

LEGAL RESPONSES TO TERRORISM

Second Edition

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LEGAL RESPONSES TO TERRORISM

Second Edition

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Library of Congress Cataloging-in-Publication Data

McCormack, Wayne.
Legal Responses to Terrorism / Wayne McCormack.—2nd ed.
p. cm.
Includes bibliographical references and index.
ISBN 978-1-4224-2501-5 (hard cover)
1. War on Terrorism, 2001—Law and legislation—United States. 2. Terrorism—United States—Cases. 3. Terrorism—Prevention. I. Title.
KF9430.M3 2008
345.73'02—dc22
2008018284

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MATTHEW  BENDER

PREFACE

I believe that teaching materials should be balanced. Because this book may fail my own test without my knowing it, I should provide here a disclosure statement of my beliefs on this subject. As I was assembling the first edition in 2004, I assumed that the excesses of the Bush Administration would be pulled back, that cooler heads would prevail, and that the “Ship of State would right itself” in due course. I thought my task was merely to provide background on the various tools for confronting terrorism. I thought the notion of a “war” on a concept would dissipate in the face of both military and political realities. I thought that controls on military action, criminal prosecutions, and intelligence gathering would contribute to a balanced approach to an ongoing problem and would take us out of the crisis mode that threatened the very stability of our government.

I was wrong. In my innate optimism, I did not anticipate that the “war on terror” would become an all-out assault on the Rule of Law. Prisoner abuse turns out to have been a conscious strategy fueled by “legal opinions” that were travesties. Detentions without hearings became commonplace. Renditions of prisoners from one foreign country to another where they would be mistreated were frequent and authorized by the President himself. The National Security Agency was authorized to spy on U.S. citizens, at least when they were communicating with a person suspected to have terrorist ties but maybe in other undisclosed circumstances. Congress was then enlisted to ratify detentions and surveillance operations without judicial oversight. As I had said before, it was up to We the People to say when enough is enough, and Congress failed to say it for Us.

I don’t know whether the book has a different tone now or whether I just feel differently about it. It has become necessary for those of us in the law schools to take on the responsibility of providing the navigational tools to get the Ship of State back on course.

I have added one note on the ethics of government lawyers. Rather than emphasizing the lapses of those in political positions, that note spends more ink on praising courageous military lawyers who have challenged detentions and mistreatment of prisoners to the detriment of their careers. I know that there were professionals in the Department of Justice who likewise challenged the excesses of the Bush Administration within the scope of their jobs, and they will remain unsung heroes.

In the fall of 2001, the United States had an opportunity unique in all of human history. One nation clearly dominated the world in both power and prestige. Almost the entire globe was of one mind to confront the cowardice of attacks on civilians. There was even an awareness within the decision elites of the world that something needed to be done to address the globalization of labor and the movement of capital. The good will of the entire world was focused on the United States and its leadership.

That good will provided an opportunity to reshape how the world goes about its political business but instead the leadership of the U.S. squandered that good will and that opportunity. Now we in the legal profession must go about the sometimes dreary but always challenging job of doing our job. Our job is the Rule of Law, and it is to that task that this book is now directed.

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