* [2011] UKSC 34; [2012] 1 AC 531, Lord Dyson at [62] (but recognising, at [63]–[64], that there might be cases where departure from the general rules would be justified as being in the interests of justice, e.g., wardship, commercial secrets cases); Lords Hope [76] and Kerr [88] (agreeing with Lord Dyson); Lord Clarke [169]–[171] (rejecting the distinction).

45. *Al Rawi v Security Service* [2011] UKSC 34; [2012] 1 AC 531, Lord Dyson [68], Lord Hope [74], Lord Brown [85], Lord Clarke [138], [152], Lord Bingham [192].

46. Migration Act 1958 (Cth), s 503(1)(d).

47. *Leghaei v Director-General of Security* [2005] FCA 1576, appeal dismissed, *Leghaei v Director-General of Security* [2007] FCAFC 56, special leave refused, *Leghaei v Director-General of Security* [2007] HCATrans 655.

48. See, e.g., *Home Office v Tariq* [2011] UKSC 35, [40] (Lord Mance, with whom Lords Hope, Dyson, Phillips, and Clarke and Lady Hale agreed), but cf. [110] (Lord Kerr, who considered that where a fair trial was not be possible, it was better that none be held).

49. 50 USC § 1806(f). "'Aggrieved person' means a person who is the target of an electronic surveillance or any other person whose communications or activities were subject to electronic surveillance" (50 USC § 1801(k)).

50. *In re Grand Jury Proceedings in the Special April 2002 Grand Jury* 347 F 3d 197, 203 (7th Cir 2003); *United States v Abu-Jihaad* 531 F Supp 2d 299, 310–11 (D Conn 2008) (the court followed the line of authority).

51. 50 USC § 1702(c); 8 USC § 1189(c)(2).

52. See generally Turner and Schulhofer 2005, 55–58.

53. United States, Deputy Secretary of Defense, 2004, par (g).

54. Ibid., par (c).

55. United States, Department of Defense, *Military Commission Order No 1*, 21 March 2002, par 6(B)(3).

56. 548 US 557 (2006).

57. 17 October 2006, Pub L 109–336, 120 Stat 2600.

58. 10 USC § 949d(f)(1)(A); see also § 949d(f)(2)(B) (evidence that might disclose classified intelligence-gathering methods).

59. 10 USC § 949d(f)(2).

60. Military Commissions Act of 2009, 28 October 2009, Pub L 111–84, Title XVIII, 123 Stat 2574.

61. 10 USC §§ 949p-4(a)(2), 949p-1(b).

62. 10 USC § 949p-6(d)(1).

63. SIAC, s 1; TA, s 5; ETR, Sch 1, r 54, and Sch 2, rr 8, 10; Regulation of Investigatory Powers Act 2000 (UK) c 23 (hereinafter RIPA), s 65 (as to the "intelligence services" jurisdiction, see *R (A) v B* [2009] UKSC 110); Prevention of Terrorism Act 2005 (UK), c 2, Sch 7; CPR, Pt 76; Terrorism Prevention and Investigative Measures Act 2011 (UK), c 23, Sch 4; CPR Pt 80.

64. POAC, r 35(4) (evidence disclosable if would be admissible in civil proceedings).

65. Special Immigration Appeals Commission (Procedure) Rules (UK), SI 2003/1034, r 4(1).

66. RIPA, s 69(6) (which also includes "the economic well-being of the United Kingdom" but does not include a reference to international relations); ETR, Sch 1, r 54; Investigatory Powers Tribunal Rules 2000 (UK), SI 2000/2665, r 6; CPR, rr 76.28, 80.18.

67. See note 20.

68. IRPA, s 78(b), (e), (g) (as enacted).

69. Criminal Code, RSC 1985, c C-46, s 83.05; Charities Registration (Security Information) Act, SC 2001, c 41, s 113, ss 4–8.

70. IRPA, s 78(h) (as enacted).

71. Ibid., ss 83(1)(b), 83(1.2), 85–85.2, 85.4.

72. Administrative Appeals Tribunal Act 1975 (Cth), ss 36(1)(a) (documentary evidence, general appeals), 39A, 39B (evidence, security assessment appeals). Other provisions govern oral evidence in nonsecurity cases and qualifications to the right to reasons in security cases.

73. Migration Act 1958 (Cth), ss 357, 375A, 437.

74. Immigration Act 2009 (NZ), ss 241–44, 256, 259 (use in proceedings), 263–70 (special advocates and special counsel).

75. Canada, House of Commons, Standing Committee on Justice and Human Rights, 2001, 21–24.

76. Canada, Senate, Special Committee on the Subject Matter of Bill C-36, 2001, 4.

77. Canada, Senate, Special Committee on the Anti-terrorism Act, 2007, recs 7–9, 13–15.

78. Canada, House of Commons, Subcommittee on the Review of the Anti-terrorism Act, 2007, 44–45, 75–81.

79. Wittes 2008, 140–41.

80. *Johnson v Eisentrager* 339 US 763 (1950); *Korematsu v United States* 323 US 214 (1944); *Liversidge v Anderson* [1942] AC 206; Weaver and Pallitto 2005, 101–2, 109.

81. *American Civil Liberties Union v National Security Agency* 493 F 3d 644 (6th Cir 2007), rev'g *American Civil Liberties Union v National Security Agency* 438 F Supp 2d 754 (ED Mich 2006).

82. *Al-Haramain Islamic Foundation v Bush* 507 F 3d 1190 (9th Cir 2007).

83. *Hepting v AT&T* 439 F Supp 2d 974 (ND Cal 2006).

84. *El-Masri v United States* 479 F 3d 296 (4th Cir, 2007), cert denied, 2007 US LEXIS

11351; *Mohamed v Jeppesen Dataplan* 614 F 3d 1070 (9th Cir, en banc, 2010), cert denied, 131 S Ct 2442 (2011), rev'g 563 F 3d 992, 1007 (9th Cir, 2009).

85. *R (Gillan) v Metropolitan Police Commissioner* [2004] EWCA (Civ) 1067; [2005] QB 88; see also *R (Aamer) v Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 3316 (Admin).

86. *R (Mohamed) v Secretary of Foreign and Commonwealth Affairs* [2010] EWCA Civ 65; [2011] QB 218, [146] (Lord Neuberger MR).

87. Ibid., [144] (Lord Neuberger MR), and see [288] (Sir Anthony May).

88. Ibid., 65, [147] (Lord Neuberger MR, and see further at [173]), [288] (Sir Anthony May).

89. Ibid., [148]–[151] (Lord Neuberger MR), and see [289] (Sir Anthony May).

90. Patrick Wintour, 2010.

91. *Canada (Attorney General) v Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar* 2007 FC 766; [2008] 3 FCR 248. See also Roach 2008, 37, who argues that the decision suggests that the desire for secrecy was prompted more by a desire not to embarrass the government and its allies than by concerns to protect information providers' anonymity or national security.

92. *Charkaoui (Re)* 2009 FC 342; [2010] 3 FCR 67. See also *Charkaoui (Re)* 2009 FC 175; [2010] 4 FCR 448.

93. Ibid.

94. *Canada (Attorney-General) v Khawaja* 2007 FC 533; [2007] FCJ No 724.

95. *Parkin v O'Sullivan* [2006] FCA 1413; (2006) 162 FCR 444; *Parkin v O'Sullivan* [2007] FCA 1647; *O'Sullivan v Parkin* [2007] FCAFC 98.

96. *Parkin v O'Sullivan* [2009] FCA 1096, [32] ("this consequence . . . is not exceptional").

97. *Sagar v O'Sullivan* [2011] FCA 192; (2011) 193 FCR 311.

98. *Attorney-General v Zaoui* [2005] NZSC 38; [2006] 1 NZLR 289.

99. *Jasper v United Kingdom*, Application 295052/95, 16 February 2005; cf. *Edwards v United Kingdom* ([2003] ECHR 381), where the court dismissed, by a 9–8 majority, an appeal made on the grounds that the relevant decision was made by a jury (which had not seen the prejudicial material).

100. The rationale for this messy procedure was that the federal court was a particularly appropriate tribunal for dealing with security issues. It possessed special facilities for keeping information safe. In addition, the federal judiciary included 10 designated judges who dealt with national security issues. They were specially trained, met regularly, and had developed expertise in the area. See *R v Ahmad* [2009] OJ No 6166; (2009) 257 CCC (3d) 135 (citing the crown privilege argument).

101. *R v Ahmad* 2011 SCC 6; [2011] 1 SCR 110, rev'g *R v Ahmad* [2009] OJ No 6166; (2009) 257 CCC (3d) 135.

102. *R v Ahmad* 2011 SCC 6; [2011] 1 SCR 110, [61]–[80].

103. *Abou-Elmaati v Canada (Attorney-General)* 2010 ONSC 2055; (2010) 101 OR (3d) 424, appeal by government allowed, cross-appeal dismissed, *Abou-Elmaati v Canada (Attorney General)* 2011 ONCA 95.

104. *Abou-Elmaati v Canada (Attorney General)* 2011 ONCA 95, [36]–[42].

105. *Charkaoui v Canada (Citizenship and Immigration)* 2007 SCC 9; [2007] 1 SCR 350, [77].

106. *Canada (Attorney-General) v Khawaja* 2007 FC 533; [2007] FCJ No 724.

107. *Canada (Attorney-General) v Khawaja* 2007 FCA 388; (2007) 289 DLR (4th) 260.

108. *R v Ahmad* 2011 SCC 6; [2011] 1 SCR 110, [23]–[24].

109. *R v Lodhi* [2006] NSWSC 571; (2006) 163 A Crim R 448; *R v Lodhi* (2007) 179 A Crim R 470.

110. *Thomas v Mowbray* [2007] HCA 33; (2007) 233 CLR 307, [124]–[126] (Gummow and Crennan JJ).

111. USAPA § 106(c).

112. *Global Relief Foundation v O'Neill* 315 F 3d 748 (7th Cir 2002), reh'g, en banc, denied, 2003 US App LEXIS 6708 (7th Cir 2003), cert denied, 2003 US LEXIS 8207 (2003); *People's Mojahedin Organization of Iran v United States Department of State* 327 F 3d 1238, 1242 (DC Cir 2003); *Holy Land Foundation for Relief and Development v Ashcroft* 333 F 3d 156 (DC Cir 2003), cert denied, 158 L Ed 2d 153 (2004).

113. *Hamdan v Rumsfeld* 548 US 557 (2006).

114. *Boumediene v Bush* 553 US 723, 785 (2008).

115. On which, see Detainees Treatment Act of 2005, PL 109–148, Title X, § 1005(e), 119 Stat 2741, codified as 10 USC § 801 note.

116. "Protective Order and Procedures for Counsel Access to Detainees at the United States Naval Base in Guantanamo Bay, Cuba," *In re Guantanamo Bay Detainee Litigation* Case 1:08-mc-00442-TFH, document 409, filed 09.11.08 (Protective Order 08).

117. *In re Guantanamo Bay Detainee Litigation* Case 1:08-mc-0442-TFH, document 1496, filed 01.09.09, Exhibit 1.

118. *In re Guantanamo Bay Detainee Litigation* 634 F Supp 2d 17, 23–25 (D DC 2009).

119. *Secretary of State for the Home Department v MB and AF* [2007] UKHL 46; [2008] AC 40.

120. *A v United Kingdom*, [2009] ECHR 301; (2009) EHRR 29.

121. *Secretary of State for the Home Department v AF* [2009] UKHL 28; [2010] AC 269.

122. *Home Office v Tariq* [2011] UKSC 35.

123. *Kennedy v United Kingdom* [2010] ECHR 682; (2011) 52 EHRR 4, [171]–[191].

124. *Charkaoui v Canada (Citizenship and Immigration)* 2007 SCC 9; [2007] 1 SCR 350.

125. *Charkaoui v Canada (Citizenship and Immigration)* 2008 SCC 38; [2008] 2 SCR 326.

126. *Harkat (Re)* 2010 FC 1242.

127. See *Leghaei v Director-General of Security* [2005] FCA 1576, appeal dismissed; *Leghaei v Director-General of Security* [2007] FCAFC 56; special leave refused, *Leghaei v Director-General of Security* [2007] HCATrans 655; *Sagar v O'Sullivan* [2011] FCA 192.

128. *Plaintiff M47 v Director General of Security* [2012] HCA 46; (2012) 292 ALR 243.

129. Shapiro and Steinzor 2006, 117.

130. Amnesty International 2002, 7–8, 9 (but its requests yielded some information); Tumlin 2004, 1193–97, 1206–10.

131. United States, Attorney General, 2009; see also the emphasis on openness in Obama 2010, 37.

132. *Al-Aulaqi v Obama* 727 F Supp 2d 1, 53–54 (D DC 2010).

133. See, e.g., *Canada (Attorney-General) v Ribic* 2003 FCA 246; [2005] 1 FCR 33; *Canada (Attorney General) v Khawaja* 2007 FC 490; [2008] 1 FCR 547, [64] (but executive opinions must have a factual basis established by evidence: see [65]); *Canada (Attorney General) v Almalki* 2010 FC 1106, [68]–[78] (national security), [79]–[80] (injury to international relations); *R v Khazaal* [2006] NSWSC 1061, [31]–[37]; *Parkin v O'Sullivan* [2009] FCA 1096, [30].

134. *Canada (Attorney General) v Khawaja* 2007 FC 490; [2008] 1 FCR 547, [138]–[145];

Canada (Attorney General) v Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar 2007 FC 766; [2008] 3 FCR 248.

135. *Canada (Attorney General) v Khawaja* 2007 FC 490; [2008] 1 FCR 547, [146]–[154]; *Canada (Attorney General) v Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar,* [73], and see [80] (importance of consideration depends on the relevant intelligence relationship).

136. *Henrie v Canada Security Intelligence Review Committee* [1989] 2 FC 229; 1988 FC LEXIS 321, [29]–[30]; generally see Weaver and Pallitto 2005, 103–5.

137. *Canada (Attorney General) v Khawaja* 2007 FC 490; [2008] 1 FCR 547, [136]; *Canada (Attorney General) v Almalki,* [115]–[118]; *Canada (Attorney General) v Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar,* [82]–[84]. Cf *Mohamed v Jeppesen Dataplan* 614 F 3d 1070, 1082 (9th Cir, en banc, 2010), cert denied, 131 S Ct 2442 (2011). In *Watson v AWB* (2009) 259 ALR 524; [2009] FCA 1047, at [65], the court rejected a mosaic argument on the grounds that disclosure of the relevant documents to the court would not create a danger that a vital piece of information would fall into wrong hands.

138. *Canada (Attorney General) v Khawaja* 2007 FC 490; [2008] 1 FCR 547, [104]–[111].

139. Ibid., [117]–[134], [137]–[162]; *Canada (Attorney General) v Almalki,* [120]–[170] (but the government must usually have made reasonable attempts to secure the foreign government's consent to disclosure).

140. Turner and Schulhofer 2005, 32–34.

141. The issue arose in *A v Hayden* [1984] HCA 67 (where the court held that the information should be disclosed); (1984) 156 CLR 532. See also *Almrei (Re)* 2009 FC 240 (where the court noted that the designated judge's obligation in a security certificate case was to ensure nondisclosure of information that would injure national security even if the minister was willing to allow disclosure); [2010] 2 FCR 165.

142. *Canada (Attorney General) v Almalki,* [108]–[109] (noting that a CSIS witness had conceded that the CSIS review of documents did not consider their age, whether the operating techniques they disclosed were still employed, whether the information they disclosed was now in the public domain, and whether use of aliases would protect sources).

143. *Harkat (Re)* 2009 FC 1050; [2010] 4 FCR 149 (failure of CSIS to disclose information capable of casting doubt on the credibility of a CSIS source was not the result of an intention to deceive but was attributable to poor training and failure of witnesses to recognise their obligations to the court); *Canada (Attorney General) v Almalki,* [112].

144. United Kingdom 2011; Justice and Security Act 2013 (UK), c 18.

145. Cited in *Benatta v Canada (Attorney General)* [2009] OJ No 5392; 2009 ON C LEXIS 4688, [124].

146. Several involved applications for closed court hearings, for which the legislation provided. These were treated as nonproblematic. In Canada, they have fallen foul of the charter.

147. ABC News.com poll, June 2002, terror7.

148. *USA Today*/Gallup poll, September 2006, terror3.

149. United States, Senate, Committee on the Judiciary, 2008; for analysis of the legislation, see Chesney 2008.

150. Canada, House of Commons, Subcommittee on the Review of the Anti-terrorism Act, 2007, 75–81.

151. Ibid., 123–26, 128–29.

152. Cf. Executive Order 12958 of 17 April 1995 (60 FR 19825), §§ 1.2, 1.3, 1.4, with Executive Order 13292 of 25 March 2003 (68 FR 15315), §§ 1.2, 1.3, 1.4.

153. Executive Order 13526 of 29 December 2009 (75 FR 707), §§ 1.1(b), 1.2(c), 1.4(e), (g).

154. Ibid., §§ 2.1(d), 3.7.

155. United States, Attorney General, 2009.

CHAPTER 6

1. There appears to be little relevant poll data (which itself is suggestive). In a 2002 poll tapping attitudes towards possible counterterror measures and their correlates, respondents were asked whether it should be a crime "to belong to or contribute money to any organization that supports international terrorism" or whether "a person's guilt or innocence should not be determined only by who they associate with or the organizations to which they belong." Seventy-one percent opted for the first alternative and 29 percent for the latter, and this item attracted a higher proportion of "pro-security" responses than items tapping attitudes towards racial profiling, warrantless searches, communications interception, preventive detention, and national ID cards (Davis and Silver 2004). Moreover, respondents were (probably unwittingly) endorsing an expansion of the law into unconstitutional territory.

2. 8 USC §1189(a)(1).

3. For the powers, see Terrorism Act 2000 (UK), c 11, s 3; Criminal Code, RSC 1985, C-46, s 83.05; Criminal Code 1995 (Cth), s 102.1; Terrorism Suppression Act 2002 (NZ) (hereinafter TSA), ss 20, 22.

4. Three years has been the limit since 2010 and it was previously two years.

5. TSA, s 35(1).

6. PL 108–458, Title A, § 7119, 118 Stat 3801 (United States); Department of Public Safety and Emergency Preparedness Act, SC 2005, c 10, s 18(3) (Canada).

7. TSA, s 3 (definition of designated terrorist entity).

8. United Nations Al-Qaida and Taliban Regulations (Can) SOR/99-444, s 1 (definitions).

9. Charter of the United Nations (Terrorism and Dealing with Assets) Regulations 2002 (Cth), reg 6A, made under Charter of the United Nations Act 1945 (Cth), s 18.

10. Al-Qaida and Taliban (Asset-Freezing) Regulations 2010 (UK), SI 2010/1197.

11. Listing is by regulation: Regulations Implementing the United Nations Resolutions on the Suppression of Terrorism (Can) SOR/2001-360, ss 1 (definition of "listed person"), 2(1), Sch. The Australian foreign minister has exercised powers conferred under Charter of the United Nations (Terrorism and Dealing with Assets) Regulations 2002, reg 6, made under Charter of the United Nations Act 1945, s 15: for the list, see http://www.dfat.gov.au/icat/UNSC_financial_sanctions.html.

12. Terrorist Asset-Freezing etc Act 2010 (UK), c 38.

13. On the antecedents of these decisions, see Chesney 2005, 4–12.

14. President Clinton's Executive Order 12497 listed entities and imposed sanctions and was issued under the authority of the International Emergency Economic Powers Act of 1977 (IEEPA) (codified at 50 USC §§1701ff; for an analysis, see *United States v Lindh* 212 F Supp 2d 541, 558–560 (ED Va 2002). President Bush's Executive Order 13224 was made under the IEEPA and the United Nations Participation Act of 1945

(on the basis of Resolutions 1214, 1267, 1333, and 1363). Annexes to the orders listed individuals, groups, and groups associated with those listed. The orders delegated rule-making powers. (The act permits this (50 USC § 1704), and this has been held not to constitute an impermissible delegation of legislative power: see *United States v Dhafir* 461 F 3d 211 (2d Cir 2006).) Regulations made pursuant to the delegated powers have permitted subdelegation. Part 595 of Title 31 of the Code of Federal Regulations supplements, Order 12947; Part 594 of Title 31 supplements, Order 13224.

15. 8 USC § 1182(a)(3)(B)(i).

16. 8 USC § 1182(a)(3)(B)(iv)(IV)(bb), (cc); (V)(bb), (cc); (VI)(cc), (dd).

17. 8 USC § 1182(a)(3)((B)(i)(I), (II).

18. 8 USC § 1182(a)(3)((B)(i)(III). This is not so if the person could demonstrate by clear and convincing evidence that they could not reasonably have known that the group was a terrorist organisation.

19. Martin 2009,15–17; McCarthy 2002, 451–52.

20. Immigration and Refugee Protection Act, SC 2001, c 27, s 34(1)(f).

21. *Motehaver v Canada (Minister of Public Safety and Emergency Preparedness)* 2009 FC 141; [2009] FCJ No 190, [18]. The court judgment suggests that it had been delisted, but it had never been listed, and the court may be confusing UN delisting with the organisation's recent delisting by the Council of the European Community.

22. Immigration Act 2009 (NZ), ss 16(1)(b), 73(1)(c).

23. 31 CFR §§ 594.201, 594.202 (SDGTs), 595.201, 595.204 (SDTs). See also 8 USC § 1189(a)(2)(C) (the secretary of the Treasury may require institutions to block dealings in organisation's assets on notification, on notification to congressional leaders of the intention to designate), and 8 CFR § 597.201 (FTOs); Al-Qaida and Taliban (Anti-Freezing) Regulations 2010 (UK), SI 2010/1197, s 3; Charter of the United Nations Act 1945, s 20; United Nations Al-Qaida and Taliban Regulations, SOR/99-444, ss 4, 4.1; Criminal Code, s 83.08; Regulations Implementing the United Nations Resolutions on the Suppression of Terrorism, SOR/2001-360, s 4; TSA, s 9. Until 2007, the TSA had applied only to organisations designated under the act, while the United Nations Sanctions (Afghanistan) Regulations 2001 (NZ) governed entities designated under the al-Qaeda/Taliban regime.

24. 24 April 1996, PL 104–132, § 302(a), 110 Stat 1248; am by Act, 30 September 1996, PL 104, §§ 356, 671(c)(1), 110 Stat 3644, 3733; 26 October 2001, PL 107–56, § 411(c), 115 Stat 349; 17 December 2004, PL 108–458, § 7119(a)–(c), 118 Stat 3801, codified at 8 USC § 1189(a)(1). While it was passed in the aftermath of the Lockerbie and Oklahoma bombings, it could trace its ancestry to legislation drafted in response to the 1993 bombing of the World Trade Center: see Martin 2006, 211–12.

25. See Donohue 2007, 100–105, 147–51, 218–20, 236, 242, 253, 288–89.

26. Australia, Senate, Legal and Constitutional Legislation Committee, 2002, 45–58.

27. Criminal Code Amendment (Hizballah) Act 2003 (Cth); Criminal Code Amendment (Hamas and Lashkar-e-Tayyiba) Act 2003 (Cth).

28. Criminal Code Amendment (Terrorist Organisations) Act 2004 (Cth); Anti-Terrorism Act (No 2) 2005 (Cth).

29. On the AEDPA, see, e.g., Chesney 2005, 15–18.

30. Omnibus Counterterrorism Act of 1995, HR 896, s 301 (adding proposed 18 USC § 2339B).

31. United States, House of Representatives, Judiciary Committee, 1995, 3.

32. See http://nationalsecurity.gov.au/Listedterroristorganizations/Pages/default.aspx (20 April 2014).

33. See http://www.osfi-bsif.gc.ca/Eng/fi-if/amlc-clrpc/atf-fat/Pages/default.aspx for a complete list of listed organisations and individuals; http://www.publicsafety.gc.ca/cnt/ntnl-scrt/cntr-trrrsm/lstd-ntts/crrnt-lstd-ntts-eng.aspx for criminal law listings (Canada: 50 organisations); https://www.gov.uk/government/publications/proscribed-terror-groups-or-organisations--2 (United Kingdom: 55 international and 14 Northern Irish organisations proscribed under Terrorism Act 2000 (UK), 2 under the Terrorism Act 2006 (UK)); http://www.state.gov/j/ct/rls/other/des/123085.htm (United States: 58 organisations). Prior to 2010, New Zealand had not proscribed any organisations other than those listed by the 1267 Committee. Since then, it has proscribed 19 additional entities, so its list corresponds closely with the criminal sanctions lists of Canada, the United Kingdom, and the United States. See http://www.police.govt.nz/advice/personal-community/counterterrorism/designated-entities#anchor3. Numbers and URLs are as at 20 April 2014.

34. See Lynch et al. 2009, 6–7.

35. On the murky politics surrounding ongoing attempts to secure its delisting, see Bennett-Jones 2012.

36. Ibid., 9.

37. http://www.hm-treasury.gov.uk/d/terrorism.htm.

38. *Yates v United States* 354 US 298 (1957).

39. (1951) 83 CLR 1.

40. E.g., Beall 1998, 699–705; Cole and Dempsey 2006, 198–201, 204–5.

41. See Lynch et al. 2009, 16.

42. 18 USCS § 1189(a)(3), 1189(c).

43. *People's Mojahedin Organization of Iran v United States Department of State* 182 F 3d 17, 22 (DC Cir 1999).

44. 251 F 3d 192 (DC Cir 2001).

45. *National Council of Resistance of Iran v Department of State* 251 F 3d 192, 208 (DC Cir 2001).

46. Ibid., 209.

47. Ibid.

48. *People's Mojahedin Organization of Iran v Department of State* 327 F 3d 1238, 1242 (DC Cir 2003).

49. PL 108–458, § 7019(a)(2), 18 Stat 3801; 8 USC § 1189(a)(4)(B).

50. *People's Mojahedin Organization of Iran v Department of State* 327 F 3d, 1244.

51. *National Council of Resistance of Iran v Department of State* 373 F 3d 152 (DC Cir 2004).

52. *People's Mojahedin Organization of Iran v United States* 613 F 3d 220 (DC Cir 2010).

53. Ibid., 230–31; but cf. Justice Henderson at 231.

54. *In re People's Mojahedin Organization of Iran* 680 F 3d 832 (DC Cir 2012).

55. United States, Department of State, 2012.

56. In the Kahane litigation, the court did advert to this issue, noting that while the 2004 designation had superseded the 2003 designation, the validity of the 2003 designation had not thereby been rendered moot: it would be of continued relevance in relation to anyone prosecuted for giving material support to any of the organizations (*Kahane Chai v Department of State* 466 F 3d 125, 133 (DC Cir 2006)).

57. Nine defendants were charged with a variety of activities related to the activi-

ties of MEK, but only seven were charged under section 2339B and were parties to the litigation surrounding MEK's designation.

58. *United States v Afshari* 426 F 3d 1150 (9th Cir, 2005).

59. *United States v Afshari* 446 F 3d 915 (9th Cir, 2006).

60. *Rahmani v United States* 2007 US LEXIS 43 (2007).

61. *United States v Afshari* 2009 US Dist LEXIS 31585, 8 (CD Cal 2009).

62. 50 USCS §§ 1701ff.

63. *United States v Al Arian* 308 F Supp 2d 1322, 1332 (D Fla 2004).

64. *Global Relief Foundation v O'Neill* 315 F 3d 748, 754 (7th Cir 2002); *Holy Land Foundation for Relief and Development v Ashcroft* 333 F 3d 156 (DC Cir 2003).

65. *Global Relief Foundation v O'Neill* 315 F 3d, 754; *Holy Land Foundation v Ashcroft* 219 F Supp 2d 57 (D DC 2002); Holy Land Foundation for Relief and Development v Ashcroft, 333 F 3d 156; *Islamic American Relief Agency v Gonzales* 477 F 3d 728 (DC Cir 2007) (where the court regarded the classified information as strengthening the government's case).

66. *Holy Land Foundation v Ashcroft* 219 F Supp 2d 57; Holy Land Foundation for Relief and Development v Ashcroft 333 F 3d 156; *Al Haramain Islamic Foundation v Department of the Treasury* 2009 US Dist LEXIS 103373, 15–27 (D Ore 2009).

67. *KindHearts for Charitable Humanitarian Development v Geithner* 710 F Supp. 2d 637 (ND Ohio 2010).

68. *Holy Land Foundation v Ashcroft* 219 F Supp 2d 57; *Holy Land Foundation for Relief and Development v Ashcroft* 333 F 3d 156; *Islamic American Relief Agency v Gonzales*, 734; *Al Haramain Islamic Foundation v United States Department of the Treasury* 585 F Supp 2d 1233 (D Ore 2008).

69. 2009 US Dist LEXIS 103373 (D Ore 2009).

70. *KindHearts for Charitable Humanitarian Development v Geithner* 647 F Supp 2d 857, 881 (ND Ohio 2009).

71. *KindHearts for Charitable Humanitarian Development v Geithner* 710 F Supp 2d 637.

72. American Civil Liberties Union 2012.

73. A history of the litigation is provided in *Holder v Humanitarian Law Project* 130 S Ct 2705, 2713–17 (2010).

74. *Holder v Humanitarian Law Project*, 2724.

75. Ibid., 2726.

76. Ibid., 2727–28.

77. Ibid., 2740–41 (2010).

78. Proscribed Organisations Appeal Commission (Procedure) Rules 2001 (UK), SI 2001/1286.

79. [2002] EWHC 644.

80. *R (Kurdistan Workers' Party and Others) v Secretary of State for the Home Department* [2002] EWHC 644, [76]–[77].

81. Relevant excerpts of the judgment are quoted in *Lord Alton v Secretary of State for the Home Department* (Proscribed Organisations Appeal Commission, unreported, 30 November 2007), [61].

82. The history of this litigation is set out in *Lord Alton v Secretary of State for the Home Department* (Proscribed Organisations Appeal Commission, unreported, 30 November 2007), [1]–[11].

83. Ibid., [62].

84. Ibid., [105]–[109].

85. Ibid., [110].
86. Ibid., [115].
87. Ibid., [355]–[358].
88. *Secretary of State for the Home Department v Lord Alton of Liverpool* [2008] EWCA Civ 443; [2008] 1 WLR 2341, [33]–[43].
89. *A and Others v HM Treasury* [2008] EWHC 869 (Admin); [2008] 3 All ER 361.
90. *A and Others v HM Treasury* [2008] EWCA Civ 1187; [2009] 3 WLR 25.
91. *Her Majesty's Treasury v Ahmed* [2010] UKSC 2; [2010] 2 AC 534, [56]–[61] (Lord Hope, with whom Lord Walker and Lady Hale agreed), [107]–[144] (Lord Phillips), [197]–[201] (Lord Brown), [225]–[231] (Lord Mance).
92. Ibid., [66]–[75] (Lord Hope, with whom Lord Walker and Lady Hale agreed), [89]–[106] (Lord Phillips), [203] (Lord Brown).
93. Ibid., [71] (Lord Hope, with whom Lord Walker and Lady Hale agreed), [203] (Lord Brown).
94. Ibid., [75]–[82] (Lord Hope, with whom Lord Walker and Lady Hale agreed), [184]–[185] (Lord Rodgers, with whom Lord Walker and Lady Hale agreed), [237]–[249] (Lord Mance).
95. Ibid., [183] (Lord Rogers, with whom Lord Walker and Lady Hale agreed).
96. Ibid., [203].
97. Terrorist Asset-Freezing (Temporary Provisions) Act 2010 (UK) c 2.
98. Ibid., ss 26, 28, 29.
99. Ibid., s 2 (1)(a).
100. Al Qaida and Taliban (Asset-Freezing) Regulations 2010, SI 2010/1197, giving effect to Council Regulation (EC) No 881/2002.
101. This was prior to the amendments under which entities are listed on no more than one list.
102. Cf. Dyzenaus 2005 (arguing that the procedure of the 1267 Committee is itself contrary to an overriding rule of international law: the requirement of legality).
103. Dosman 2004, 15–19.
104. *Abdelrazik v Canada (Minister of Foreign Affairs)* 2009 FC 580; [2010] 1 FCR 267, [51], [53].
105. Ibid.
106. British Columbia Civil Liberties Association 2010.
107. United Nations Security Council 2011.
108. Terrorism Suppression Amendment Act 2005 (NZ), s 6; Terrorism Suppression (Amendment) Act 2007 (NZ), s 20.

CHAPTER 7

1. *Rahman v R* [2008] EWCA Crim 1465; [2008] 4 All ER 661, [8] (Lord Phillips of Worth and Matravers CJ).
2. See Zabel and Benjamin 2008, 33–34, for a discussion of the relationship between the elements of material assistance offences and conspiracy and attempt offences.
3. Metcalfe 2007, 32–35; E. Parker 2007, 753 (citing arguments to this effect).
4. Roach 2001, 160.
5. Chesney 2007a, 447–75.
6. *R v Déry* 2006 SCC 53; [2006] 2 SCR 669, [34]–[35].

7. Ibid., [38].
8. Ashdown 2006, 780–81.
9. On the relationship between charitable provision and terrorist organisations, see, e.g., Flanigan 2006.
10. Roach and Trotter 2005, 994–95.
11. 18 USC § 2332b(g)(5). This requirement means that if a person contributes under the intent that the contribution be used for the group's nonterrorist activities, the enhancement is not attracted: see *United States v Chandia* 2010 US App LEXIS 19178 (4th Cir 2010) (citing *United States v Hammoud* 381 F 3d 316, 356 (4th Cir 2004), *United States v Benkhala* 530 F 3d 300, 313 (4th Cir 2008)).
12. Terrorism Act 2000 (UK), c 11, s 41, Sch 8; Crimes Act 1914 (Cth) (hereinafter CAA), ss 23DB-23DF.
13. CAA, ss 23CA, 23CB, 23DA.
14. Turner and Schulhofer 2005, 37–40.
15. 18 USC § 3142(e)(1).
16. 18 USC § 3142(e)(3)(C) (if the offence carries a maximum term of 10 years or more). The relevant amendment was made by PL 108–458, § 6952, 118 Stat 3775.
17. 18 USC § 3142(g)(1). The relevant amendment was made by PL 108–458, § 6952, 118 Stat 3775.
18. Criminal Code, RSC 1985, c C-46, s 515(6)(a)(ii), as amended by Anti-terrorism Act, SC 2001, c 41, s 19(4).
19. CAA, s 15AA. The relevant amendment was made by *Anti-terrorism Act 2004* (Cth), Sch item 1B.
20. See, e.g., *Rahman v R* [2008] EWCA 1465; [2008] 4 All ER 661.
21. United States Sentencing Guidelines § 3A1.4.
22. Counter-Terrorism Act 2008 c 28, ss 30–33, Sch 2; Criminal Code, RSC 1985, c C-46, s 718(a)(5).
23. CAA, s 19AG.
24. PL 104–132, § 303, 110 Stat 1250.
25. United States, House of Representatives, Judiciary Committee, 1995, 178–80 (dissent), 189 (dissenters).
26. PL 107–56, §§ 803, 805, 115 Stat 376, 377.
27. PL 108–458 § 6952, 118 Stat 3775.
28. United Kingdom, Parliament, Joint Committee on Human Rights, 2005.
29. Zabel and Benjamin 2008, 21–22.
30. Ibid.; Zabel and Benjamin 2009.
31. Chesney 2007c.
32. The Center on Law and Security (2010, 3) defines "terrorism charges" as offenses against §§ 2339A–2339D, Chapter 113B offences, and 18 USC §§ 1992, 1993 (terrorist attacks on mass transportation systems).
33. Chesney 2005, 18–20.
34. Chesney 2007c, 879, 885. The figure is 26, based on a comparison between the two lists of defendants given in Chesney's appendices A and B.
35. Zabel and Benjamin 2009, 9.
36. United Kingdom, Home Office, 2009, 10 (table 3(a)).
37. Ibid., 11 (table 3(b)).
38. Ibid., 5 (table A).
39. Kissane et al. 2008.

40. Catanzariti 2009, 13.
41. Hagan 2010, 3.
42. Munro 2010.
43. See *R v Mallah* [2005] NSWSC 317 (threat to kill official, but not for political purposes); Swanwick 2009 (bombs not for terrorist purposes); *R v Thomas* [2006] VSCA 165; (2006) 14 VR 475 (appeal on terrorism charge allowed).
44. *R v Ul-Haque* [2007] NSWSC 1251; (2007) 177 A Crim R 348.
45. *R v Khawaja* 2011 ONCA 862; 103 OR (3d) 321, special leave granted, *Khawaja v R* [2011] JSCC No 34103.
46. *R v Ahmad* 2009 CanLII 84788; 257 CCC (3d) 135.
47. *R v Thambaithurai* 2011 BCCA 137; 302 BCAC 288.
48. O'Toole 2011.
49. Cumming and Masters 2012.
50. Indeed, they sometimes consider them to be inadequate: see the trial judge's remarks, cited in *R v Sherif* [2008] EWCA Crim 2653, [45].
51. See, e.g., *R v Barot,* [2007] EWCA Crim 1119, [37] (a terrorism case where the principal offence was conspiracy to murder; but see at [61]: allowance also to be made for whether a conspiracy is likely to have led to an attempt and whether the attempt would have proved successful); *Lodhi v The Queen* (2007) A Crim R 470, [79] (Spiegelman CJ), [211] (Barr J), [229] (Price J); *R v Amara* 2010 ONSC 441; [2010] OJ No 181, [102]–[106].
52. See, e.g., *United States v Abu Ali* 528 F 3d 210 (4th Cir 2008); *Lodhi v R* [2006] NSWCCA 360; 2007 179 A Crim R 470, [221] (Price J, with whom Spiegelman CJ and Barr J agreed); *R v Amara,* [120], [121].
53. See, e.g., *R v Barot,* [54]; *Lodhi v R* [2006] NSWCCA 360; 2007 179 A Crim R 470; cf. *R v Roche* (2008) 188 FLR 336 (where there was evidence of remorse); *R v Sherif,* [45]; *R v Kent* [2009] VSC 375, [46].
54. Under Canadian law, those sentenced to "life" imprisonment may be released on parole as early as 10 years into their sentence.
55. *R v Amara* 2010 ONSC 441; [2010] OJ No 181.
56. *United States v Jayyousi* F 3d 1085, 1117 (11th Cir 2011) (citing *United States v Meskini* 319 F 3d 88, 92 (2d Cir 2003)).
57. Ibid., 1132–33.
58. Center on Law and Security 2010, 13.
59. Zabel and Benjamin 2009, 41–42.
60. Center on Law and Security 2010,14–15.
61. Zabel and Benjamin 2009, 9.
62. United Kingdom, Home Office, 2009, 18–19 (tables 8(a), 8(b). Sentencing data are provided only for 2007–8. The number of custodial sentences for terrorism offences exceeds the number of convictions in 2007–8 for which a terrorism offence was the most serious conviction charge. The number of custodial sentences for defendants not convicted under terrorism legislation falls far short of the number of defendants for whom a nonterrorist charge was the principal conviction charge.
63. Hagan 2010, 3.
64. *R v Amara* 2010 ONSC 441; [2010] OJ No 181 (9 years and life for sentences carrying maxima of 10 years and life, to be served concurrently).
65. *R v Amara,* ibid., [68]–[74].
66. *R v Thambaithurai* 2011 BCCA 137; 302 BCAC 288.

67. Zabel and Benjamin 2009, 7.
68. *Attorney General's Reference (No 4 of 2002)* [2004] UKHL 43; [2005] 1 AC 264.
69. *Zafar v* R [2008] EWCA Crim 184; *R v K* [2008] EWCA Crim 185; [2008] QB 827; *R v M* [2007] EWCA Crim 298; [2008] Crim LR 71 (interpreting sections 57 and 58 and the different operations of the two sections).
70. Roach 2008, 36.
71. Ibid., 36.
72. Sturcke 2009.
73. Kissane et al. 2008.
74. Catanzariti 2009, 13.
75. Ripley 2002.
76. CNN 2004.
77. In its narrative of the circumstances leading up to Abdi's being charged, the Fourth Circuit's judgment states that he had initially come to the notice of the authorities because Iyman Faris had told them that he had said he intended to "shoot up" a shopping center. Abdi denied this in subsequent interviews but was alleged to have admitted that he intended to bomb a shopping center (*United States v Abdi* 463 F 2d 547 (6th Cir 2006)). The judgment does not expressly say that he in fact confessed to this.
78. United States, Department of Justice, 2003.
79. See United States Department of Justice, Office of the Inspector General, 2006; and for additional details, see *Mayfield v United States* 504 F Supp 2d 1023, 1026–1029 (D Ore 2007) (the two sources yield slightly different versions of the story; that contained in the judgment is partly a narrative of claims by the plaintiffs).
80. Roach and Trotter 2005, 988–89; Turner and Schulhofer 2005, 70–71.
81. Roach and Trotter 2005, 975–81.
82. Smith 2005.
83. Clarke 2008, 1:45–206.
84. Cumming and Masters 2012.
85. Difo 2010, 8–10.

CHAPTER 8

1. Quoted in Chesney 2005, 31.
2. Obama 2010, 22.
3. Pilkington 2012, 6.
4. Boot and Kirkpatrick 2009.
5. Executive Order 13492 of 22 January 2009, 74 FR 4897; Amnesty International 2005; Fletcher and Stover 2009, 245.
6. See *Kiyemba v Obama* 605 F 3d 1046, 1048 (DC Cir 2010) (citing the legislation and ruling that it was not unconstitutional).
7. "US Could Allow Guantanamo Visits" 2011, 8; Pilkington 2012, 6; Harris 2013.
8. Goldsmith 2007, 107–9. For the legal advice, see Philbin and Yoo 2005, 29.
9. On the combatant status review tribunals, which found in favour of fewer than 8 percent of detainees, see Denbeaux and Hafetz 2009, 148–68; Forsythe 2011, 171–72. Others were released following recommendations by annual review boards. Wittes (2008, 72–102) is also critical of the procedures but argues that a considerable proportion of those detained had links with al-Qaeda or the Taliban.
10. Codified at 18 USC § 4001(a).

11. 542 US 507 (2004).
12. 115 Stat 224.
13. *Rasul v Bush* 542 US 466 (2004).
14. Detainee Treatment Act of 2005, PL 109–163, Title X, § 1405(e)(1), 119 Stat 3477, amending 28 USC § 2241.
15. *Hamdan v Rumsfeld* 548 US 557 (2006).
16. Military Commissions Act of 2006, PL 109–336, § 7, 120 Stat 2635, amending 28 USC § 2241.
17. *Boumediene v Bush* 553 US 723 (2008).
18. As to the implications of the decision, see, e.g., Fallon 2010, 378–96.
19. Wittes et al. 2010.
20. Cole 2010, 49; Worthington 2012b.
21. See *Al Maqaleh v Obama* 605 F 3d 84, 98 (DC Cir 2010) ("the writ [of habeas corpus] does not extend to the Bagram confinement in an active theatre of war in a territory under neither the *de facto* nor *de jure* sovereignty of the United States and within the territory of another *de jure* sovereign").
22. Grey 2007.
23. Ibid., 89 (CIA prisons), 267 (in 2006, the prisons were closed, and the remaining 14 prisoners were transferred to Guantánamo).
24. Grey (2007, 115) estimated that "hundreds" had been transferred.
25. Examples are Khaled El-Masri and Abu Omar, who was initially confined to Egypt following his release. See Grey 2007, 93–94,197.
26. Grey 2007, 237–39.
27. Bringing a person into the United States against the person's will and without resort to extradition procedures is permitted for the purpose of securing the person's presence at a trial before US courts for an offence against US law, but the extraordinary rendition program was devised because trial of suspected terrorists was often not feasible. Originally, rendition to third countries was approved on the basis that transferees would be given a fair trial in the third country. Those involved in the program knew otherwise. See Grey 2007, 125–42.
28. Grey 2007, 188–211; Shapiro 2012.
29. 66 FR 54909.
30. Amnesty International 2002; Tumlin 2004, 1186, 1197–1203.
31. Lobel 2002, 778–80; Cole 2009, 703–4.
32. *Turkmen v Ashcroft* 589 F 3d 542 (2d Cir 2009).
33. *Ashcroft v Iqbal* 129 S Ct 1937, 1951–52 (2009).
34. *Zadvydas v Davis* 533 US 678 (2001).
35. Ibid., 696 (per Breyer J, delivering the majority judgment).
36. PL 107–56 § 412, 115 Stat 351, codified at 8 USC § 1226a.
37. Cole 2009, 694; Wittes 2008, 136.
38. See, e.g., Chesney 2005, 34–37; Nesbitt 2007, 57–64.
39. Human Rights Watch 2005.
40. 403 US 368 (1999).
41. *Al-Kidd v Ashcroft* 580 F 3d 949 (9th Cir 2010), reh'g denied, 598 F 3d 1129 (9th Cir 2010); *Ashcroft v Al-Kidd* 131 S Ct 2074 (2011).
42. *Al-Kidd v Gonzales* 1:05-cv-093-EJL-MHW, docs 331, 332 (orders dismissing applications against senior officials, agencies, and Ashcroft), 336 (report re Agents Grencko and Mace), 337 (report re United States); 2012 US Dist LEXIS 141025 (Id D 2012).

43. Stent 1980.

44. English 2003, 139–42; T. Parker 2007; Blackbourn 2009, 137.

45. United Kingdom, Intelligence and Security Committee, 2005, [8] ("Handling of detainees"); *R (Maya Evans) v Secretary of State for Defence* [2010] EWHC 1445 (Admin), [19]–[48].

46. Memorandum of Understanding between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Islamic Republic of Afghanistan Concerning Transfer by the United Kingdom Armed Forces to Afghan Authorities of Persons Detained in Afghanistan, in United Kingdom, House of Commons, Foreign Affairs Committee, 2007, appendix 3, [3.1], [3.3]. Despite this agreement, three people had been transferred to US custody: see *R (Maya Evans) v Secretary of State for Defence*, [135].

47. On the nature of these arrangements and their implications for whether the internment power is governed by the ECHR, see *Al-Jedda v United Kingdom* [2011] ECHR 1092; (2011) 53 EHRR 23.

48. United Kingdom, House of Commons, Foreign Affairs Committee, 2007, [4]; Cobain and Norton-Taylor 2010.

49. Amnesty International 2005, 67–68; United Kingdom, House of Commons, Foreign Affairs Committee, 2007, 48, 50, 53, 54 (reporting views of the Foreign and Commonwealth Office).

50. Cobain and Norton-Taylor 2010.

51. United Kingdom, House of Commons, Foreign Affairs Committee, 2007, 28–29.

52. United Kingdom, House of Commons, Foreign Affairs Committee, 2005, [78]–[79]; 2006, [40].

53. Anti-terrorism, Crime and Security Act 2001 (UK), c 24, s 23; for background, see, e.g., Metcalfe 2007, 13–18.

54. As of December 2003, 16 foreign nationals had been detained; 2 had voluntarily left the United Kingdom, and 14 remained in detention: see United Kingdom, Privy Counsellor Review Committee, 2003, 51.

55. Ibid., 50.

56. Ibid., 52–56.

57. *A v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 AC 68.

58. Prevention of Terrorism Act 2005 (UK), c 2.

59. Lord Carlile of Berriew 2011, 7.

60. Metcalfe 2007, 35.

61. *A v United Kingdom*, [2009] ECHR 301; (2009) EHRR 29, applied (albeit with limited enthusiasm) in *Secretary of State for the Home Department v AF* [2009] UKHL 28; [2010] AC 269.

62. Lord Carlile of Berriew 2011, 8.

63. May 2011, 36–42.

64. For an assessment of the legislation, see Roach 2006, 2198–2201.

65. United Kingdom, Parliament, Joint Committee on Human Rights, 2007, 9.

66. Quoted in *Amnesty International Canada v Canada (Attorney General)* 2008 FC 336; [2008] FCJ No 356, [55].

67. Ibid., [61]–[63], [66]–[67].

68. Ibid., [75]–[81].

69. Canada, Commission of Inquiry, 2005.

70. The periods were November 2001–January 2002 (Elmaati), May 2002–March 2004 (Almalki), and December 2003–January 2004 (Nureddin).

71. Iacobucci 2008, 349–57 (Elmaati), 438–46 (Nureddin).

72. *Amnesty International Canada v Canada (Attorney General)*, [85].

73. Immigration and Refugee Protection Act, SC 2001, c 27, ss 76–81.

74. *Charkaoui v Canada (Citizenship and Immigration)* 2007 SCC 9; [2007] 1 SCR 350.

75. Security certificates have been used on about 30 occasions: see *Harkat (Re)* 2010 FC 1242, [228].

76. Anti-terrorism Act, SC 2001, c 41, s 4, amending Criminal Code, RSC 1985, c C-46, by the addition of sections 83.29 (arrest to secure presence at an investigatory hearing) and 83.3 (detention where a peace officer reasonably believes a terrorist attack will be carried out and that arrest of a person is necessary to prevent it).

77. See Roach 2006, 2212–14 (use of the powers); Roach 2008, 25–28 (on the circumstances surrounding the refusal to extend the powers).

78. Roach 2008, 30–33; SC 2013, c 9, s 10.

79. For this reason, Hicks sought registration as a UK citizen. The home secretary refused registration. Hicks succeeded in an application for judicial review of the refusal: see *Hicks v Secretary of State for the Home Department* [2005] EWHC 2818 (Admin), appeal dismissed, *Secretary of State for the Home Department v Hicks* [2006] EWCA 400. The home secretary took six months to consider the application, granted citizenship, and then immediately cancelled it, using new powers: see Crabb 2006.

80. Coorey and Banham 2007.

81. For a critical analysis of the relevant proceedings, see Law Council of Australia 2007.

82. Criminal Code Act 1995 (Cth), Div 104, added by Anti-Terrorism Act (No 2) 2005, Sch 4, item 24.

83. Australian Security Intelligence Organisation Act 1979, ss 34F–34H, 34S, added by Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003, Sch 1, item 24. For subsequent amendments, see Notes to the Act.

84. Criminal Code Act 1995 (Cth), Div 105, added by Anti-Terrorism Act (No 2) 2005, Sch 4, item 24.

85. *Al Kateb v Godwin* (2004) 219 CLR 562.

86. Munro 2011, 5.

87. Needham 2012, 5.

88. Australia, Parliament, Joint Select Committee, 2012, [6.125]–[6.152].

89. *Plaintiff M47 v Director General of Security* [2012] HCA 46; (2012) 292 ALR 243.

90. Immigration Act 1987 (NZ) Pt 4A, which was superseded by Immigration Act 2009 (NZ) Pt 9.

91. McCarthy 2002, 440, 449–50.

92. *Fox News*/Opinion Dynamics poll, September 2001, terrorism10.

93. *ABC News*/*Washington Post* poll, November 2001, terrorism8.

94. Howell 2004, 1203–05.

95. National Defense Authorization Act for Fiscal Year 2012, Pub L 112–81, §§ 1021, 1022, 125 Stat 1562. The former section stated that it did not purport to change existing law (§ 1021(d), (e)). The latter section, which targets al-Qaeda activists, may expose them to military detention for acts on US soil, but only if they are engaged in acts falling within the Authorization for Use of Military Force. A district court concluded that the scope of the act was much wider: see *Hedges v Obama* 2012 US Dist LEXIS 68683 (SD

NY 2012), clarified by *Hedges v Obama* 2012 US Dist LEXIS 78867 (SD NY 2012), which granted permanent injunctive relief, whose operation was almost immediately stayed by the court of appeals (*Hedges v Obama* 2012 US App LEXIS 19880 (2d Cir 2012)).

96. Section 19, which subsequently reversed the district court's decision, on the ground that the plaintiffs lacked standing: 740 F 3d 170 (2d Cir 2013).

97. Protection of Freedoms Act 2012 (UK), c 9, s 57.

98. ICM/BBC poll, 26 May 2004.

99. MORI poll, 7–9 April 2005, questions 24–26.

100. YouGov/*Spectator* survey, 14–15 August 2006.

101. Australian Security Intelligence Organisation Legislation Amendment Bill 2002 (Cth); Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003 (Cth).

102. Anti-terrorism Act 2004 (Cth).

103. Anti-terrorism Act (No 2) 2005 (Cth).

104. *A v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 AC 68.

105. *Charkaoui v Canada (Citizenship and Immigration)* 2007 SCC 9; [2007] 1 SCR 350, [129]–[132].

106. *Rahmatullah v Secretary of State for Foreign and Commonwealth Affairs* [2011] EWCA Civ 1540.

107. *Rahmatullah v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2012] EWCA Civ 182.

108. *Rasul v United States* 215 F Supp 2d 55 (D DC 2002); *Al Odah v United States* 321 F 3d 1134 (DC Cir 2003).

109. Chief Justice Roberts and Justices Thomas and Scalia dissented.

110. *Khalid v Bush* 355 F Supp 2d 311 (DC 2005); *In re Guantanamo Detainee Cases* 355 F Supp 2d 443 (DC Cir 2005).

111. 344 F Supp 2d 152 (D DC 2004); 415 F 3d 33 (DC Cir 2005).

112. 476 F 3d 981 (DC Cir 2007).

113. Worthington 2012a, 2012b.

114. For a summary of the history of some of the litigation given, see *Secretary of State for the Home Department v AF* [2010] EWHC 42 (Admin), [3]–[8].

115. *A v Secretary of State for the Home Department* [2002] EWCA (Civ) 1502; [2004] QB 335 (allowing appeal from Special Immigration Appeals Commission); [2004] UKHL 56, [2005] 2 AC 68 (of the nine Law Lords, only Lord Walker dissented on the validity issue).

116. *Charkaoui v Canada (Citizenship and Immigration)* 2007 SCC 9; [2007] 1 SCR 350.

117. Denbeaux and Hafetz 2009, 109ff.

118. United Kingdom, Parliament, Joint Committee on Human Rights, 2010, [42].

119. See, e.g., the case of *AJAF*, discussed in ibid., [89].

120. 2010 US App LEXIS 14263 (DC Cir 2010).

121. See chapter 9.

122. *Thomas v Mowbray* [2007] HCA 33; (2007) 233 CLR 307.

123. *Hicks v Ruddock* [2007] FCA 299; (2007) 156 FCR 574.

124. Human Rights Watch 2005, 45–58.

125. *Al-Adahi v Obama* 2010 US App LEXIS 14263 (DC Cir 2010); *United States v Chandia* 2010 US App LEXIS 19178, 11–12 (4th Cir 2010).

126. Jones 2009. See also Montopoli 2009.

127. Morales 2009. See also Jones 2009; Condon 2010.

128. Morales 2009.

129. ASSDA, Australian Survey of Social Attitudes (2007), v123, v545 by v539, weighted by v656.

130. United Kingdom, Parliament, Joint Committee on Human Rights, 2010c.

131. Cf. ibid., 46–48 (Dr. Evan Harris, MP, dissenting on several issues).

132. MORI poll, April 19, 2005.

133. YouGov poll, January 2011.

134. Detention at Guantánamo may be permitted in circumstances where information adverse to the detainee has been obtained by physical coercion. See *Salahi v Obama* 625 F 3d 745 (DC Cir 2010), noting that the circumstances in which admissions were made meant that while the detainee could not be prosecuted for providing material assistance, the court could nonetheless conclude that his detention might be justified.

135. Wittes 2008, 72–102.

CHAPTER 9

1. Cited in Taylor and Wittes 2009, 4, 6.

2. Grey 2007, 152.

3. Taguba 2004, [11].

4. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1465 UNTS 85, Arts 1, 2 (entered into force 26 June 1987) (hereinafter Torture Convention).

5. See, e.g., Parry 2010, 18–19, 28, 36–40.

6. Torture Convention, Art 1(1) ("any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person"), Art 16 (duty to prevent "other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1").

7. Nowak 2006, 821–22.

8. Parry 2010, 55–75.

9. *Ahmed v R* [2011] EWCA Crim 184.

10. PL 103–236, § 506(a), 109 Stat 463, codified at 18 USC § 2340.

11. See, e.g., Fletcher and Stover 2009; Forsythe 2011; Sands 2009.

12. Mackey 2004.

13. See, e.g., Wittes 2008, 198–205.

14. Taguba 2004, [10].

15. Amnesty International 2005, 116–30.

16. Bybee 2005, 172; Yoo 2003.

17. These are discussed in United States, Department of Justice, Office of Professional Responsibility, 2009, 132–59, 241–51.

18. Goldsmith 2007, 150–51; Taylor and Wittes 2009, 9. For more details, see United States, Department of Justice, Office of Professional Responsibility, 2009, 30–37, 83–97.

19. Taylor and Wittes 2009, 11–14; Amnesty International 2005, 84–102, 103–6,124. As to the ill-treatment of those detained as "material witnesses," see Human Rights Watch 2005, 43–45.

20. Goldsmith 2007, 152–53.

21. PL 109–148, Div A Title X, § 1002, 119 Stat 2739.

22. Taylor and Wittes, 2009, 15.

23. PL 109–148, Div A, Title X, § 1004, 119 Stat 2740, codified at 42 USC § 2000dd-1.

24. *Hamdan v Rumsfeld* 548 US 557 (2006).

25. PL 109–336, §§ 5–8, 120 Stat 2639 (expanding the protections afforded by 42 USC § 2000dd-1).

26. HR 2082, Final Vote Results for Roll Call 117, 11 March 2008, http://clerk.house.gov/evs/2008/roll117.xml.

27. Executive Order 13491 of 22 January 2009, 74 FR 4893; Taylor and Wittes 2009, 2.

28. Davies et al. 2010.

29. Cobain et al. 2012.

30. *Ireland v UK* [1978] ECHR 1. The case was later to be cited in the US torture memoranda as authority for what constituted torture. As to its relevance to what constitutes torture, see United States, Department of Justice, Office of Professional Responsibility, 2009, 190–93.

31. Criminal Justice Act 1988 (UK), c 33, s 134.

32. Cited in *R (Mohamed) v Secretary of Foreign and Commonwealth Affairs* [2010] EWCA Civ 65; [2011] QB 218, [168].

33. United Kingdom, Intelligence and Security Committee, 2005, 13–18, 31.

34. Ibid., 31–32.

35. Ibid., 180–81.

36. *Al Rawi v Security Service* [2010] EWHC 1496 (QB).

37. United Kingdom 2010.

38. United Kingdom, Equality and Human Rights Commission, 2010. Its reservations about the suggestion that interrogation may proceed if risks are mitigated through caveats or assurances seems questionable if the effect of the caveats or assurances is that the interrogator believes that there is no longer a real risk of torture.

39. *(R) Mousa v Secretary of State for Defence* [2011] EWCA Civ 1334, [2]

40. Cobain and Norton-Taylor 2010.

41. The UK appears not to have been directly involved, but on two occasions, it has allowed the refuelling of planes that were en route to collect and transport detainees. The government denied awareness of the purpose of the flights. See, inter alia, Grey 2007, 228–30; Irfan Siddiq [Foreign Office] to Grace Cassy (assistant private secretary, 10 Downing Street), "Detainees," http://www.newstatesman.com/pdf/rendition/rendition.pdf (accessed 3 June 2011); Bright 2006.

42. Cobain 2012.

43. *R (Maya Evans) v Secretary of State for Defence* [2010] EWCA 1445 (Admin); Leigh 2010.

44. Davies et al. 2010.

45. Grey 2007; Cobain 2009 (list of questions provided by MI5 and Manchester police).

46. Grey 2007, 231.

47. Ibid. 226–27; Cobain 2009 (reporting both the current policy and instances of earlier cases of questioning by MI5 officials of people who had been tortured); Cobain and Norton-Taylor 2010.

48. United Kingdom, Intelligence and Security Committee, 2005, 9–10 (citing evidence given to the committee by the foreign secretary).

49. *A v Secretary of State for the Home Department (No 2)* [2005] UKHL 71; [2006] 2 AC 221, [115].

50. For summaries of the government's argument, see *A v Secretary of State for the Home Department (No 2)* [2005] UKHL 71; [2006] 2 AC 221, [46].

51. Criminal Code, RSC 1985, c C-46, s 269.

52. Canada, Commission of Inquiry, 2005.

53. Ibid., 360–95 (Elmaati), 405–35 (Almalki), 446–55 (Nureddin).

54. 2009 FC 580; [2010] 1 FCR 267, [91]–[93].

55. See *Canada (Prime Minister) v Khadr* 2010 SCC 3; [2010] SCJ No 3.

56. Canada. House of Commons. Special Committee on the Canadian Mission in Afghanistan 2009.

57. Canada, House of Commons, Standing Committee on Public Safety and National Security, 2009, appendix D.

58. BBC News 2012.

59. Criminal Code Act 1995 (Cth), Div 274. As to attempts, participation, and complicity, see sections 11.1, 11.2.

60. Banham 2006.

61. Australia, Defence Department, 2008.

62. No Australian died from enemy or friendly fire during Australia's period of involvement.

63. Australia, Senate, Foreign Affairs, Defence and Trade References Committee, 2005.

64. Habib 2008, 123–24, 127–28, 141, 150–51, 203, 225, 240–41.

65. *Habib v Commonwealth of Australia* [2010] FCAFC 12, [15]–[19] (Perram J, summarising the claims); (2010) 183 FCR 62.

66. Welch 2011, 7.

67. Australia, Inspector-General of Intelligence and Security, 2011.

68. Stephenson 2009.

69. Stephenson 2010.

70. Ibid.

71. "PM: Our Troops Don't Torture" 2010.

72. Taylor and Wittes report claims that coercive questioning has yielded valuable intelligence. They conclude that while these claims are generally far from conclusive, some claims (not relating to the War on Terror) are well documented, and other claims may not be without merit (Taylor and Wittes 2009, 10–12, 18–25; see also Wittes 2008, 190–98; United States, Department of Justice, Office of the Deputy Attorney General, 2010, 53). Indeed, media reports following the killing of Osama bin Laden claim that some of the information used in constructing the mosaic leading to the discovery of his whereabouts was derived from interrogation of prisoners at Guantánamo and elsewhere (Mazzetti et al. 2011, 18). For a more sceptical analysis, see United States, Department of Justice, Office of Professional Responsibility, 2009, 243–49. See also Sands 2009, 176–81. Chris Mackey (2004, xxii–xxiii), who is adamant that degradation is useless as a strategy, reports that one prisoner began cooperating after he realised that he was not going to be tortured. This last example suggests that the person being interrogated must at least have a fear that he might be tortured. This does not require that the belief have any grounds, and it might arise from enemy propaganda. But despite Mackey's confidence that torture would not work, one of the themes of his book is that he and those he worked with found it hard to extract information from prisoners without resorting to relatively coercive forms of questioning.

73. Phillips 2010, 96–109.

74. Mackey's 2004 account of his experiences as an interrogator in Afghanistan suggests the appeal of this reasoning.

75. Taft 2005, 129. The applicability question was distinct from the question of whether prisoners taken by the United States would enjoy prisoner-of-war status. There was general agreement that they would not. See Goldsmith 2007, 110–13; see also 154 (on military lawyers' opposition to the memoranda from the Office of Legal Counsel).

76. The CIA was determined that the State Department not learn of the program. See United States, Department of Justice, Office of Professional Responsibility, 2009, 38; see also 260 (where the report criticises the failure to circulate drafts of the torture memoranda to the State Department, given its interest in the interpretation of treaties).

77. Taylor and Wittes 2009, 12–13; Amnesty International 2005, 93; United States, Department of Justice, Office of Professional Responsibility, 2009, 30–33.

78. Morrow 2007.

79. On the centrality to the FBI of obtaining convictions, see Treverton 2009, 62–74.

80. See, e.g., Sands 2009.

81. See, e.g., Sands 2009; United States, Senate, Committee on Armed Services, 2008; Parry 2010, 171–203;, Forsythe 2011 (for the development of the legal responses).

82. United States, Department of Justice, Office of Professional Responsibility, 2009, 159–226.

83. Ibid., 252.

84. Ibid., 241–51.

85. United States, Department of Justice, Office of the Deputy Attorney General, 2010 (Margolis Memorandum).

86. *Mohammed v Obama* 704 F Supp 2d 1 (D DC 2009) (evidence adverse to petitioner); *Salahi v Obama* 625 F 3d 745 (DC Cir 2010).

87. E.g., *Al-Mithali v Bush* 2009 US Dist LEXIS 7033 (D DC 2009); *Lnu v Obama* 656 F Supp 2d 187 (D DC 2009); *Bin Attash v Obama* 628 F Supp 2d 24 (D DC 2009).

88. *Kiyemba v Obama* 561 F 3d 509 (DC Cir 2009), cert denied, 2010 US LEXIS 2462 (US, 22 March 2010), applying *Munaf v United States* 128 S Ct 2207, 2226 (2008) ("The judiciary is not suited to second-guess such determinations—determinations that would require federal courts to pass judgment on foreign justice systems and undermine the Government's ability to speak with one voice in this areas"). In *Kiyemba*, the government intended to return the detainees not to China (where they had come from) but to a country or countries willing to accept them.

89. *El-Masri v United States* 479 F 3d 296 (4th Cir 2007), cert denied, 552 US 947 (2007); *Mohamed v Jeppesen Dataplan* 614 F 3d 1070 (9th Cir, en banc, 2010), rev'g (6–5) 563 F 3d 992, 1007 (9th Cir 2009), cert denied, 131 S Ct 2442 (2011).

90. *Arar v Ashcroft* 585 F 3d 559 (2d Cir 2009), cert denied, 130 S Ct 3409 (2010).

91. *In re Iraq & Afghanistan Detainees Litigation* 479 F Supp 2d 85, 95 (D DC 2007).

92. *Ali v Rumsfeld* 649 F 3d 762, 773 (DC Cir 2011) (citing *In re Iraq & Afghanistan Detainees Litigation*, 105).

93. *Padilla v Yoo* 633 F Supp 2d 100 (ND Cal 2009).

94. *Lebron v Rumsfeld* 764 F Supp 2d 787, 799–800 (Charleston D SC 2011).

95. Ibid., 50–51.

96. *Lebron v Rumsfeld* 670 F 3d 540 (4th Cir 2012), cert denied, 132 S Ct 2751 (2012).

97. *Ashcroft v al-Kidd* 131 S Ct 2074, 2083 (2011).

98. *Padilla v Yoo* 678 F 3d 748 (9th Cir 2012).

99. Ibid., 766–68.

100. *Vance v Rumsfeld* 694 F Supp 2d 957 (ND Ill 2010); *Doe v Rumsfeld* 800 F Supp 2d 94 (D DC 2011)

101. *Vance v Rumsfeld* 653 F 3d 591 (7th Cir 2011), vacated by *Vance v Rumsfeld* 2011 US App LEXIS 22083 (7th Cir, 2011).

102. *Doe v Rumsfeld* 683 F 3d 390 (DC Cir 2012), reh'g, en banc, denied, 2012 US App LEXIS 15717 (DC Cir 2012).

103. *Vance v Rumsfeld* 701 F 3d 193 (7th Cir 2012).

104. Center for Constitutional Rights, *Turkmen v Ashcroft*, 2012, http://ccrjustice.org/ourcases/current-cases/turkmen-v.-ashcroft.

105. [2005] UKHL 71; [2006] 2 AC 221, [53] (Lord Bingham), [126] (Lord Hope).

106. *R v Ahmed* [2011] EWCA Crim 184, [30].

107. Ibid., [42]–[49].

108. *A v Secretary of State for the Home Department (No 2)* [2005] UKHL 71; [2006] 2 AC 221, per Lord Bingham [47] (prepared to accept); Lord Nicholls [69] (it might be ludicrous not to); Lord Hoffmann [93] (also noting [88] that evidence of the discovery of the ticking bomb would be admissible, notwithstanding that torture led to its discovery), Lord Rodger [132] (failure could involve breach of duty to protect); Lord Carswell [149] (a "very necessary ability"), Lord Brown [161]–[162], [171] ("bound to do so"; evidence of fruits admissible).

109. *R (Mohamed) v Secretary of Foreign and Commonwealth Affairs* [2010] EWCA Civ 65; [2011] QB 218, [168] (Neuberger LJ), and appendix, par (ix).

110. *R (Maya Evans) v Secretary of State for Defence* [2010] EWCA 1445 (Admin), [315]–[325].

111. [2011] EWCA Civ 1334.

112. *Al Rawi v Security Service* [2011] UKSC 34; [2012] AC 531.

113. Wintour 2010.

114. *Youssef v Home Office* [2004] EWHC 1884.

115. *Habib v Commonwealth of Australia* [2010] FCAFC 12; (2010) 183 FCR 62

116. See *Canada (Prime Minister) v Khadr* 2010 SCC 3; [2010] SCJ No 3.

117. *Abou-Elmaati v Canada (Attorney General)* 2011 ONSC 7720.

118. *Almalki v Canada (Attorney General)* 2012 ONSC 3023.

119. *Amnesty International Canada v Canada (Canadian Forces)* 2008 FCA 401; [2008] 4 FCR 546, application for special leave to appeal to Supreme Court dismissed, 2009 CanLII 25563.

120. Pew Research Center poll, 14–21 April 2009 (and earlier polls), http://www.pollingreport.com/terror2.htm.

121. Angus Reid Public Opinion poll, 19–21 February 2010 (torture against suspected terrorists by the US military and intelligence agencies always justified (13%), justified most of the time (21%), justified only sometimes (30%), never justified (30%)).

122. *Newsweek* poll, 10–11 November 2005, http://www.pollingreport.com/terror5.htm; Taylor and Wittes 2009, 4.

123. Ibid.

124. *USA Today*/Gallup poll, September 2006, http://www.pollingreport.com/terror3.htm.

125. *CBS News*/*New York Times* poll, 15–19 September 2006, http://www.pollingreport.com/terror3.htm. See also *ABC News*/*Washington Post* poll, 21–24 April 2009, http://www.pollingreport.com/terror2.htm.

126. CNN/Opinion Research Corporation poll, 2–4 November 2007, http://www.pollingreport.com/terror2.htm; *CBS News/New York Times* poll, 22–26 April 2009, http://www.pollingreport.com/terror2.htm; Angus Reid Public Opinion poll, 19–21 February 2010.

127. AP-GfK poll, 28 May–1 June 2009; CNN/Opinion Research Corporation poll, 23–26 April 2009, http://www.pollingreport.com/terror2.htm.

128. Angus Reid Public Opinion poll, 19–21 February 2010.

129. MORI poll, 7–9 April 2005, questions 24–26.

130. AP-Ipsos, September 2005, "Poll finds broad approval of terrorist torture" (61% of Americans as compared with "just over half" of British respondents), http://www.nbcnews.com/id/10345320/ns/world_news-americas/t/poll-finds-broad-approval-terrorist-torture/.

131. PIPA 2006.

132. United States, Department of Justice, Office of Professional Responsibility, 2009, 151–52.

133. Amnesty International 2005, 102n277.

134. Roll Call 117 of 2008.

135. *Newsweek* poll, 10–11 November 2005, terror5; Taylor and Wittes 2009, 4.

136. Angus Reid Public Opinion Poll, 19–21 February 2010.

137. Hetherington and Suhay 2012.

138. MORI poll, 7–9 April 2005.

139. ASSDA, Australian Survey of Social Attitudes (2007), v545 by v539, weighted by v656. For the logistic regression analysis, v545 was dichotomised, and low-frequency responses were excluded from the two categoric variables.

CONCLUSION

1. A case which might have resolved the question was decided against the plaintiffs on the grounds that the current circumstances of their detention did not make it unlawful: *Plaintiff M47 v Director General of Security* [2012] HCA 46; 292 ALR 243.

2. Daniels et al. 2001.

3. Howell 2004.

4. Wittes 2008.

5. *Al-Aulaqi v Obama* 727 F Supp 2d 1 (D DC 2010).

6. The only successful challenges related to the requirement that those served with NSLs keep this a secret. They must now be notified of their right to require the government to show cause why such an order should be made. Only one person has availed themselves of that right, and the matter was settled: Todd M Hinnen, Statement before the Subcommittee on Crime, Terrorism and Homeland Security, Committee on the Judiciary, United States House of Representatives, March 30, 2011, 8.

7. *A v Secretary of State for Home Affairs* [2005] AC 68, 102.

8. See chapter 4, note 13.