

Civil Liberties and Securing the Homeland

CHAPTER 4

CHAPTER LEARNING OBJECTIVES

This chapter will enable readers to do the following:

1. Identify and discuss historical perspectives on civil liberties and homeland security
2. Understand how domestic security policies are designed to address threat environments existing at the time
3. Critically evaluate the importance of balancing civil liberties protections and domestic security necessities
4. Present arguments from each side of the debate on how to balance civil liberty and homeland security
5. Discuss controversial options for promoting domestic security

OPENING VIEWPOINT: FREEDOM OF REPORTING AND SECURITY PRIORITIES

The term *homeland security* is common to the modern political lexicon and security environment. Although the term is new and originated within the context of the September 11, 2001, attacks and American policy adaptations, the underlying concept has been periodically applied during historical periods of national security and political crises. Controversial administrative measures were often implemented during these

periods and were deemed necessary at the time. Restrictions on the reporting of information by the media is an example of such controversial measures.

The United States has periodically restricted media access to information about matters that affect security policy. This has occurred during times of crisis, and the logic is quite understandable: A policy decision was adopted that concluded that the war

effort (or counterterrorism policy) requires limitations to be imposed to prevent information from helping the enemy and to prevent the enemy from spreading its propaganda.

The challenge for democracies is to strike a balance between governmental control over information—for the sake of national security—and unbridled propaganda. The following examples illustrate how the United States managed the flow of information during international crises:

- During the *Vietnam War*, journalists had a great deal of latitude to visit troops in the field and observe operations. Vietnam was the first “television war,” so violent and disturbing images were broadcast into American homes on a daily basis. These reports were one reason why American public opinion turned against the war effort.
- During the 1991 *Persian Gulf War*, news was highly controlled. Unlike during the Vietnam War, the media received their information during official military press briefings. They were not permitted to travel into the field except under highly restrictive conditions.
- During the Afghan phase of the *war on terrorism* in late 2001, news was highly restricted. Official press briefings were the norm, and requests were made for cooperation in not broadcasting enemy propaganda.
- During the 2003 conventional phase of the *invasion of Iraq*, reporters were “embedded” with military units and reported events as they unfolded. Official press briefings were the norm.

The preamble to the U.S. Constitution states that its central purpose is to establish a government system providing security, peace, and welfare for the population and to secure liberty for the people: “We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.”

The authors of the Constitution took great care to balance liberty and security and drafted the first ten amendments to the Constitution as a new Bill of Rights. In effect, the concepts of civil liberty, a just government, and general security are founding principles of the Republic.

There is a natural tension between the desire to safeguard human rights and the necessity of securing the homeland. This tension is reflected in spirited political and philosophical debates about how to accomplish both goals. It is also reflected in the fact that during historical periods when threats to national security existed, sweeping security measures were undertaken as a matter of perceived necessity. The implementation of these policies was often politically popular at the time—primarily because of the immediacy of the perceived threat—but questioned during reflection in later years.

The modern homeland security environment exists because of the attacks on September 11, 2001, and has resulted in the creation of extensive bureaucracies, the passage of new security-related laws, and the implementation of controversial counterterrorist measures. The new security environment and policies were adopted because of the immediacy of the existent threat to the homeland, yet questions nevertheless arose about the efficacy and ethics of some measures. For this reason, oversight on the potential civil liberties implications of security-related policies is embedded in the homeland security

enterprise. For example, the Office of Civil Rights and Civil Liberties is an integral administrative component in the U.S. Department of Homeland Security.

The discussion in this chapter addresses the difficult balance between securing the homeland and preserving constitutionally protected civil liberties by examining the following perspectives:

- Security and liberty: The historical context
- Achieving security
- Balancing civil liberties and homeland security

❖ Security and Liberty: The Historical Context

To understand modern concerns about the correlation between achieving strong homeland security and preserving constitutionally protected civil liberties, it is necessary to evaluate this question within the context of several historical periods. Several historical eras integrated security-related policies into the fabric of domestic politics and society. The rationale was to protect the nation from perceived (and often verifiable) threats.

The United States has experienced several episodes of crisis where the American public and political leaders perceived a need to enact legally based policies to manage the crisis. Laws were passed because of fear and uncertainty precipitated by domestic or foreign threats. At the time, contemporary measures were deemed necessary and were, therefore, often quite popular. This was because domestic security measures were presented as practical necessities. However, although such policies enjoyed significant support, their implementation just as often stirred strong criticism and opposition. The constitutionality and ethics of these laws were called into question during reflection in post-crisis years.

Table 4.1 summarizes these historical periods, the perceived threat, selected countermeasures, and outcomes.

The Early Republic and Civil War

Since its inception, the United States has periodically responded to perceived threats by empowering the federal government to restrict the liberties of legally specified groups. During the early republic, Congress passed a series of laws commonly referred to as the Alien and Sedition Acts. During the Civil War, the writ of habeas corpus was suspended under declared emergency authority assumed by the executive branch of government.

The Early Republic and the Alien and Sedition Acts

During the presidency of John Adams (1797–1801), the United States responded to growing concern over the possibility of engaging in war with France. France, which had militarily supported the United States during the American Revolution, was waging war in Europe during the early career of Napoleon Bonaparte. At this time, European

Table 4.1 Security and Civil Liberty: Historical Perspectives

Balancing the desire for domestic security while concurrently protecting civil liberties can be a complex process. The United States has experienced several historical periods in which countermeasures were implemented to thwart perceived threats to domestic security. The following table summarizes these historical periods, the perceived threat, selected countermeasures, and outcomes.

<i>Historical Period</i>	<i>Perceived Threat and Responses</i>		
	<i>Perceived Threat</i>	<i>Selected Countermeasure</i>	<i>Outcome</i>
Early Republic (1797–1809)	Enemy immigrants and critics of government	Passage of the Alien and Sedition Acts	Strong criticism and repeal of the laws
Civil War (1860–1865)	Confederate sympathizers in Union states	Suspension of the writ of habeas corpus	Successful suspension of the writ; 38,000 civilians detained
First Red Scare (1919)	Anarchist and communist terrorism and subversion	Palmer Raids, arrests, and deportations	Successful disruption of anarchist and communist organizations
Second Red Scare (1930s to 1940s)	Communist subversion	HUAC investigations and federal legislation	High-profile investigations and prosecutions
Third Red Scare (1950s)	Communist subversion	McCarthy Senate hearings and investigations	Widespread denunciation of “McCarthyism”
Second World War (1941–1945)	Sympathy for Japan by Japanese Americans	Internment camps	Relocation of thousands of Japanese Americans; eventual reparations

monarchies were attempting to crush the French Revolution, but they fared badly when Bonaparte scored repeated victories. Some American leaders argued that the United States should assist French revolutionaries in their time of need; others opposed intervention in the European conflict.

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Alien and Sedition Acts Four laws passed during the administration of President John Adams granting Adams authority to suppress activism by immigrants. Known as the Alien and Sedition Acts, these statutes placed significant restrictions on the liberty of immigrants and political critics.

Adams’s Federalist Party controlled Congress and supported Great Britain in its opposition to Bonaparte’s France. The Democratic Republican Party supported France and enjoyed political favor from new immigrants, many of whom were French. Four laws were passed by the Federalist-controlled Congress granting authority to President Adams to suppress activism by immigrants. These statutes were known as the **Alien and Sedition Acts**, and the new laws placed significant restrictions on the liberty of political critics and immigrants.

- *Alien Enemies Act.* The president was granted authority to deport or imprison citizens of “enemy” countries.
- *Alien Friends Act.* The president was granted authority to deport or imprison citizens of “friendly” countries if they were deemed to be dangerous.
- *Naturalization Act.* This act required immigrants to live in the United States for 14 years before being permitted to receive citizenship.
- *Sedition Act.* This act permitted the imprisonment of individuals for criticizing the government.

The Alien and Sedition Acts were strongly opposed as violating the First Amendment to the U.S. Constitution. During the presidential administration of Thomas Jefferson (1801–1809), who was a Democratic Republican, the four laws were amended, repealed, or allowed to expire. The Alien and Sedition Acts represent the first (but not the last) time in U.S. history when specified groups experienced the legalized abrogation of constitutional liberties. In later years, similar abrogations would be directed against specified ideological, political, and ethnic groups.

The Civil War and Suspension of Habeas Corpus

A writ of habeas corpus (Latin for “that you have the body”) is an order from a judge demanding that an imprisoning authority deliver its prisoner to court for a determination on the constitutionality of the imprisonment. Should the judge determine that detention is unconstitutional, the prisoner must be released. Writs of habeas corpus represent a powerful counterweight to the authority of the state to detain individuals without bringing charges in a timely manner. Article III, Section 9 of the U.S. Constitution states, “The privilege of the writ of habeas corpus shall not be suspended, unless when in a case of rebellion or invasion the public safety may require it.” Thus, any suspension of habeas corpus requires clear confirmation that rebellion or invasion is a threat to public safety, and absent such proof, the suspension is invalid.

During the Civil War, President Abraham Lincoln suspended the right to habeas corpus and ordered the military to detain an Ohio congressman, 31 legislators from Maryland, and hundreds of alleged Confederate sympathizers. President Lincoln made all detainees subject to the jurisdiction of military courts-martial rather than the civilian judiciary. The U.S. Supreme Court ruled that these measures were unconstitutional, but Lincoln ignored the Court’s ruling, and during the Civil War, approximately 38,000 civilians were detained by the military. In this way, the executive branch of the government circumvented the judiciary by invoking its own interpretation of Article III, Section 9 as a justifiable suspension of habeas corpus.

The Civil War–era suspension of habeas corpus and the use of military courts-martial was the first precedent for applying such measures to alleged enemies of the state—by a similar rationale as that recently used to justify controversial detentions of modern enemy combatants in facilities such as Guantánamo Bay.

Communism and the Red Scares

“**Red Scares**” refer to several periods in U.S. history when perceived threats from anarchist, communist, and other leftist subversion created

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a generalized climate of political anxiety. In fact, these perceived threats were sometimes complemented by genuine security-related incidents and conspiracies by radical leftists. During these periods, sweeping security procedures were implemented that were later criticized as being overly broad or unconstitutional. Domestic terrorism in the modern era is further discussed in Chapter 8.

Anticommunist Red Scares occurred several times in the United States when national leaders sought to suppress the perceived threat of communist subversion. During the Red Scares, government officials reacted to communist activism by adopting authoritarian measures to preempt incipient sedition. The Red Scares took place during three periods in American history: first in the aftermath of the 1917 Bolshevik Revolution in Russia, again at the height of the Great Depression in the 1930s, and finally during the East–West tensions of the Cold War in the 1950s.

The First Red Scare

The First Red Scare began following the founding of the Communist Party USA (CPUSA) in 1919. The CPUSA was established during a global effort by communists to create an international movement to end capitalism.

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Palmer Raids During a domestic bombing campaign allegedly conducted by communists and anarchists, President Woodrow Wilson authorized U.S. attorney general A. Mitchell Palmer to conduct a series of raids—the so-called Palmer Raids—against labor activists, including American labor unions, socialists, communists, anarchists, and leftist labor groups.

In 1919, a series of letter bombs were intercepted after they were mailed to prominent officials and industrial executives. Additional bombs were detonated in several cities by violent extremists, including one directed against U.S. attorney general A. Mitchell Palmer. It was widely held at the time that leftist revolutionaries were responsible for the bombing campaign, particularly communists and anarchists. In response to these incidents, Palmer received authorization from President Woodrow Wilson to conduct a series of raids—the so-called **Palmer Raids**—against labor activists, including leftist labor groups, communists, anarchists, socialists, and mainstream American labor unions. Offices of many organizations were searched without warrants and shut down; thousands were arrested. Leftist leaders were arrested and put on trial, and hundreds of people were placed aboard ships and deported from the United States.

The legal foundations for the law enforcement crackdown against leftists were the Espionage Act of 1917 and the Sedition Act of 1918. An interesting postscript is that A. Mitchell Palmer was eventually prosecuted and convicted for misappropriation of government funds.

The Second Red Scare

The Second Red Scare began during the 1930s, at the height of the Great Depression. Communists and socialists enjoyed a measure of popularity during this period because of mass unemployment and the apparent crisis of capitalism. Fears grew that the uncertainty of the Great Depression would lead to widespread unrest encouraged by communist and socialist agitation.

Congress acted to halt the dissemination of leftist sentiment by establishing the House Un-American Activities Committee in 1938, which investigated alleged sedition, disloyalty, and other subversive activities by private individuals. Congress also passed the Smith Act of 1940, which made advocacy of the violent overthrow of the

government a federal crime. High-profile investigations were conducted during this period, and through the late 1940s, a number of alleged communists were prosecuted. High-profile prosecutions occurred, including the investigation of Alger Hiss, a State Department official accused of being a communist spy.

The Third Red Scare

The Third Red Scare occurred during the 1950s, when Republican senator Joseph McCarthy of Wisconsin held a series of hearings to counter fears of spying by communist regimes, primarily China and the Soviet Union. The hearings reflected and encouraged a general fear that communists were poised to overthrow the government and otherwise subvert the “American way of life.”

McCarthy sought to expose conspiracies and communist infiltration in the entertainment industry, government, and private industry. Hundreds of careers were ruined during the hearings, and many people were blacklisted—that is, nationally barred from employment. McCarthy was adept at promoting his cause. The manner in which he did so was to publicly interrogate people from these sectors by utilizing a mode that had never been extensively used before: on television. Critics later argued that McCarthy overstepped the bounds of propriety, and the pejorative term **McCarthyism** has come to mean an ideologically and politically motivated witch hunt.

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Wartime Internment Camps

The attack on Pearl Harbor on December 7, 1941, by the Empire of Japan created a climate of fear against ethnic Japanese in the United States. Conspiracy scenarios held that domestic sympathizers would begin a campaign of sabotage and subversion on behalf of Japan. This would, in theory, be done in preparation for a Japanese invasion of the West Coast. Unfortunately, a prewar backdrop of racial prejudice against Asians in general became a focused animosity toward Asians of Japanese heritage. This combination of declared war, fear of subversion, and prejudice culminated in the relocation of ethnic Japanese from their homes to internment facilities.

The administration of President Franklin Delano Roosevelt established a War Relocation Authority, and the U.S. Army was tasked with moving ethnic Japanese to internment facilities on the West Coast and elsewhere. More than 100,000 ethnic Japanese, approximately two-thirds of whom were



(Photo by Getty Images/Hulton Archive)

❖ Photo 4.1

Senator Joseph McCarthy giving testimony during the Red Scare of the 1950s. His accusations and methods were usually sensational and were widely denounced in later years.

❖ **Photo 4.2**

A Japanese American family in San Francisco being evacuated to an internment camp during the Second World War. The relocation program targeted Americans of Japanese ancestry in the aftermath of the attack on Pearl Harbor by the Empire of Japan.



(Photo by Buyenlarge/Getty Images)

American citizens, were forced to relocate to the internment facilities. Internment facilities were operational until 1945, and most internees lost their property and businesses during the relocations. Reparation payments of \$20,000 were authorized during the 1980s to be disbursed to surviving internees. In 1988, the U.S. government formally apologized for the internments by passing the **Civil Liberties Act** and declared the internment program unjust.

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❖ **Achieving Security**

Civil liberties advocates contend that a careful balance must be struck between achieving security and protecting civil liberties. To achieve security, government responses must be proportional to the perceived threat and measured in how they are implemented. At the same time, some civil liberties advocates argue that because government responses are usually reactive after a threat arises, a more permanent solution may be found by countering extremism through reform—in effect, the creation of an environment that counters conditions conducive to encouraging radical sentiment. The following discussion considers this argument within the context of balancing homeland security and civil liberty perspectives.

Practical Considerations: Civil Liberty and Government Responses

Homeland security experts must pragmatically concentrate on achieving several fundamental counterterrorist objectives. These objectives can realistically only minimize, rather than eliminate, terrorist threats, but nevertheless, they must be actively pursued. In a practical sense, counterterrorist objectives include the following:

- Disrupt and prevent domestic terrorist conspiracies from operationalizing their plans.
- Deter would-be activists from crossing the line between extremist activism and political violence.
- Implement laws and task forces to create a cooperative counterterrorist environment.
- Minimize physical destruction and human casualties.

Balancing Theory and Practicality

It is clear that no single model or method for achieving security will apply across every scenario or terrorist environment. Because of this reality, the process for presenting counterterrorist models must include frameworks based on both theory and practical necessity. *Theoretical* models must reflect respect for human rights protections and balance this against options that may, out of necessity, include the use of force and law enforcement options. The *practicality* of these models requires them to be continually updated and adapted to emerging terrorist threats. With these adaptations, perhaps terrorism can be controlled to some degree by keeping extremists and violent dissidents off balance, thereby preventing them from having an unobstructed hand in planning and carrying out attacks or other types of political violence.

As a matter of practical necessity, counterterrorist policy adaptations may conceivably require controlling the dissemination of information from the media or engaging in surveillance of private communications. Both options potentially challenge fundamental notions of civil liberty.

Regulating the Media

Freedom of the press is an ideal standard—and arguably an ideology—in the United States. The phrase embodies a conceptual construct that suggests that the press should enjoy the liberty to independently report information to the public, even when this information might involve national security or be politically sensitive. News editors and journalists, when criticized for their reports, frequently cite “the people’s right to know” as a justification for publishing controversial information. The question is whether the right to know extends without restraint to information that may affect national security.

The counterpoint to absolute freedom of the press is regulation of the press. This issue arises when the media publish information about subjects that the public or the government would rather not consider. Regulation is theoretically a genuine option when matters of national security are at stake. When these and other concerns arise, policymakers and editors are challenged to address the following policy questions:

- Should the media be officially regulated?
- If regulation is desirable, how much regulation is acceptable?

In the United States, broad regulation of the media is not considered to be a politically viable option, and there is rarely an effort by government entities to officially suppress or otherwise regulate media content when media outlets decide to publish information. Rather, the first option by government agencies is to decline to release information by citing national security confidentiality. However, when government officials conclude that pending publication of information in the media may pose a threat to national security, the most common recourse is the U.S. judicial system, and thus, executive fiat is rarely attempted as an option.

Because of these limitations on the ability of officials to regulate the publication of information, the American media culture tends to rely on standards of journalistic self-regulation and media gatekeeping. Within the context of this system, the media

will self-regulate the reporting and portrayal of potentially unsavory, controversial, or sensitive news. For example, the American media have rarely published images of casualties from terrorist incidents or the international war on terrorism. This system is sometimes not ideal, and Chapter Perspective 4.1 discusses the debate concerning national security, the reporting of terrorism, and regulation of the media.

CHAPTER PERSPECTIVE 4.1: National Security, Reporting Terrorism, and Regulating the Media

In the United States, consensus exists that ethical standards should be observed when reporting terrorist incidents. These include the following:

[Do not] serve as a spokesman/accomplice of the terrorists. . . .

[Do not] portray terror as attractive, romantic, or heroic; honest portrayal of motives of terrorists. . . .

Hold back news where there is clear and immediate danger to life and limb.

Avoid . . . unchallenged terrorist propaganda. . . .

Never try to solve a situation.^a

In order to comply with these standards, one professional model is that of journalistic self-regulation. Journalistic self-regulation is sometimes referred to as media gatekeeping. If conducted under established standards of professional conduct, self-regulation obviates the need for official regulation and censorship. In theory, moral arguments brought to bear on the press from political leaders and the public will pressure them to adhere to model standards of fairness, accuracy, and objectivity.

This is, of course, an *ideal* free press environment; in reality, critics argue that journalistic self-regulation is a fluid and inconsistent process. The media report terrorist incidents using certain labels and often create a mood by spinning their reports. Some media—acting in the tabloid tradition—sensationalize acts of political

violence so that very little self-regulation occurs. Critics argue that unregulated sensationalized reporting can harm national security, and therefore, outside regulation is necessary.

Internationally, many democracies occasionally regulate or otherwise influence their press community while, at the same time, advocating freedom of reporting. Some democracies selectively release information or release no information at all during terrorist incidents. The rationale is that the investigation of these incidents requires limitations to be placed on which information is made available to the public. This occurs as a matter of routine during wartime or other national crises.

Discussion Questions

1. Should the public's "right to know" take precedence over the regulation of potentially sensitive national security information?
2. Should the government rely exclusively on journalistic self-regulation to control the reporting of sensitive national security information?
3. Are adequate protections in place to control unjustifiable suppression of information by government authorities?

Note

^aSee David L. Paletz and Laura L. Tawney, "Broadcasting Organizations' Perspectives," in *Terrorism and the Media*, ed. David L. Paletz and Alex P. Schmid (Newbury Park, CA: Sage, 1992), 129.

Electronic Surveillance and Civil Liberty

Electronic surveillance has become a controversial practice in the United States and elsewhere. The fear is that civil liberties can be jeopardized by unregulated interception of telephone conversations, e-mail, telefacsimile, and other transmissions. Detractors argue that government use of these technologies can conceivably move well beyond legitimate application against threats from crime, espionage, and terrorism. Absent strict protocols to rein in these technologies, a worst-case scenario envisions state intrusions into the everyday activities of innocent civilians. Should this happen, critics foresee a time when privacy, liberty, and personal security become values of the past.



❖ Photo 4.3

Official seal of the U.S. National Security Agency, the electronic surveillance branch of the U.S. intelligence community.

❖ Case in Point: Data Mining by the National Security Agency

In June and July 2013, the British newspaper *The Guardian* published a series of articles reporting covert surveillance operations coordinated by the U.S. National Security Agency (NSA). These operations involved the acquisition of European and U.S. telephone metadata and Internet surveillance. First reports indicated that the operations were code-named **Tempora** (apparently a British operation cooperating with the NSA) and **PRISM**.¹ **Edward Snowden**, a former NSA contractor and Central Intelligence Agency employee, became an international fugitive after leaking details of these operations to the media. The information was apparently delivered to a documentary filmmaker, the *Washington Post*, and *The Guardian*. Subsequent articles in *The Guardian* detailed another NSA operation, code-named **XKeyscore**, which apparently deployed a much more robust ability to collect online data.² According to the reports, XKeyscore was capable of collecting real-time data on social-networking media, chat rooms, e-mail, and browsing history.

These revelations began a vigorous debate in the United States and Europe about privacy, espionage, and whether the programs were justifiable. Civil libertarians questioned the legality of the extensive data-mining operations. In defense of the surveillance, intelligence officials commented that the NSA's program had thwarted approximately 50 terrorist plots in 20 countries, including at least 10 plots directed against the United States.³

Tempora A British covert surveillance operation conducted in cooperation with the U.S. National Security Agency (NSA).

PRISM A covert surveillance operation coordinated by the U.S. National Security Agency.

Snowden, Edward A former Central Intelligence Agency employee and National Security Agency contractor who leaked details of covert surveillance operations to the media prior to becoming an international fugitive. The information was apparently delivered to *The Guardian*, the *Washington Post*, and a documentary filmmaker.

XKeyscore A covert surveillance operation, coordinated by the U.S. National Security Agency, capable of collecting real-time data on chat rooms, browsing history, social networking media, and e-mail.

Carnivore An early software surveillance tool created to monitor e-mail.

DCS-1000 The upgraded and renamed version of the Carnivore software surveillance tool.

Chapter Perspective 4.2 discusses an instructive case study involving the deployment of *Carnivore*, an early software surveillance tool created to monitor e-mail.

CHAPTER PERSPECTIVE 4.2: Carnivore: The Dawn of Internet Surveillance

In July 2000, it was widely reported that the FBI possessed a surveillance system that could monitor Internet communications. Called *Carnivore*, the system was said to be able to read Internet traffic moving through cooperating Internet service providers. All that was required was for *Carnivore* to be installed on an Internet provider's network at its facilities. Under law, the FBI could not use *Carnivore* without a specific court order under specific guidelines, much like other criminal surveillance orders.

The FBI received a great deal of negative publicity, especially after it was reported that the agency had evaded demands for documents under a Freedom of Information Act (FOIA) request filed by the Electronic Privacy Information Center (EPIC), a privacy rights group. Concern was also raised by critics when it was reported in November 2000 that *Carnivore* had been very successfully tested and that it had exceeded expectations. This report was not entirely accurate. In fact, *Carnivore* did not operate properly when it was used in March 2000 to monitor a criminal suspect's e-mail; it had inadvertently intercepted the e-mail of innocent Internet users. This glitch embarrassed the Department of Justice (DOJ) and angered the DOJ's Office of Intelligence Policy and Review.

By early 2001, the FBI gave *Carnivore* a less ominous sounding new name, redesignating the system **DCS (Digital Collection System)-1000**. Despite the political row, which continued well into 2002 (in part because of the continued FOIA litigation), *Carnivore* was cited as a potentially powerful tool in the new war on terrorism. The use of DCS-1000 after 2003 was apparently reduced markedly, allegedly because Internet surveillance was outsourced to private companies' tools. The program reportedly ended in 2005 because of the prevalence of significantly improved surveillance software.

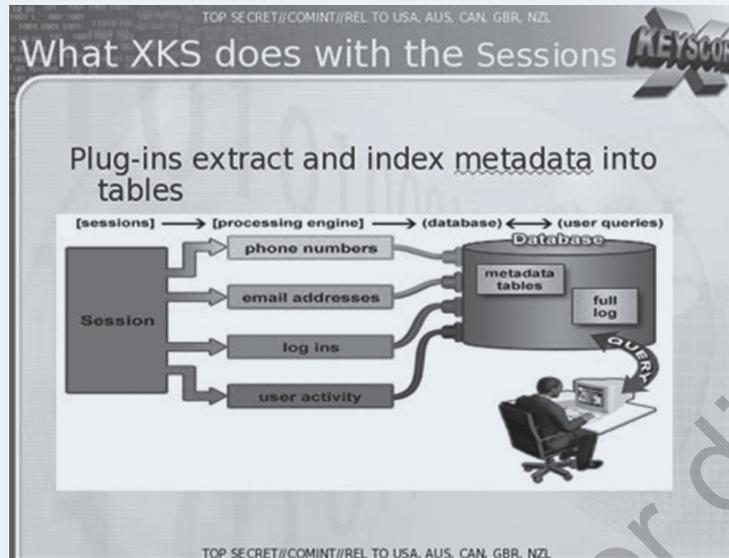
Discussion Questions

1. Should the public be concerned that federal agencies are using surveillance technologies domestically?
2. How should ethical considerations be balanced against national security considerations in the domestic use of surveillance technologies?
3. At what point does the domestic use of surveillance technologies infringe on privacy?

Civil Liberty and Countering Extremism Through Reform

Extremist ideologies and beliefs are fertile soil for politically violent behavior. Ethnocentrism, nationalism, ideological intolerance, racism, and religious fanaticism are core motivations for terrorism. History has shown that coercive measures used to counter these tendencies are often only marginally successful. The reason is uncomplicated: A great deal of extremist behavior is rooted in passionate ideas, recent historical memories of conflict, and cultural tensions. Very importantly, injustice does occur, and ideologies or other expressions of identity are used to rouse opposition to injustice. It is difficult to forcibly reverse these tendencies, and although coercion can eliminate cadres and destroy extremist organizations, sheer repression is a risky

Figure 4.1 XKeyscore and NSA Data Mining



Source: Greenwald, Glenn. "XKeyscore: NSA Tool Collects 'Nearly Everything a User Does on the Internet'." *The Guardian*, July 31, 2013.

long-term solution. In fact, outright repression and the suppression of civil liberties can create a backlash in which members of the suppressed group feel justified in their violent resistance.

Because extremism has historically originated primarily from domestic conflict (sometimes from national traumas such as invasions), efforts to counter domestic extremism must incorporate societal and cultural responses. A central consideration is that new societal and cultural norms often reflect demographic changes and political shifts. Dissent can certainly be repressed, but it is rarely a long-term solution absent preventive measures such as social reform, political inclusion, and protection of constitutional rights.

❖ Case in Point: Cultural Shifts, Inclusion, and Civil Liberty in the United States

The United States is a good subject for evaluating cultural shifts. In the aftermath of the political turmoil of the 1960s and 1970s, the United States underwent a slow cultural and ideological shift that began to promote concepts such as multiculturalism and diversity. These concepts have been adaptations to the United States' gradual transformation into a country in which no single demographic group will constitute a majority of the population, probably by the mid-twenty-first century. This reflects a significant cultural and societal shift from the *melting-pot ideology* of previous generations, when new immigrants, racial minorities, and religious minorities were expected to accept the cultural values of the American mainstream.

In the United States and elsewhere, grassroots efforts to promote inclusion became common features of the social and political environment (although not without political opposition). For example, private watchdog organizations monitor extremist tendencies, such as right-wing and neofascist movements. Some of these organizations, such as the Southern Poverty Law Center and the Anti-Defamation League in the United States, have implemented programs to promote community inclusiveness. In the public sector, government agencies have long been required to monitor and promote inclusion of demographic minorities and women in government-funded programs. Also in the public sector, the trend among local police forces has shifted toward practicing variants of community-oriented policing, which, in practice, means that the police operationally embed themselves as much as possible within local communities.

The theoretical outcome of these cultural tendencies would be an erosion of the root causes for extremist sentiment. In essence, the protection of civil liberties co-opts the extremists' position that the government or dominant group is uninterested in the rights of the championed group.

❖ Balancing Civil Liberties and Homeland Security

Counterterrorist options occasionally involve controversial practices and procedures that recurrently inflame misgivings held by civil liberties advocates. This tension between homeland security necessities and civil liberty ideals is starkly highlighted when one considers several politically sensitive counterterrorist options. The underlying question is whether effective homeland security is a justifiable end for implementing controversial options.

Table 4.2 summarizes selected countermeasures and their implications for civil liberty protections.

..... Terrorist Profiling

terrorist profile A descriptive composite similar to standard criminal profiles.

The modern terrorist profile includes the following characteristics: Middle Eastern heritage, temporary visa status, Muslim faith, male gender, and young-adult age.

criminal profiles Descriptive composites that include the personal characteristics of suspects, such as their height, weight, race, gender, hair color, eye color, and clothing. Suspects who match these criminal profiles can be administratively detained for questioning.

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The American approach to domestic counterterrorism prior to the September 11, 2001, attacks was a law enforcement approach. After the attacks, the new homeland security environment called for a more security-focused approach. The Federal Bureau of Investigation (FBI) and other agencies created a **terrorist profile** that was similar to standard **criminal profiles** used in law enforcement investigations. Criminal profiles are descriptive composites that include the personal characteristics of suspects, such as their clothing, eye color, gender, hair color, weight, race, and height. Suspects can be administratively detained for questioning if they match these criminal profiles.

The composite of the new terrorist profile included the following characteristics: male gender, Middle Eastern heritage, young-adult age, Muslim faith, and temporary visa status. Based on these criteria—and during the serious post-9/11 security crisis—the FBI and Immigration and Naturalization Service administratively detained hundreds of men fitting this description. Material witness warrants were used from the outset to detain many of

Table 4.2 Implementing Countermeasures: Challenges to Civil Liberty

The selection of countermeasures to combat terrorism often poses challenges to the protection of civil liberties. Nevertheless, some countermeasures are deemed necessary, and the imperative for ensuring domestic security must be balanced against the need to protect civil liberties.

Selected Countermeasure	Implementation and Civil Liberty Challenges		
	Justification for Countermeasure	Mode of Implementation	Civil Liberty Consideration
Terrorist profiling	Identifying potential terrorists	Questioning, surveillance, and detention of persons fitting the profile	High potential for racial profiling
Labeling or defining the enemy	Clarifying the status of detainees	Indefinite detentions without legal recourse	Legal protections should be enforced for suspects
Extraordinary renditions	Taking suspected terrorists into custody	Covert global capturing of suspects	Illicit kidnappings and detentions violate local and international laws
Enhanced interrogations	Eliciting useful information from detainees	Redefining torture and use of coercive methods during interrogations	Torture, however defined, is fundamentally immoral

these men for questioning. This is recognized as a legally and procedurally acceptable practice as long as suspects are not differentially treated when criminal profiles are designed.

As the September 11 investigations continued and in the wake of several warnings about additional terrorist threats, the U.S. Department of Justice expanded the FBI's surveillance authority. New guidelines were promulgated in May 2002 that permitted field offices to conduct surveillance of religious institutions, websites, libraries, and organizations without an *a priori* (before-the-fact) finding of criminal suspicion. A broad investigative net was cast, using the rationale that verifiable threats to homeland security must be detected and preempted.

These detentions and guidelines were widely criticized by civil liberties advocates. Critics argued that the detentions were improper because the vast majority of the detainees had not been charged with violating the law and no criminal suspicion had been articulated. Critics of the surveillance guidelines contended that they gave too much power to the state to investigate innocent civilians. Many also maintained that there was a danger that these investigations could cross a conceptual threshold and become discriminatory **racial profiling**, involving the unconstitutional detention of people because of their racial heritage or ethnonational identity. Nevertheless, the new security policies continued to use administrative detentions and enhanced surveillance as counterterrorist methods.

.....
racial profiling The unconstitutional detention of people because of their ethnonational or racial heritage.

The Problem of Labeling the Enemy

When formulating counterterrorist policies, American homeland security experts are challenged by two problems: first, the problem of defining terrorism, and second, the problem of labeling individual suspects. The latter problem poses challenges to protecting fundamental constitutional rights.

Although defining terrorism can be an exercise in semantics and is often shaped by subjective political or cultural biases, certain fundamental elements are objectively accepted. Common features of most formal definitions include the use of illegal force, subnational actors, unconventional methods, political motives, attacks against passive civilian and military targets, and acts aimed at affecting an audience.

In comparison, official designations (labels) used to confer special status on captured insurgent and terrorist suspects have become controversial. After September 11, 2001, it became clear that official designations and labels of individual suspected terrorists are a critical legal, political, and security issue. The question of a suspect's official status when he or she is taken prisoner is central. It determines whether certain recognized legal or political protections are or are not observed.

Civil Liberties and Detainees

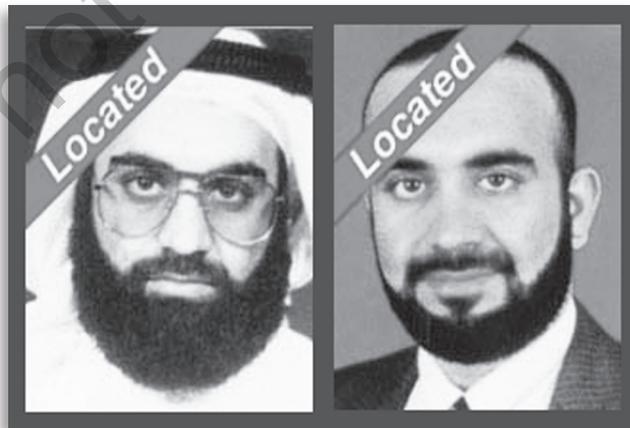
When enemy soldiers are taken prisoner, they are traditionally afforded legal protections as *prisoners of war*. This is well recognized under international law. During the war on terrorism, many suspected terrorists were designated by the United States as *enemy combatants* and were not afforded the same legal status as prisoners of war, and were therefore technically ineligible to receive the right of legal protection. Such practices have been hotly debated among proponents and opponents.

According to the protocols of the third Geneva Convention, prisoners who are designated as prisoners of war and are brought to trial must be afforded the same legal rights in the same courts as soldiers from the country holding them prisoner. Thus, prisoners of war held by the United States would be brought to trial in standard military courts under the Uniform Code of Military Justice and would have the same rights and protections (such as the right to appeal) as all soldiers.

Suspected terrorists have not been designated as prisoners of war. Official and unofficial designations, such as *enemy combatants*, *unlawful combatants*, and *battlefield detainees*, have been used by American authorities to differentiate them from prisoners of war. The rationale is that suspected terrorists are not soldiers fighting for a sovereign nation and are, therefore, not eligible for prisoner-of-war status. When hundreds of prisoners were detained by the United States at facilities

❖ Photo 4.4

Al-Qaeda operative Khalid Sheikh Mohammed, who was interrogated using the waterboarding procedure during captivity in secret locations.



(Photo by FBI/Getty Images)

such as the American base in Guantánamo Bay, Cuba, the United States argued that persons designated as enemy combatants were not subject to the Geneva Conventions. Thus, such individuals could be held indefinitely, detained in secret, transferred at will, and sent to allied countries for more coercive interrogations. Under enemy combatant status, conditions of confinement in Guantánamo Bay included open-air cells with wooden roofs and chain-link walls. In theory, each case was to be reviewed by special military tribunals, and innocent prisoners would be reclassified as non-enemy combatants and released.

Civil liberties and human rights groups disagreed with the special status conferred on prisoners by the labeling system. They argued that basic legal and humanitarian protections should be granted to prisoners regardless of their designation.

The Ker-Frisbie Rule and Extraordinary Renditions

In many ways, the war on terrorism is a “shadow war” that is fought covertly and beyond the attention of the public. It is also a war that employs unconventional tactics and uses resources that were hitherto either uncommon or unacceptable. One unconventional tactic adopted by the United States is known as **extraordinary rendition**, a method of covertly abducting and detaining suspected terrorists or affiliated operatives.

Extraordinary renditions were initially sanctioned during the Reagan administration in about 1987 as a means of capturing drug traffickers, terrorists, and other wanted persons. They involve an uncomplicated procedure: Find suspects anywhere in the world, seize them, transport them to the United States, and force their appearance before a state or federal court. Such compulsory appearances before U.S. courts (after forcible abductions) have long been accepted as procedurally valid and as not violating one’s constitutional rights. The doctrine that permits these abductions and appearances is an old one, and it has come to be known as the **Ker-Frisbie Rule**.⁴

This practice was significantly expanded after the September 11 terrorist attacks. It became highly controversial because, unlike previous renditions in which suspects were seized and brought into the U.S. legal system, most anti-terrorist abductions placed suspects in covert detention. Many abductions have been carried out by Central Intelligence Agency (CIA) operatives, who transported a number of abductees to allied countries for interrogation. The CIA also established secret detention facilities and maintained custody of suspects for extended periods of time.⁵

Allegations have arisen and findings have been made that these suspects were tortured.

Western governments such as Italy, Sweden, and Germany launched investigations into alleged CIA-coordinated extraordinary renditions from their countries. In June 2005, Italy went so far as to order the arrests of 13 alleged CIA operatives for kidnapping an Egyptian cleric from the streets of Milan.⁶

❖ Case in Point: The Torture Debate

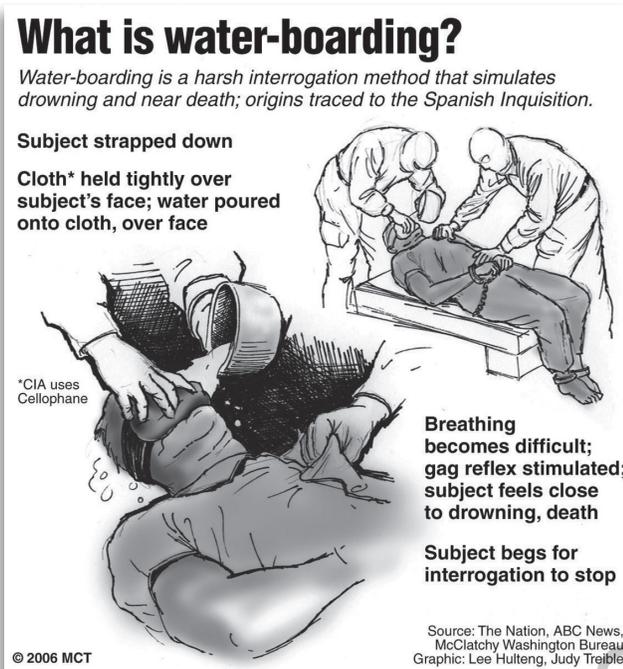
Few counterterrorist methods garner such passionate debate as the infliction of physical and psychological pressure on terrorist suspects. The United States joined the debate in the aftermath of the invasion of Iraq. From October through December 2003, Iraqi

.....
extraordinary rendition A method of covertly abducting and detaining suspected terrorists or affiliated operatives.

Ker-Frisbie Rule A doctrine that permits coercive abductions and appearances before U.S. judicial authorities, named after two cases permitting such abductions and appearances.

❖ Photo 4.5

A depiction of the waterboarding procedure. So-designated "enhanced interrogation" methods have been both condemned as unethical torture, and supported as a hard necessity in the war on terror.



(The Nation, ABC News, McClatchy Washington Bureau)

detainees held at the U.S.-controlled Abu Ghraib prison near Baghdad were abused by American guards. The abuse included sexual degradation, intimidation with dogs, stripping prisoners naked, forcing them into human pyramids, and making them stand in extended poses in so-called stress positions. The U.S. Congress and global community became aware of these practices in April 2004 when graphic photographs were published in the media, posted on the Internet, and eventually shown to Congress. Criminal courts-martial were convened, and several guards were convicted and sentenced to prison.

Unfortunately for the United States, not only was its image tarnished, but further revelations about additional incidents raised serious questions about these and other practices. For example, in March 2005, U.S. Army and Navy investigators reported that 26 prisoners in American custody had possibly been the victims of homicide. Furthermore, detainees incarcerated in detention centers at the Guantánamo Bay Naval Base were reported to have been regularly subjected to intensive physical and psychological interrogation techniques.

.....
enhanced interrogation Physical and psychological stress methods used during the questioning of suspects.

A debate about the definition and propriety of torture ensued. The debate included questions of how to draw definitional lines between so-called "**enhanced interrogation**" methods and torture.

Torture is a practice that is officially eschewed by the United States, both morally and as a legitimate interrogation technique. Morally, such practices are officially held to be inhumane and unacceptable. As an interrogation method, American officials have long argued that torture produces bad intelligence because victims are likely to admit whatever the interrogator wishes to hear. However, during the war on terrorism, a fresh debate began about how to define torture and whether physical and psychological stress methods that fall outside of this definition are acceptable.

Assuming that the application of coercion is justifiable to some degree to break the resistance of a suspect, the question becomes whether physical and extreme psychological coercion is also justifiable. For instance, do the following techniques constitute torture?

- Waterboarding, in which prisoners believe that they will drown
- Sexual degradation, whereby prisoners are humiliated by being stripped or being forced to perform sex acts

- Stress positions, whereby prisoners are forced to pose in painful positions for extended periods
- Creating a chronic state of fear
- Environmental stress, accomplished by adjusting a detention cell's temperature
- Sleep deprivation
- Inducing disorientation about one's whereabouts or the time of day
- Sensory deprivation, such as depriving suspects of sound or light

When images such as those from Abu Ghraib became public, the political consequences were serious. Nevertheless, policymakers continued their debate on which practices constitute torture and whether some circumstances warrant the imposition of as much stress as possible on suspects—up to the brink of torture. In May 2008, the U.S. Department of Justice's inspector general released an extensive report that revealed that FBI agents had complained repeatedly since 2002 about harsh interrogations conducted by military and CIA interrogators.

Global Perspective: Wrongful Prosecution in the United Kingdom

This chapter's Global Perspective discusses prosecutions and police investigations in the United Kingdom during an Irish Republican Army bombing campaign. Two examples of miscarriages of criminal justice are presented.

GLOBAL PERSPECTIVE: Wrongful Prosecution in the United Kingdom

In the United Kingdom, where factions of the Irish Republican Army were highly active in London and other cities, the British police were considered to be the front line against IRA terrorism. They usually displayed a high degree of professionalism without resorting to repressive tactics and consequently enjoyed widespread popular support. For example, London's Metropolitan Police (also known as "The Met") became experts in counterterrorist operations when the Irish Republican Army waged a terrorist campaign during the 1970s.

The Met's criminal investigations bureau generally used high-quality detective work, rather than authoritarian techniques, to investigate terrorist incidents. The British criminal

justice system also generally protected the rights of the accused during trials of IRA suspects. However, in the rush to stop the IRA's terrorist campaign (especially during the 1970s), miscarriages of criminal justice did occur. Examples of these miscarriages include the following examples:

- **Guildford Four.** Four people were wrongfully convicted of an October 1974 bombing in Guildford, England. Two of them were also wrongfully sentenced for a bombing attack in Woolwich. The Guildford Four served 15 years in prison before being released in 1989, when their convictions were overturned on

(Continued)

(Continued)

appeal. The group received a formal apology from Prime Minister Tony Blair in June 2000 and received monetary awards as compensation. The case was made famous by the American film *In the Name of the Father*.

- **Birmingham Six.** Six men were convicted for the November 1974 bombings of

two pubs in Birmingham, England, that killed 21 people and injured 168. On appeal, the court ordered the release of the Birmingham Six after it ruled that the police had used fabricated evidence. The men were released in 1991 after serving 16 years in prison.

Chapter Summary

This chapter introduced some of the challenges inherent in the balancing of civil liberties considerations with domestic security necessities. Historical precedents indicate that the debate on this issue is as old as the nation. Several historical eras were confronted with the question of how far the nation should go to ensure domestic security. In this regard, questions arise about whether policies deemed acceptable and appropriate at a particular time were actually, in retrospect, violations of principles of civil liberty. Modern counterterrorist practices such as extraordinary renditions and enhanced interrogation epitomize this tension.

There is often a natural tension between preserving human rights and

securing the homeland. This tension is reflected in political and philosophical debates about how to accomplish both goals. Nevertheless, during historical periods when threats to national security existed, sweeping measures were undertaken as a matter of perceived necessity. The implementation of these measures was often politically popular at the time but questioned in later years. The modern homeland security environment exists because of the attacks of September 11, 2001, which resulted in the creation of extensive bureaucracies, the passage of new security-related laws, and the implementation of controversial counterterrorist measures.

Discussion Box

Civil Liberty Protections and the “Ticking Bomb” Scenario

This chapter’s Discussion Box is intended to stimulate critical debate

about how to balance civil liberty protections against the need to respond to an immediate homeland security threat.

It can be argued that civil liberty considerations are largely a moral debate about norms of justice in civil society—in other words, whether a just society should suspend its norms of justice when challenged by real and imminent danger from violent extremists.

Consider the following scenario: A terrorist cell has been active in several cities in the upper Midwest region of the United States. They have carried out numerous bombings and acts of sabotage, including a hostage crisis at a school that left dozens of dead and injured. There is every expectation that the cell will continue its campaign. Law enforcement officials have captured a member of the cell in an apartment apparently used as a “bomb factory,” and it is evident that the suspect is a master bomb maker. The suspect refuses to reveal any information about his comrades, where completed bombs may have been sent, or where

the next intended targets will be attacked. Lives are clearly at stake, and time is of the essence.

Discussion Questions

1. Which interrogation techniques are acceptable in this situation from a homeland security perspective?
2. Which interrogation techniques are *not* acceptable in this situation from a civil liberties perspective?
3. Considering the ruthlessness of the terrorists, should martial law be declared in the upper Midwest? What are the civil liberties consequences of doing so? What are the homeland security consequences of *not* doing so?
4. Should the captured suspect be afforded due process protections under the law?
5. Who should have primary custody and jurisdiction over the suspect?

Key Terms and Concepts

The following topics were discussed in this chapter and can be found in the glossary:

- Alien and Sedition Acts
- Carnivore
- Civil Liberties Act
- criminal profiles
- DCS-1000
- enhanced interrogation
- extraordinary renditions
- Ker-Frisbie Rule
- McCarthyism
- Palmer Raids
- PRISM
- racial profiling
- Red Scares
- Snowden, Edward
- Tempora
- terrorist profile
- XKeyscore

On Your Own

The open-access Student Study Site at <http://study.sagepub.com/martinhs2e> has a variety of useful study aids, including eFlashcards, video and web resources, and journal articles. The websites, exercises, and recommended readings listed below are easily accessed on this site as well.

Recommended Websites

The following websites provide perspectives on civil liberties and human rights issues and interventions:

American Civil Liberties Union: www.aclu.org/national-security

Amnesty International: www.amnesty.org

DHS Office of Civil Rights and Civil Liberties: www.dhs.gov/office-civil-rights-and-civil-liberties

Doctors of the World: www.doctorsoftheworld.org

Electronic Privacy Information Center: epic.org

Gendercide Watch: www.gendercide.org

Human Rights Watch: www.hrw.org

Médecins Sans Frontières: www.doctorswithoutborders.org

Web Exercise

Using this chapter's recommended websites, conduct an online investigation of the civil liberty and homeland security debate. Compare and contrast each side of the debate.

1. What are the primary issues at the center of the debate?
2. How would you describe the differences between those who question homeland security policies and those who believe they are absolutely necessary?
3. In your opinion, are any of these positions more persuasive than others? Less persuasive?

To conduct an online search on research and monitoring organizations, activate the search engine on your Web browser and enter the following keywords:

“Homeland security and civil liberty”

“Homeland security and human rights”

Recommended Readings

The following publications provide discussion on homeland security and civil liberties issues:

- Begg, Moazzam and Victoria Brittain. 2006. *Enemy Combatant: My Imprisonment at Guantánamo, Bagram, and Kandabar*. New York: New Press.
- Crank, John P. and Patricia E. Gregor. 2005. *Counter-Terrorism After 9/11: Justice, Security and Ethics Reconsidered*. New York: Anderson.
- Daalder, Ivo H., ed. 2007. *Beyond Preemption: Force and Legitimacy in a Changing World*. Washington, DC: Brookings Institution Press.
- Ginbar, V. 2008. *Why Not Torture Terrorists? Oxford*, UK: Oxford University Press.
- Grey, Stephen. 2006. *Ghost Plane: The Inside Story of the CIA's Secret Rendition Programme*. New York: St. Martin's.
- Heymann, Phillip B. and Juliette N. Kayyem. 2005. *Protecting Liberty in an Age of Terror*. Cambridge, MA: MIT Press.
- Schawb, Stephen Irving Max. 2009. *Guantánamo, USA: The Untold History of America's Cuban Outpost*. Lawrence: University Press of Kansas.
- Tsang, Steve. 2007. *Intelligence and Human Rights in the Era of Global Terrorism*. Westport, CT: Praeger Security International.
- Wilson, Richard Ashby, ed. 2005. *Human Rights in the War on Terror*. New York: Cambridge University Press.
- Worthington, Andy. 2007. *The Guantánamo Files*. Ann Arbor, MI: Pluto Press.

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