After the terrorist attacks of September 11, 2001, law enforcement officials and lawmakers instituted many new laws and policies. The president, Congress, the U.S. attorney general, the FBI, the CIA, the Department of Homeland Security, and even local police have become involved in the war on terrorism.

Civil liberties groups and others have challenged some of these laws and executive actions, saying they unnecessarily restrict individual rights at a time when the country is not really at war. Proponents of antiterrorism measures say that protective measures are justified. They claim the danger to the United States from terrorism is even worse than during a declared war because this conflict knows no borders and involves enemy combatants who are not accountable to any nation. As part of the ongoing war on terrorism, the president, as Commander in Chief, has claimed very broad powers under the Constitution. Civil liberties groups counter that the president must still obey the law.

The Pentagon was one target of the terrorist attacks of September 11, 2001.
The Law in Times of War

The horrific events of September 11, 2001, shook American society to its core. The attacks on the World Trade Center and the Pentagon were the largest on U.S. soil since World War II. In response to the feeling of vulnerability following the attacks, Congress passed new federal laws and made changes to existing laws.

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

The expanded powers allowed by the USA Patriot Act raised key questions for Americans: Do these measures infringe on the rights of citizens? How much freedom and privacy should be given up in order to be more secure?

In past times of crisis, the U.S. government has taken away some of the rights of citizens, and courts have upheld some of these measures. During the Civil War, for example, President Lincoln suspended the right of prisoners to seek the protection of habeas corpus, a legal means by which prisoners can challenge the constitutionality of their imprisonment in court. During World War I, the federal government restricted citizens’ rights to criticize U.S. involvement in the war, either verbally or in writing. During World War II, the government removed more than 100,000 people of Japanese heritage, most of whom were U.S. citizens, from their homes and detained them in camps. Much of their personal property, including homes and businesses, was never returned to them. In 1988 the U.S. government formally apologized for the detention of Japanese Americans, and Congress approved a reparations payment for surviving detainees.
Problem 17.1

a. Is today’s war on terrorism similar to other wars when people’s rights have been restricted? How is it the same? How is it different?

b. Assume you were the U.S. president after the September 11, 2001, attacks. What special powers would you want? Give your reasons.

c. Assume you were the leader of a civil liberties organization. What freedoms would you fight hardest to protect? Give your reasons.

d. William Rehnquist, former chief justice of the United States, once wrote: “The laws will thus not be silent in time of war, but they will speak with a somewhat different voice.” What does this mean?

Surveillance and Searches

Since September 11, 2001, the U.S. government has had more power to conduct surveillance against everyone. This is due in part to the USA Patriot Act, which was passed by Congress as a response to the September 11 terrorist attacks. It expanded the authority of law enforcement agencies in order to combat terrorism in the United States and abroad. One aspect of the act allows the government greater authority in tracking and intercepting communications.

The USA Patriot Act enables law enforcement officials to call on a special court known as the Foreign Intelligence Surveillance Act (FISA) Court, whose records and rulings are kept completely secret, to authorize wiretaps to identify terrorists. This court was originally established in 1978 to authorize surveillance to gather foreign intelligence, not to gather evidence for domestic criminal trials. For that reason, this court is not required by law to obey the rules that ordinary courts must observe to protect the rights of individuals. For example, the FISA Court can approve wiretaps to monitor an individual’s telephone and Internet communications, even if the government has not shown that there is probable cause to believe the individual is involved in criminal activity.

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

Even though the Patriot Act makes it easier to use FISA, the executive branch of government conducted some wiretaps without first securing a warrant from the FISA Court. Some members of Congress and of the public have criticized these actions, while the executive branch has defended them as necessary to prevent another terrorist attack.
Problem 17.2

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

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

b. Using the same scale, take a stand on each of the following statements. In each case, assume that Congress has proposed laws giving the federal government the power to take the following actions:

• Look at everyone’s e-mail at work.
• Look at everyone’s e-mail at home.
• Install surveillance cameras on all public streets.
• Plant small cameras in the homes of suspected terrorists.
• Monitor everyone’s library records.
• Check the travel records of people coming into the country.

In 2007 Congress passed the Protect America Act, which further broadened the government’s powers to listen in on telephone conversations, read e-mails, monitor financial transactions, and intercept faxes. Under this law, a warrant was not required from the FISA Court as long as one person was reasonably believed to be outside the United States and might possess foreign intelligence information. This law also gave the government broader power to obtain phone records from telecommunications companies. The Bush administration justified the law on the grounds of national security and the need to find and arrest terrorists before they could cause great harm. Some criticized the law for removing judicial oversight and leaving innocent people in the United States subject to invasions of their privacy.
Problem 17.3

Ed stays in touch by making calls and sending e-mails and faxes on a regular basis to his friend Abdul in Syria. The two met years earlier at a seminar in Europe about international relations. They talk about U.S. foreign policy, and both criticize the U.S. war in Iraq. At one point Ed wires Abdul some money because his family is going through a difficult time financially.

The U.S. government listens in to the calls, reads the e-mails and faxes, and obtains a copy of a financial statement Ed’s bank sends him. They also contact Ed’s phone company and obtain his phone records showing many calls to Abdul’s number in Syria. The government also has evidence that Abdul’s brother has been involved in plotting a bombing in Iraq. The government then arrests Ed for “aiding and abetting a terrorist.”

a. Can the government take these actions without obtaining a search warrant from either a regular U.S. court or the FISA Court? What are the arguments for and against allowing the government to do this?

b. Does the government have enough evidence to arrest Ed?

c. Would your answer to (a) and (b) change if, before arresting Ed, the government had received information from its intelligence officers that Abdul had been attending meetings of terrorist groups in Syria? Explain your answer.

Detention, Interrogations, and Torture

Since the terrorist attacks of September 11, 2001, tens of thousands of foreigners living in the United States—many of them Arabs and Muslims—have been called in for fingerprinting, photographing, and special registration. Several thousand have also been interviewed by the FBI. The government claims this is necessary to deter terrorism. Critics say it constitutes harassment against specific groups and point out that it has not resulted in any terrorism convictions, although a number of these individuals were charged with other offenses such as immigration law violations.

Torture has long been outlawed in the United States, and confessions secured by torture have not been allowed as evidence at trials in this country. Torture is also outlawed by the Geneva Conventions—the international treaties that establish the rules of war—which have been signed by the United States. After the terrorist attacks of September 11, 2001, the U.S. government held and interrogated many prisoners captured in Afghanistan and later in Iraq. The government took the position that the Geneva Conventions did not apply to these
Problem 17.4

Achmed, 26, is a university student from a country in the Middle East. He is in the United States on a student visa. He goes to his state’s motor vehicle administration office to renew his driver’s license. Since the September 11, 2001, attacks, federal law enforcement officials have been stationed around this facility to help gather information on possible terrorists. Achmed is pulled out of line and questioned about when and why he entered the United States. His answers sound suspicious to the officers, and they decide to detain him while they investigate his background further. He is not allowed to talk to anyone outside the detention facility, including his family or a lawyer. He is held for four months and then is released without having been charged with a crime.

a. If you were a government official charged with locating possible terrorists, what reasons would you give for detaining Achmed?

b. Should the government be allowed to detain people for these reasons?

c. Were Achmed’s rights violated? If so, how?

prisoners or detainees as this was not “a war against a country” but a war against the Taliban and al-Qaeda, terrorist groups within those countries. The government’s position was rejected by the U.S. Supreme Court in the case of \textit{Hamdan v. Rumsfeld} in 2006, where the Court held that the Geneva Conventions did apply.

In addition to the Geneva Conventions, the United States has signed the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The \textit{Detainee Treatment Act}, passed by Congress in 2005, imposes severe penalties for torture. It requires that “no person in the custody or under the physical control of the U.S. government, regardless of nationality or physical location, shall be subject to torture or cruel, inhuman, or degrading treatment or punishment.”

Exactly what constitutes torture, as opposed to “aggressive questioning” or “enhanced interrogation,” has been a point of disagreement since the terrorist attacks of 2001. Many people captured by U.S. troops in Afghanistan and Iraq have been subject to aggressive questioning, some of which has been criticized as torture.

After photographs were uncovered showing apparent acts of torture, some U.S. soldiers who served as guards in the Abu Ghraib prison in Iraq were convicted of serious crimes and sent to jail. For the most part, senior officers were not prosecuted.

Some Iraqis who have been detained for interrogation by U.S. troops in Iraq have experienced hostile treatment. Why did the U.S. government claim that the Geneva Conventions of War did not apply to prisoners captured in Afghanistan and Iraq?
Many prisoners were also allegedly subject to “aggressive questioning,” or torture, at the U.S. military prison in Guantanamo Bay, Cuba, where hundreds of detainees were held. Guantanamo is the site of a U.S. naval installation, and this property is leased from the Cuban government on a long-term basis.Arguing that this was not part of the United States, the government took the position that U.S. laws and international treaties did not apply there. Some prisoners were held for as long as five years with little or no access to a lawyer and no way to challenge the legality of their detention.

Problem 17.5

Torture is defined under the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment as an act by a government official that inflicts pain or suffering, physical or mental, for particular reasons, including obtaining information. In recent years some government lawyers have proposed an alternative definition of torture as “any act that gives rise to pain that would ordinarily be associated with a sufficiently serious physical condition or injury such as death, organ failure or serious impediment of bodily functions.”

a. Apply the two definitions of torture outlined above to the following situations and decide if the act constitutes torture.
   - loud music played continuously for four hours
   - hoisting the person and then questioning
   - using water to simulate drowning (also called “water boarding”)
   - yelling at the person for one hour
   - hanging the person from the ceiling upside down
   - keeping the person in total darkness for 24 hours
   - keeping the person naked in a small cage

b. Is there a significant difference between these two definitions of torture?

c. Yee, a suspected terrorist, is arrested by the FBI. The government has information that he knows where a car bomb is scheduled to go off in two hours in a crowded area of a large city. The FBI interrogates Yee to find out the location of the car bomb and to prevent possible deaths. Are there any limits on the techniques the government can use to obtain this information? If so, what are those limits?

Many people captured in Afghanistan and Iraq have been designated as “unlawful enemy combatants” and imprisoned at the U.S. naval base at Guantanamo Bay, Cuba. The U.S. government took the position that many of these people had direct ties to terrorist organizations and that they could be held until the end of the war on terror. In addition to the issue of torture, the continued detention of these individuals raised the question of whether they were entitled to some process for determining whether they were in fact unlawful enemy combatants.
In general, the government has taken the position that the Guantanamo Bay detention is the equivalent of holding prisoners of war on or near a battlefield, and if there is any process for determining the legitimacy of imprisoning these people, it is for the military to establish. The government contends that it is inappropriate for the detainees to have access to the U.S. legal system to review the legality of their detention according to the due process of law. An additional argument against allowing the detainees access to the court system is that a trial or hearing might result in certain sensitive information becoming public.

In 2006, Congress passed the *Military Commissions Act*, which provides a process, conducted by the military, for determining the status of enemy combatants. The law also denies detainees judicial review of their status.

Lawyers for the detainees filed a suit in federal court asking that judges in federal courts be able to review the status of enemy combatants. Article I of the U.S. Constitution says that the writ of habeas corpus, which allows a judge to determine whether a person is being unlawfully detained by the government, may be suspended only “when in cases of rebellion or invasion the public safety may require it.” Those who believed that the *Military Commissions Act* violated the Constitution thought that upholding the law would make Guantanamo a legal “black hole,” meaning a place without law. Others believed it improper for the judicial branch to interfere with the government’s conduct of the war and that the act gave the detainees adequate protection, particularly in a setting outside the United States. In 2008 the Supreme Court ruled in a 5-to-4 decision that the established military procedures did not give the Guantanamo Bay detainees a meaningful opportunity to challenge their detention in federal courts and that they did have a right to habeas corpus.