Index

abusive treatment see ill-treatment
Ackerman, B. 308
Acosta Arcarazo, D. 86
Addo, M. 224
Al Qaeda
  conflict as non-international armed conflict 307, 308, 309
  sanctions committee 33, 39–40, 41–2, 44, 47–8, 49
Alvarez, J. 85
Amar, A. 270
Anderson, D. 54, 66, 67, 70, 74, 91
Anderson, K. 309–10
Arendt, H. 94, 298
Army Field Manual on Interrogations 248–9, 255
Arnold, R. 330
ASEAN Convention on Counter-Terrorism 86
asset freezing 57, 63, 66, 67, 70, 74–5, 160
see also sanctions
asylum seekers
  asylum right of terrorist suspects 215–20
  EU Asylum Procedures Directive 217
  inhuman or degrading treatment 217, 218
  non-refoulement (non-return) rule 221, 222–4
  see also refugees
Austin, J. 80
Australia, Independent National Security Legislation Monitor (INSLM) 71
Authorization for Use of Military Force (AUMF) conditions 238, 239, 244, 249, 250–51, 253
Avbelj, M. 40
Avigad, D. 298
Azmy, B. 254
Baker, C. 165
Banks, W. 153
Barak-Erez, D. 330
Barron, D. 191
Bassok, O. 283–304, 324
Bennett, W. 238
Benvenisti, E. 329
Berman, H. 81
Bernhardt, R. 18
Beyrinin, U. 82
Bigo, D. 149
Bivens question 205
black flag test 287–8
see also legality of military operations
blacklists 147, 160–62, 326
Blank, L. 312, 314, 321
Blum, G. 289, 293, 310
Bohrer, Z. 285
Boister, N. 82
Bojin, L. 226
Borch, F. 283
Boyron, S. 213
Brand, J. 114, 118
Burch Elias, S. 159
Burke-White, W. 120
Burnett, C. 200, 207, 266
Cahill, J. 88
Calabresi, S. 116
Calliess, G. 81, 83
Cameron, I. 20, 66, 72
Canada
  Abdelrazik v. Canada (Minister of Foreign Affairs) 336
  Canada (Justice) v. Khadr 122
extra-territorial scope of constitutional Charter of Rights 121–2, 123
information technology usage 108–9
R. v. Hape 121–2
R. v. Tessling 108–9
R. v. Tse 116–18
“reasonable” searches and accountability 116–19
“special advocates” 158
Cannizzaro, E. 56
Carrera, S. 174
cellphone search 182, 183
Chesney, R. 247, 251, 311, 319–20, 321
children, abuse prevention 223
Chong, J. 240
Choudhry, S. 87
Chrisafis, A. 178
civil prosecutions 73, 192–3, 211, 253, 257–8, 312
CJEU (Court of Justice of the European Union) see EU, CJEU cases
Cleveland, S. 196, 206, 236, 247
‘closed material proceedings’ (CMP) 64–5, 73, 76
coercive tactics 166, 167–8, 201–2, 240, 249, 253, 255, 256
Cohen, A. 296, 297, 302, 303
Cohen, S. 90–91
Colangelo, A. 234
Cole, D. 123, 141, 148, 169–88, 197, 214, 275, 324
Condon, J. 256
Constitution, US see US Constitution
headings
constitutional rights, extra-territorial obligations of European states 213–14
constitutional-democratic states, domestic intelligence surveillance 148–51, 152–4, 162, 163–5, 167
constitutionalism, substantive see substantive constitutionalism
Conte, A. 55, 71
Convention Against Torture 165, 246–7
see also torture
Cooper, K. 52–77, 94, 324
 Cotterell, R. 81
counter-terrorism financial sanctions regimes see legal reform of counter-terrorism financial sanctions regimes in EU transnational law see transnational counter-terrorism law dynamics
Cox, S. 234
Craig, A. 296, 297, 299, 304
Cremona, M. 23
criminal law evidence dilemma, material support as crime 157
intelligence-gathering, war-model versus crime-model 146–7, 148–9, 153–4
International Criminal Court (ICC) Statute 286
ship-based detention, criminal justice system protection 241–2, 255–7 and terrorist attacks 307–8, 311, 312
cross-border shootings 197–9
Curtin, D. 151–2
Cuyvers, A. 66
Da Costa, K. 162
Darnstädt, T. 169
Daskal, J. 158, 191–212, 229, 238, 239, 250, 312, 317, 319, 324
data protection ECHR protection 177–8
EU Data Protection Directive, EU 172, 173, 174
PATRIOT Act and telephonic metadata program 101–2, 103, 113, 114–15
reciprocal privacy 172–3, 182, 183
screening procedures for personalized data 166
telephone data collection 107–8, 182, 183
third party disclosure 103, 119–20
transnational counter-terrorism law dynamics 86–7
see also information disclosure; privacy
David, T. 73
Index

Davis, F. 86, 93
De Búrca, G. 44, 56, 57, 94, 332
De Hert, P. 49
De Londras, F. 93
De Wet, E. 31, 35–51, 79, 324, 326–7, 332–4
death penalty cases 201–2
Deeks, A. 205
Demarest, G. 165
deportation, rights of terrorist suspects 220–27
De Rosa, M. 247
detention
combatant detention in international armed conflicts 307, 312
habeas corpus see habeas corpus judicial review 316–18, 318–19
preventive detention 159–60
ship-based see ship-based detention and extra-territorial application of US constitutional rights
targeted killing and detention operations abroad 207–12
Dickson, B. 206, 213–32, 324
Dinstein, Y. 285, 286, 287, 288, 290, 304
disaggregation problem 89–90
disclosure of information see information disclosure
Donohue, L. 87, 114, 119, 149
Dotan, Y. 290
Dotson Zimdahl, S. 116
Douglas, L. 80
Downs, G. 329
dragnet surveillance 171, 174, 178, 183
driftnet surveillance 162–3, 166
dual character of First Amendment (structural–individual rights distinction) 270–72
dualist approach (EU implementing measures as distinct from legality of UN resolution) 56–7, 61, 63, 69, 70–74
Dublin III Regulation, EU 217–18
due process rights
legal reform of counter-terrorism financial sanctions regimes in EU 58–9, 63, 64, 66, 68, 72
ship-based detention and US Constitution’s Due Process Clause 250, 251, 254–5, 256, 257
transnational seizures and US Fifth Amendment due process rights 191, 192–3, 197, 198, 199–200, 206
Dupuy, P. 36

ECHR see European Convention on Human Rights
Eckes, C. 66
ECtHR see European Court of Human Rights
Ejima, A. 125–45, 324, 325
electronic surveillance 105–15, 119–20
see also surveillance
Ellmann, S. 305–22, 324
enforcement processes, transnational counter-terrorism law dynamics 84–90
Escudé, C. 66
EU
Asylum Procedures Directive 217
counter-terrorism financial sanctions regimes see legal reform of counter-terrorism financial sanctions regimes in EU
Data Protection Directive 172, 173, 174
Dublin III Regulation 217–18
EU-US Passenger Name Records (PNR) agreement 188
EU-US Safe Harbor Agreement invalidation 170, 187
EU-US Terrorist Finance Tracking program 188
‘Eurodac’ Regulation and sharing of asylum seekers’ fingerprints 217
extra-territorial obligations see extra-territorial obligations of European states

Federico Fabbrini and Vicki C. Jackson - 9781784715397
Downloaded from Elgar Online at 12/25/2018 01:32:55PM
via free access
privacy protections see reciprocal privacy, European privacy protections
Qualification Directive 217, 218
Reception Conditions Directive 217
regional counter-terrorism law adoption 86
Third Anti-Money Laundering Directive 89
EU, CJEU cases
Commission v. Germany 174
Digital Rights Ireland 174, 336
European Parliament v. Council of the EU 69
Kadi I 3, 21–5, 38–9, 40–41, 42, 47, 50, 55, 61, 93–4, 161, 327–8, 332
Kadi II 26–8, 39, 40, 41–2, 43–4, 47, 50, 58–9, 60, 61–2, 63, 64, 68, 161, 332, 335
Les Verts 3
Melli Bank v. Council 42
Mohamed El Morabit v. Council 43
NS and ME Joined Cases 217–18
Österreichischer Rundfunk 174
People’s Mojahedin Organization of Iran v. Council of the European Union 62, 67, 68
R, Aden and others v. Council and Commission 67
Schrëms 170, 187
Sison v. Council of the European Union 63, 68
Society for the Protection of Unborn Children v. Grogan 223
Stitching Al-Aqsa v. Council 67, 68
ZZ v. Secretary of State for the Home Department 64, 150
EU, CJEU practice
judicial favoring of human rights over United Nations Security Council sanctions 38–45
legal reform of counter-terrorism financial sanctions regimes 55–65
role 327–9, 332–6
Rules of Procedure of the General Court proposals 64–5

European Convention on Human Rights (ECHR)
extra-territorial obligations of European states 218–19, 225, 226, 227–8
reciprocal privacy 174–7
European Court of Human Rights (ECHR) 328–9
extrajudicial detention 245–6
“margin of appreciation” doctrine 175
minimum criminal procedure protections 165
and non-refoulement 222–4
relativist approach 226–7
role 327–9, 332–6
European Court of Human Rights (ECHR), cases
A v. United Kingdom 59
Aksoy v. Turkey 246
Al-Dulimi & Montana Management v. Switzerland 48–9, 50, 61, 161, 328, 334–5
Al-Jedda v. United Kingdom 45, 47, 333, 334
Al-Nashiri v. Poland 336
Al-Skeini v. United Kingdom 121, 154, 176, 206, 227–30, 336
Babar Ahmad v. United Kingdom 224
Bankovic v. Belgium 176, 206, 227–8, 333
Behrami and Behrami v. France 327–8, 332–3
Bosphorus v. Ireland 3, 49, 334–5
Brogan v. United Kingdom 246
Chahal v. United Kingdom 42, 222, 224–5
Copland v. United Kingdom 175
Cyprus v. Turkey 228
E v. United Kingdom 223
El-Masri v. the Former Yugoslav Republic of Macedonia 336
Finogenov v. Russia 222–3
Hassan v. United Kingdom 230, 336
Jaloud v. the Netherlands 336
Index

Jones v. United Kingdom 227
Klass v. Germany 174
Liberty v. United Kingdom 177
McKay v. United Kingdom 246, 250
Malone v. United Kingdom 175
Marper v. United Kingdom 175
MSS v. Belgium and Greece 218
Müslim v. Turkey 225
NA v. United Kingdom 218–19
Nada v. Switzerland 30–31, 45–7, 50, 61, 72, 326–7, 332, 333–4
Open Door Counselling and Dublin Well Woman Centre v. Ireland 223
Othman v. United Kingdom 226
Rotaru v. Romania 175
Saadi v. Italy 222, 225
Saramati v. France, Germany and Norway 328, 332–3
Shamayeva v. Georgia and Russia 225
Sharifi v. Italy and Greece 218
Soering v. United Kingdom 222
Sufi and Elmi v. United Kingdom 219
Uzun v. Germany 175
Weber and Saravia v. Germany 118–19, 175, 177
evidence dilemma in global anti-terror campaign 146–68, 324–5
asset freezing 160
blacklists 147, 160–62, 326
coercive tactics 166, 167–8
designation of organization as “terrorist” 157–8
domestic intelligence surveillance in constitutional-democratic states 148–51, 152–4, 162, 163–5, 167
domestic police regulation comparison 148–50, 152–3, 164–5
drift-net surveillance 162–3, 166
evidence acquired by illegal means and torture 164, 165, 166, 167–8
evidence problems 148–55
individuals, concerns over focus on 148, 149, 151, 152–4, 155, 160–62, 164, 165, 166, 167
intelligence agencies in non-democratic and/or non-constitutional states 152, 154, 163–4, 167
intelligence services regulation 148–55, 163–4
intelligence-gathering, war-model versus crime-model 146–7, 148–9, 153–4
labelling requirement, need for 166
legal reform, need for 165–8
material support as crime 157
military commissions instead of civilian courts 158
new terrorism offenses, vagueness concerns 155–8
novel courts and trial rules 158–9
originator control principle 151
precrimes comparison 156–7
preventive detention 159–60
right to remain silent 164
screening procedures for personalized data 166
secretly sourced evidence in legal proceedings, concerns over use 150–51
“special advocates” 158
threatening behaviour towards individuals 166
UN Security Council “1267 sanctions” lists 160–61
evidence use in judicial review 43–4
excessive force, use of 197–9, 208
see also ill-treatment
extra-territorial application of US Constitution 260–80
application zones 275–9
Bill of Rights overview and constitutional protection 262–6, 273, 276
dual character of First Amendment (structural–individual rights distinction) 270–72
extending constitutional rights abroad 262–74
Fifth Amendment 191, 192–3, 197, 198, 199–200, 206
First Amendment 260–80
Foreign Terrorist Organization (FTO) list 279

Federico Fabbrini and Vicki C. Jackson - 9781784715397
Downloaded from Elgar Online at 12/25/2018 01:32:55PM via free access
Constitutionalism across borders in the struggle against terrorism

Fourth Amendment 103–11, 119–20, 122, 123, 179–81, 194–5, 197–9, 202–4, 206–8, 211
“impracticable and anomalous” standard 276–7
Insular Cases 262–6, 275
nonresident aliens 266, 268, 272–5
preservation of or non-interference with local culture, concerns over 277–8
resolving tension in favor of 270–72
ship-based detention see ship-based detention and extra-territorial application of US constitutional rights
sovereignty issues 276–8
Suspension Clause 192, 196, 197, 236–7, 266, 272, 278, 314, 317
Third Restatement of Foreign Relations Law 275
Uniformity Clause 262–3
unreasonable searches and seizures see US constitutional protection against unreasonable searches and seizures
extra-territorial obligations of European states 213–32
Asylum Procedures Directive 217
asylum right of terrorist suspects 215–20
Common European Asylum System 216–17
constitutional rights and obligations 213–14
Dublin III Regulation 217–18
‘Eurodac’ Regulation and sharing of asylum seekers’ fingerprints 217
European Convention on Human Rights (ECHR) 218–19, 225, 226, 227–8
European Court of Human Rights (ECtHR) 222–4
European Court of Human Rights (ECtHR) relativist approach 226–7
inhuman or degrading treatment of asylum seekers 217, 218
international human rights law (IHRL) 214, 226–7, 228, 229–30
Memoranda of Understanding (diplomatic assurances) 224–7
prevention of abuse of children 223
Qualification Directive 217, 218
Reception Conditions Directive 217
Refugee Convention 218, 219–21, 222–3
right to free speech or right to freedom of association 223
rights of terrorist suspects not to be deported, extradited or subjected to sanctions 220–27
risk of being subjected to ill-treatment 222–4, 225–7
rule of non-refoulement (non-return) for asylum seekers 221, 222–4
security forces engaged in counter-terrorism operations abroad 227–30
‘third country nationals’ exclusion from refugee status 218
UN Convention Relating to the Status of Refugees limitations 215–16, 221
extradition rights of terrorist suspects 220–27
see also sanctions

Federico Fabbrini and Vicki C. Jackson - 9781784715397
Downloaded from Elgar Online at 12/25/2018 01:32:55PM
via free access
Index

Foreign Terrorist Organization (FTO) list 279
Foucault, M. 90
Fowler, S. 114, 119
France
data privacy protection 178
special procedural and evidentiary rules for national security cases 158
Fraser, N. 94–5
free speech, right to 223
FREEDOM Act, USA 119
Frowein, J. 18
fundamental rights tradition, transnational seizures 200–202, 204
future reform potential, EU 65–76
future research, transnational counter-terrorism law dynamics 95–7
Gaeta, P. 285
Garland, D. 90
Garlicki, L. 323–36
Gearty, C. 61
Germany
data privacy protection 177, 178
domestic intelligence-gathering 149, 153–4
labelling requirement 166
special procedural and evidentiary rules for national security cases 158
Ginsborg, L. 21, 25–6, 58, 65, 161
Ginsburg, T. 83
global governance development 85–6
globalization and migration of responses and ideas 323–6
Goldsmith, J. 205, 242, 247, 321
Gonzalez, A. 211
Goodwin-Gill, G. 82
GPS (global positioning system) use 109–10
Greenwald, G. 102–3
Greer, S. 330
Grief, N. 224
Gross, O. 175
Guantanamo Bay detainees 120, 180, 196, 234–6, 249, 251–4, 277–8
habeas corpus
availability and law of war 313–14, 315
and Guantanamo Bay 120, 180, 196, 234–6, 249, 251–4, 277–8
ship-based detention 236–7, 252–5
and transnational seizures 192–3, 196
US constitutional protection against unreasonable searches and seizures 119–20
see also detention
Habermas, J. 92
Hafetz, J. 229, 233–59, 318, 324
Hakimi, M. 245, 321–2
Halutz, D. 294–5, 298
Hamilton, V. 292, 297, 298, 299, 301, 302
Harel, A. 296
Harnon, E. 287
Hart, H. 80
Hayden, J. 270
Hayes, B. 160, 161
heard, right to be 42, 46, 49, 50, 57
Hendry, J. 65
Hepple, B. 82
HIG (High-Value Detainee Interrogation Group) 240–41
Highet, K. 202
Hill-Cawthorne, L. 230
Hollenberg, S. 66
Hornung, G. 177
Horton, S. 249
Hosenball, M. 238
Hovell, D. 40
human rights 331–2
Inter-American Court of Human Rights 206, 329
international law see international human rights law; international humanitarian law
judicial favoring see judicial favoring of human rights over United Nations Security Council sanctions
Constitutionalism across borders in the struggle against terrorism

and legality of military operations 295–302
standards, legal reform of counter-terrorism financial sanctions regimes in EU 55, 57, 71
UK Human Rights Act and extra-territorial scope 121, 123
UN Human Rights Committee see UN Human Rights Committee
UN law 16, 17, 18–19, 20, 21, 22–3, 24–5, 26, 28–34
Hurwitz, A. 216

ICCPR (International Covenant on Civil and Political Rights) 28, 29, 126, 207, 245, 246, 247, 248
Sayadi and Vinck v. Belgium 28–30, 61
ICJ see International Court of Justice
ICRC (International Committee of the Red Cross) 238, 243, 244, 245, 308, 311, 312–13, 314
IHL see international humanitarian law (IHL)
IHRL see international human rights law (IHRL)
ill-treatment
evidence dilemma and threatening behaviour towards individuals 166
excessive force, use of 197–9, 208
inhuman or degrading treatment of asylum seekers 217, 218
risk of being subjected to 222–4, 225–7
unregulated and abusive treatment in detention and Eighth Amendment 308, 309, 311, 314
see also torture
illegal means, evidence acquired by 164, 165, 166, 167–8
see also evidence dilemma in global anti-terror campaign
‘impracticable and anomalous’ standard, extra-territorial First Amendment 276–7
‘incident to arrest’ doctrine 110–11
individuals concerns over focus on 148, 149, 151, 152–4, 155, 160–62, 164, 165, 166, 167
dual character of First Amendment (structural–individual rights distinction) 270–72
and legality of military operations see legality of military operations
personal data protection see under data protection
smart sanctions and targeted individuals 20, 22–5, 26–34
threatening behaviour towards individuals, evidence dilemma in global anti-terror campaign 166
information disclosure
Fourth Amendment and sharing information with third party 179, 180–82
Japan, Act on Access to Information Held by Administrative Organs (AAIAO) 130–31, 138, 144–5
nuclear power plants, Japan 142–3
security sensitive information, EU 61, 64–5, 69, 73–4
unauthorized disclosure punishment, Japan 137–8, 141
see also data protection; intelligence gathering; privacy
Ingram, D. 238
intelligence gathering
domestic intelligence surveillance in constitutional-democratic states 148–51, 152–4, 162, 163–5, 167
intelligence agencies in non-democratic and/or non-constitutional states 152, 154, 163–4, 167
intelligence units’ role 300–301
war-model versus crime-model 146–7, 148–9, 153–4
see also evidence dilemma in global anti-terror campaign; information disclosure; surveillance
Index

Inter-American Court of Human Rights 206, 329
International Committee of the Red Cross (ICRC) 238, 243, 244, 245, 308, 311, 312–13, 314
International Court of Justice (ICJ) 327
Democratic Republic of Congo v. Uganda 228
Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory 228
Lockerbie case (Libya v. US) 19
International Covenant on Civil and Political Rights (ICCPR) 28, 29, 126, 207, 245, 246, 247, 248
International Criminal Court (ICC) Statute 286
Israel humanitarian law protection of civilians in Gaza Strip 320 legality of military operations 288–90, 296–8, 300 Winograd Commission 303
Johnson, J. 250
Johnson, M. 237
judicial favoring of human rights over
United Nations Security Council
sanctions 35–51, 326–7, 329–30, 332–4
Al Qaida sanctions committee 39–40,
41–2, 44, 47–8, 49
CJEU practice 38–45
ECtHR practice 45–50
evidence use in judicial review 43–4
human-rights-based hierarchy 37, 44,
45–6, 48–9
international organization
membership effects 49
interpretation concerns 47, 49
legal order fundamental rights 40–41,
43–5
legal uncertainty issues 44–5, 47, 50
norm conflict definition 36
Ombudsperson through UNSC
Resolution 1904 (2009) 39–40,
44
right to be heard 42, 46, 49, 50
right to judicial review before EU
courts 43–4, 46
sanction listing and de-listing
procedures 39–44, 46, 47–8, 50
sanctions list review 42–3
systemic integration issues 47
targeted sanctions 39, 45–7
travel restrictions 45–6
UN Resolution 1267 (1999) sanctions
regime 46–7
UN Resolution 1483 (2003) 48–9
judicial review
law of war see under law of war,
unraveling
military commissions instead of
civilian courts 158
right to full, EU 56–7, 58–61, 63, 68,
69
ship-based detention 244–9, 254–5,
257–9
UN law 17, 19, 20, 24, 26–7, 33
jus cogens boundaries 22–3, 56, 63
Kahan, D. 304
Kaido, Y. 143
Kaufman, C. 81
Keitner, C. 123
Kelman, H. 292, 297, 298, 299, 301,
302
Kelsen, H. 15–16, 18, 35, 65
Kennedy, D. 295, 310
Kent, A. 193, 197, 202, 257
Kerr, O. 181
Knop, K. 87
Knowles, R. 234
Koh, H. 80, 81, 82, 244, 246, 310
Kokott, J. 58
Korenica, F. 49
Koskeniemi, M. 96
Kreß, C. 308
Kretzmer, D. 208
Krisch, N. 18, 93
Kumar, M. 158–9
labelling requirement 166
see also evidence dilemma in global
anti-terror campaign
Lambert, H. 82
language, military operations and legal
‘language rules’ 301–2
Larik, J. 47, 61
Laughlin, S. 277
Lauterpacht, H. 304
Law, D. 105
law of war and ship-based detention
239–40, 255–6
law of war, unraveling 305–22
Al Qaida’s terrorist strikes on 9/11 as
‘armed attack’ 309
armed conflict and terrorism 306–12
civil prosecutions 312
combatant detention in international
armed conflicts 307, 312
courts’ role in determining where
hostilities are taking place
314–15
criminal law and terrorist attacks
307–8, 311, 312
expansion of rights 313–21
habeas availability in areas of
hostilities 315
| habeas availability military detainees | 313–14 |
| International Committee of the Red Cross (ICRC) | 308, 311, 312–13, 314 |
| judicial review of conditions of detention for military detainees | 316–18 |
| judicial review of executive’s choice to exercise military detention authority | 319 |
| judicial review of targeting | 319–21 |
| judicial review of the continued need for military detention | 318–19 |
| non-international armed conflict | 307, 308–9 |
| person held as enemy combatant | 319 |
| POW status, lack of | 307, 316 |
| right of self-defense | 309–10 |
| Suspension Clause entitlement | 314, 317 |
| terrorism as armed conflict | 309–11 |
| torture of noncitizens abroad | 318 |
| unregulated and abusive treatment in detention and Eighth Amendment | 308, 309, 311, 314 |
| Lederman, M. | 247, 251 |
| legal order fundamental rights | 40–41, 43–5 |
| legal reform of counter-terrorism financial sanctions regimes in EU | 52–77 |
| ‘closed material proceedings’ (CMP) | 64–5, 73, 76 |
| disclosure of security sensitive information | 61, 64–5, 69, 73–4 |
| due process rights | 58–9, 63, 64, 66, 68, 72 |
| ECJ decisions | 55–65 |
| EU implementing measures as distinct from legality of UN resolution (dualist approach) | 56–7, 61, 63, 69, 70–74 |
| EU Rules of Procedure of the General Court proposals | 64–5 |
| future reform potential | 65–76 |
| human rights standards | 55, 57, 71 |
| international efforts, limited effects of | 52–3 |
| jus cogens boundaries | 56, 63 |
| property rights and freezing of assets | 57, 63, 66, 67, 70, 74–5 |
| proscription in priority to financial sanctions listing | 74–6 |
| prosecution in priority to financial sanctions listing | 72–4 |
| right of defence | 59, 60–61, 63 |
| right to be heard | 57 |
| right to full judicial review | 56–7, 58–61, 63, 68, 69 |
| sanctions listings debate | 53–4, 62 |
| statement of reasons to affected parties | 62–3 |
| time factors, criticism of | 61–2 |
| UN Convention for the Suppression of the Financing of Terrorism | 72, 74 |
| UNSCR 1267 scheme, core problem | 54–5 |
| UNSCR 1267 scheme impact | 52–4 |
| UNSCR 1267 scheme, listings copying as ‘mandatory duty’ | 67 |
| UNSCR 1267 scheme, narrative summary reform | 57–8, 60–61, 62 |
| UNSCR 1267 scheme, private entities and individuals as targets | 54 |
| UNSCR 1373 and legislative designs of individual states | 59, 66–72, 75–6 |
| UNSCR 1535 Counter-Terrorism Committee Executive Directorate proposal | 71–2 |
| UNSCR 1730, listing and delisting procedures | 55, 58 |
| UNSCR 1822, listings review | 59–60 |
| UNSCR 1904, Ombudsperson role | 58, 59, 60, 69 |
| legal uncertainty issues | 44–5, 47, 50 |
| legality of military operations | 283–304 |
| eyesight role in past massacres and unmediated encounter with victims | 291–3 |
Geneva Convention on legal advisers and human rights 295–302
intelligence units’ role 300–301
International Criminal Court (ICC) Statute 286
Israeli Defense Forces (IDF), Early Warning Procedure 288–90
Israeli Defense Forces (IDF), International Law Department (ILD) and targeted killings policy 296–8
Israeli Defense Forces (IDF), Time Critical Targets 297, 300
legal advisor role 299–302
legal approval strengthens appearance of authorization 297–8
legal ‘clearance’ effects 298–9
legal ‘language rules’ 301–2
modern battlefields and detachment effects 293–5
orders that are manifestly unlawful, black flag test 287–8
orders that are manifestly unlawful, reason-based and emotion-based approaches 286–90, 295
segmentation of functions and individual responsibility 299–301
superior order defense 285–7
Lemaitre, F. 169
Lenart, J. 216–17
Leo, R. 153, 164
Łętowska, L. 330
Levi, M. 79
Levi-Barzilai, V. 294
lex specialis of international humanitarian law 205–6, 207, 208–9
Liang, J. 286
Livni, E. 296
Lizza, R. 169
Loader, I. 96
Lobel, J. 271
Luban, D. 284, 303
MacAskill, E. 102–3
McBride, J. 165
McMahon, R. 54
Maffei, S. 158
Marauhn, T. 82
Margulies, P. 243
Marques da Silva, S. 88
Marschik, A. 71
material support as crime 74, 76, 157, 203, 269
Mayer, J. 167
Melzer, N. 309
Memoranda of Understanding, extra-territorial obligations of European states 224–7
Merriam, J. 265–6, 296, 297, 301
Miklaszewski, J. 237
Milanovic, M. 30, 36, 121, 176, 206
military commissions instead of civilian courts 158
military operations interference concerns 205–6, 208–10
legality see legality of military operations
ship-based detention and Authorization for Use of Military Force (AUMF) conditions 238, 239, 244, 249, 250–51, 253
Miranda warnings 211, 239, 240–41, 255, 256
Mitsilegas, V. 93, 173
modern battlefields and detachment effects 293–5
see also legality of military operations
Mordarai, G. 257
Morocco, torture use 154–5
Mosko, Y. 294, 298
Murphy, C. 66, 78–97, 324
Nakashima, E. 111
national systems domestic intelligence surveillance in constitutional-democratic states 148–51, 152–4, 162, 163–5, 167
domestic police regulation comparison 148–50, 152–3, 164–5

Federico Fabbrini and Vicki C. Jackson - 9781784715397
Downloaded from Elgar Online at 12/25/2018 01:32:55PM
via free access
legal diffusion between national legal systems 82, 87, 88
and reciprocal privacy, EU 173–4, 179
sovereignty issues 16, 18, 276–8
see also individual countries

Neocleous, M. 96
Neuman, G. 121, 194, 196–7, 202, 235, 266, 277, 278
new terrorism offenses, vagueness concerns 155–8
New Zealand, Terrorism Suppression Amendment Act 70–71

Ní Aoláin, F. 183
NIAC see non-international armed conflict (NIAC)
‘no-spy’ agreements 185
see also reciprocal privacy

Nolkaemper, A. 37
non-democratic/non-constitutional states, intelligence agencies 152, 154, 163–4, 167
non-international armed conflict (NIAC) 307, 308–9
ship-based detention 243–4, 245, 246, 247, 254–5
non-refoulement (non-return) rule for asylum seekers 221, 222–4
non-traditional international armed conflict and non-state actors 209–10

Noone, G. 239, 243
Noorda, H. 72
nuclear power plants and information disclosure, Japan 142–3

Nussbaum, M. 304

Olson, L. 308
Ombudsperson role 39–40, 44, 58, 59, 60, 69
originator control principle 151
see also evidence dilemma in global anti-terror campaign

Osier, M. 285, 286, 287, 295, 304

Paust, J. 313
Pearlstein, D. 191, 314
Pejic, J. 244, 245, 255
Peppetti, J. 234
personal data protection see under data protection
Peters, A. 48, 94, 120–21
Philbin, P. 235
physical incapacitation, scrutiny of 200, 201–2
see also torture
Pictet, J. 243
Poli, S. 23, 56
police regulation comparison 148–50, 152–3, 164–5

Ponsa, C. 277
Posner, E. 266
POW status 243, 254, 307, 316
precrimes, comparison with 156–7
see also evidence dilemma in global anti-terror campaign
preventive detention 159–60
see also detention
PRISM program, US 102–3, 112–14
privacy and dissent in Supreme Court 105–11
proportionality principles in privacy intrusions 118–19
reciprocal see reciprocal privacy
right and Fourth Amendment 105–15, 119–20
see also data protection; information disclosure; reciprocal privacy
private sector role in rule-making and enforcement 88–9
property rights and freezing of assets, EU 57, 63, 66, 67, 70, 74–5
proportionality principles in privacy intrusions 118–19
protection against unreasonable seizures see US constitutional protection against unreasonable searches and seizures
Public Records and Archives Management Act (PRAMA), Japan 144–5
Puerto Rico, Consejo de Salud Playa de Ponce v. Rullan 276
Qualification Directive, EU 217, 218
Constitutionalism across borders in the struggle against terrorism

Rajogopal, B. 84
Ramraj, V. 78, 79, 84
Rapaport, A. 293, 300, 301
reasonableness requirements and Fourth Amendment 206, 208, 210, 211
Reception Conditions Directive, EU 217
reciprocal privacy 169–88
dragen surveillance 171, 174, 178, 183
EU-US Passenger Name Records (PNR) agreement 188
EU-US Safe Harbor Agreement invalidation 170, 187
EU-US Terrorist Finance Tracking program 188
surveillance beyond borders, US and EU parallels 171
transatlantic legal framework, need for 171, 184–8
US National Security Agency (NSA) domestic metadata program 181–3
US National Security Agency (NSA) global electronic surveillance, and Transatlantic Trade and Investment Partnership (TTIP) negotiations 187, 188
US National Security Agency (NSA) telephone data collection 107–8, 182, 183
reciprocal privacy, European privacy protections 172–8
Data Protection Directive 172, 173, 174
ECHR extra-territorial application 176–7
ECHR privacy protections 174–7 and national security laws 173–4
personal data protection 172–3
surveillance operations of EU member states conducted outside EU 174
reciprocal privacy, US privacy law 178–84
Fourth Amendment and sharing information with third party 179, 180–82
Fourth Amendment and US officials’ searches of foreign nationals abroad 179–80
FREEDOM Act 183
information shared with third-party service providers 180–81
national security surveillance 179
‘no-spy’ agreements 185
Privacy and Civil Liberties Oversight Board 182–3
Refugee Convention 218, 219–21, 222–3
refugees
Refugee Convention 218, 219–21, 222–3
‘third country nationals’ exclusion from refugee status 218
UN Convention Relating to the Status of Refugees limitations 215–16, 221
see also asylum seekers
Repeta, L. 126
Resnik, J. 118, 207
Rettman, A. 174
inghts
First Amendment structural–individual rights distinction 270–72
human see human rights
of asylum seekers 215–20
of defense, individual 59, 60–61, 63
of national self-defense 309–10
of terrorist suspects not to be deported, extradited or subjected to sanctions 220–27
to be heard 42, 46, 49, 50, 57
to due process 191, 192–3, 197, 198, 199–200, 206
to free speech or the right to freedom of association 223
to freedom from unreasonable searches and seizures see US constitutional protection against
Index

unreasonable searches and seizures
to full judicial review 43–4, 46, 56–7, 58–61, 63, 68, 69
to remain silent 164

Roach, K. 84, 87
Robertas, A. 37
Rocha Machado, M. 89
Rosand, E. 85
Roxstrom, E. 227

rule-making or enforcement processes, transnational counter-terrorism law dynamics 84–90

Sadurski, W. 330
Said, W. 157
Saito, T. 131
Salinas de Frías, A. 220, 225

sanctions
asset freezing 57, 63, 66, 67, 70, 74–5, 160
financial sanctions regimes see legal reform of counter-terrorism financial sanctions regimes in EU
judicial favoring of human rights see judicial favoring of human rights over United Nations Security Council sanctions
listing and de-listing procedures 39–44, 46, 47–8, 50, 53–4, 62
rights of terrorist suspects not to be subjected to 220–27
smart sanctions and targeted individuals 20, 22–5, 26–34
tavel restrictions 45–6
UN regime 326–32
Sands, P. 80
Sassóli, M. 308
Satterthwaite, M. 247
Saul, B. 78
Savage, C. 238, 240, 246, 249
Schauer, F. 270
Scheinin, M. 15–34, 58, 65, 66, 71, 79, 161, 324, 326
Scheppel, K. 118, 123, 146–68, 258, 324–5
Schmidt, M. 238

Schmitt, E. 240
Schmitt, M. 296, 297, 301
Schnabel, C. 177–8
Schulhofer, S. 246
Schultz, T. 80

searches, unreasonable see US constitutional protection against unreasonable searches and seizures
dog sniffing searches 109
secrecy law, Japan see Japan, secrecy law and ‘National Security Council’
secretly sourced evidence 150–51
see also evidence dilemma in global anti-terror campaign

security
access limitation and security clearance, Japan 136–7, 143
disclosure of security sensitive information, EU 61, 64–5, 69, 73–4
forces engaged in counter-terrorism operations abroad 227–30
Security Acts, Japan 133
UN Security Council see UN Security Council headings
seizures
transnational see transnational seizures
unreasonable see US constitutional protection against unreasonable searches and seizures
Self-Defense Forces Act, Japan 129
self-defense right 59, 60–61, 63, 309–10
Serrano, R. 240
Shaffer, G. 83, 84
Shalita, C. 296
Shelton, D. 35
ship-based detention and extra-territorial application of US constitutional rights 233–59
Army Field Manual on Interrogations 248–9, 255
Authorization for Use of Military Force (AUMF) conditions 238, 239, 244, 249, 250–51, 253
coercive interrogation 240, 249, 253, 255, 256
constitutional protection, extending 253–9
Constitution’s Due Process Clause 250, 251, 254–5, 256, 257
Convention Against Torture 246–7
criminal justice system protection 256–7
criminal law-based requirement of prompt presentment 241–2
ex post civil damages actions 257–8
federal anti-torture statute 258–9
Geneva III on temporary detention of POWs 243, 254
Guantanamo Bay restrictions, effects of 234–6, 251–4
habeas rights 236–7, 252–5
High-Value Detainee Interrogation Group (HIG) 240–41
International Committee of the Red Cross (ICRC) access 238, 243, 244, 245
International Covenant on Civil and Political Rights (ICCPR) and prohibition of arbitrary detention 245, 246, 247, 248
international human rights law (IHRL) 236, 241, 244–5, 246, 247–8, 254, 255
international humanitarian law (IHL) 236, 239, 240, 241, 244–5, 246, 249, 253–6
judicial access and restrictions on interrogation under international law 244–9, 254–5, 257–9
Ker-Frisbie rule 257
Khatallah case 238–40, 241, 242, 256, 259
law-of-war and criminal detention dual track approach 255–6
law-of-war authority 239–40
Miranda ‘public safety’ warnings 239, 240–41, 255, 256
National Defense Authorization Act (NDAA) 249
non-international armed conflict (NIAC) 243–4, 245, 246, 247, 254–5
territorial limitations 234–42
Uniform Code of Military Justice (UCMJ) 258–9
US domestic law 249–53
War Crimes Act 258–9
Warsame and al-Libi cases 237–40, 242, 245, 251, 255, 256
Shishido, J. 129, 139
Shochat, Y. 300
Sifton, J. 258
Silhouette, right to remain silent 164
Simon, J. 91
Sivakumaran, S. 244
Slaughter, A. 78–9, 92, 120, 329
Slobogin, C. 180
smart sanctions and targeted individuals 20, 22–5, 26–34
see also sanctions
Snowden, E. 7, 8, 103, 126, 162, 170, 171, 178, 186
Sobotta, C. 58
South Africa, anti-apartheid lawyering 321
sovereignty issues 16, 18, 276–8
see also national systems
Spain
data privacy protection 178
special procedural and evidentiary rules for national security cases 158
‘special advocates’ 158
see also evidence dilemma in global anti-terror campaign
Stahlberg, T. 26
state systems see national systems
Steinhauer, J. 183
Steyn, J. 236
Stoel, P. 84, 89
Stone Sweet, A. 330
Stroobants, J. 169
Stuntz, W. 164
Su, A. 223, 260–80, 324
substantive constitutionalism 17, 18–21
and formal hierarchy clash 21–31
see also constitution headings
Index

Sullivan, G. 160, 161
Suro, R. 150
surveillance
dragnet 171, 174, 178, 183
driftnet 162–3, 166
electronic 105–15, 119–20
reciprocal privacy 171, 174
US Foreign Intelligence Surveillance
Act 102–3, 112–14, 148
see also intelligence gathering
Suskind, R. 160
Swire, P. 149
Switzerland, A v. Federal Department of
Economic Affairs 48
Tal-Shir, A. 294, 301
targeted individuals, and smart
sanctions 20, 22–5, 26–34
targeted killings 207–12, 296–8, 319–21
Taylor, G. 39, 40, 41
Taylor, M. 255
Teitel, R. 283
telephone data collection 107–8, 182, 183
territoriality
and extension of constitutional rights
abroad, US 192–9
limitations and ship-based detention
234–42
see also extra-territorial headings
Thaman, S. 165
thermal imaging 108–9
Thimm, J. 186
‘third country nationals’ exclusion from
refugee status, EU 218
third parties, Fourth Amendment and
data disclosed to 103, 119–20, 179, 180–82
Thomas, G. 164
threatening behaviour towards
individuals 166
see also evidence dilemma in global
anti-terror campaign
time factors
criticism of length of time to resolve
legal disputes concerning EU
financial sanctions regime 61–2

Israeli Defense Forces (IDF), Time
Critical Targets 297, 300
Tladi, D. 39, 40, 41
Tonkin, H. 88
torture
Convention Against Torture 165,
246–7
evidence acquired by 164, 165, 166,
167–8
noncitizens abroad 318
physical incapacitation scrutiny 200,
201–2
ship-based detention and federal
anti-torture statute 258–9
see also ill-treatment; interrogation
transatlantic legal framework, need for
171, 184–8
see also reciprocal privacy
transnational counter-terrorism law
dynamics 78–97
bi-lateral agreements 86–7
Bivens question 205
comparative law methods 83
context problem 90
counter-terrorist finance law 91–4,
96–7
critique development 90–95
data surveillance and privacy
concerns 86–7
disaggregation problem 89–90
future research 95–7
global governance development 85–6
‘internalization’ of rules into national
legal systems 82
legal diffusion between national legal
systems 82, 87, 88
private sector role in rule-making and
enforcement 88–9
regional government adoption of
counter-terrorism law 86, 89
rule-making or enforcement
processes 84–90
Terrorist Finance Tracking
Programme (TFTP) 86
UN Counter-Terrorism Committee
85–6
UN Security Council resolution 1373
85, 89, 96
UN Security Council resolution 1617
and counter-terrorist finance 89
UN Security Council resolution 2178
and global response to national
security threat 96
transnational seizures 191–212
aliens and ‘ascending scale of rights’ 105
coercive tactics 201–2
category-specific application
199–200, 204, 205, 207–9, 210
cross-border shootings 197–9
death penalty cases 201–2
excessive force, use of and Fourth Amendment rights 197–9, 208
Fifth Amendment due process rights
191, 192–3, 197, 198, 199–200, 206
Fourth Amendment’s reference to ‘the people’ as term of art 194–5, 202–3
fundamental rights tradition
200–202, 204
and habeas corpus 192–3, 196
and International Covenant on Civil and Political Rights (ICCPR)
207
lex specialis of international humanitarian law 205–6, 207, 208–9
military operations’ interference concerns 205–6, 208–10
Miranda warnings 211, 239, 240–41, 255, 256
non-traditional international armed conflict and non-state actors
209–10
physical incapacitation scrutiny
201–2
procedural protections and Fifth Amendment 210–11
protection against unreasonable seizures 200–202, 204
reasonableness requirements and Fourth Amendment 206, 208, 210, 211
seizures of persons and triggering of application of the Fourth and Fifth Amendments 199–207
Suspension Clause 192, 196, 197
targeted killing and detention operations abroad 207–12
territoriality and extension of constitutional rights abroad, US Supreme Court’s conflicting approaches to 192–9
universalist approach to constitutional rights application 194
warrantless searches and Fourth Amendment 194–6, 202–4, 211
tavel restrictions 45–6
see also sanctions
Tshwane Principles 128
TTIP (Transatlantic Trade and Investment Partnership) negotiations 187, 188
Tushnet, M. 321
Tzanakopoulos, A. 38, 40, 41, 45
Tzanou, M. 23, 56, 178
UCMJ (Uniform Code of Military Justice), ship-based detention 258–9
UK
armed forces protection when engaged in military operations abroad 229
asylum claims 219–20
data privacy protection 177–8
domestic intelligence-gathering 149
extended detention aboard a ship 247–8
extradition orders 224
GCHQ dragnet surveillance reports 174, 178
Human Rights Act and extra-territorial scope 121, 123
intelligence gathering, cooperative efforts 150–51
Investigatory Powers Tribunal 150
Proscribed Organisations Appeal Commission (POAC) 76
’special advocates’ 158
## Index

<table>
<thead>
<tr>
<th>Terrorist Asset-Freezing Act (TAFA)</th>
<th>69, 70</th>
</tr>
</thead>
<tbody>
<tr>
<td>UN 1373 implementation rules</td>
<td>66–70, 75–6</td>
</tr>
<tr>
<td>UK, cases</td>
<td></td>
</tr>
<tr>
<td>A v. Secretary of State for the Home Dept (No 2)</td>
<td>226</td>
</tr>
<tr>
<td>Ahmed v. HM Treasury</td>
<td>336</td>
</tr>
<tr>
<td>Al-Sirri v. Secretary of State for the Home Department</td>
<td>219–20</td>
</tr>
<tr>
<td>Al-Skeini v. Sec’y of State for Defence</td>
<td>121, 123</td>
</tr>
<tr>
<td>Horvath v. Secretary of State for the Home Department</td>
<td>220</td>
</tr>
<tr>
<td>IA (Iran) v. Secretary of State for the Home Dept</td>
<td>216</td>
</tr>
<tr>
<td>Jamuzi v. Secretary of State for the Home Department</td>
<td>220</td>
</tr>
<tr>
<td>Liberty v. General Communications Headquarters</td>
<td>150–51</td>
</tr>
<tr>
<td>Lord Alton of Liverpool and others (Re The People’s Mojahadeen Organization of Iran) v. Secretary of State for the Home Department</td>
<td>76</td>
</tr>
<tr>
<td>R (JS) (Sri Lanka) v. Secretary of State for the Home Department</td>
<td>219</td>
</tr>
<tr>
<td>R (Sivakumar) v. Secretary of State for the Home Dept</td>
<td>219</td>
</tr>
<tr>
<td>R (Smith) v. Oxfordshire Assistant Deputy Coroner</td>
<td>229</td>
</tr>
<tr>
<td>R (Ullah) v. Special Adjudicator</td>
<td>225–6</td>
</tr>
<tr>
<td>RB (Algeria) v. Secretary of State for the Home Dept</td>
<td>225</td>
</tr>
<tr>
<td>Serdar Mohammed v. Ministry of Defense</td>
<td>248</td>
</tr>
<tr>
<td>Smith v. Ministry of Defence</td>
<td>229</td>
</tr>
<tr>
<td>T v. Secretary of State for the Home Department</td>
<td>220</td>
</tr>
<tr>
<td>Youssef v. Secretary of State for Foreign and Commonwealth Affairs</td>
<td>62</td>
</tr>
<tr>
<td>UN Convention for the Suppression of the Financing of Terrorism</td>
<td>72, 74</td>
</tr>
<tr>
<td>UN Convention Relating to the Status of Refugees limitations</td>
<td>215–16, 221</td>
</tr>
<tr>
<td>UN Counter-Terrorism Committee</td>
<td>85–6</td>
</tr>
<tr>
<td>UN Human Rights Committee (UNHRC)</td>
<td>327</td>
</tr>
<tr>
<td>Sayadi and Vinck v. Belgium</td>
<td>28–30, 328</td>
</tr>
<tr>
<td>UN law</td>
<td>15–34, 326</td>
</tr>
<tr>
<td>Constitution definition</td>
<td>15–17</td>
</tr>
<tr>
<td>Grundnorm</td>
<td>16, 18, 34</td>
</tr>
<tr>
<td>hierarchy of legal norms</td>
<td>16–17, 18, 19, 21–32</td>
</tr>
<tr>
<td>human rights</td>
<td>see human rights</td>
</tr>
<tr>
<td>judicial review</td>
<td>17, 19, 20, 24, 26–7, 33</td>
</tr>
<tr>
<td>smart sanctions and targeted individuals</td>
<td>20, 22–5, 26–34</td>
</tr>
<tr>
<td>substantive constitutionalism</td>
<td>see substantive constitutionalism</td>
</tr>
<tr>
<td>UN Charter as Constitution</td>
<td>18–19</td>
</tr>
<tr>
<td>UN Security Council anti-terrorism laws</td>
<td>19–21</td>
</tr>
<tr>
<td>Chapter VII powers</td>
<td>18, 19, 20, 22–5, 26–31, 32</td>
</tr>
<tr>
<td>UN Security Council Resolution 1267 judicial powers</td>
<td>20–21</td>
</tr>
<tr>
<td>legal reform of counter-terrorism financial sanctions regimes in EU</td>
<td>52–4, 54–5, 57–8, 60–61, 62, 67</td>
</tr>
<tr>
<td>listings copying as ‘mandatory duty’</td>
<td>67</td>
</tr>
<tr>
<td>narrative summary reform</td>
<td>57–8, 60–61, 62</td>
</tr>
<tr>
<td>private entities and individuals as targets</td>
<td>54</td>
</tr>
<tr>
<td>sanctions regime</td>
<td>46–7, 160–61</td>
</tr>
<tr>
<td>terrorist listing regime</td>
<td>20, 21–2, 25, 26–8, 29–30, 33</td>
</tr>
<tr>
<td>UN Security Council Resolution 1373 legislative designs of individual states</td>
<td>59, 66–72, 75–6</td>
</tr>
<tr>
<td>permanent legislative powers</td>
<td>20–21</td>
</tr>
<tr>
<td>transnational counter-terrorism law dynamics</td>
<td>85, 89, 96</td>
</tr>
</tbody>
</table>
UN Security Council Resolution 1535, Counter-Terrorism Committee Executive Directorate proposal 71–2
UN Security Council Resolution 1617, and counter-terrorist finance 89
UN Security Council Resolution 1730, listing and delisting procedures 55, 58
UN Security Council Resolution 1822 listings review 59–60
UN Security Council Resolution 1904 Ombudsman role 58, 59, 60, 69
UN Security Council Resolution 2178, global response to national security threat 96
UN Security Council sanctions see judicial favoring of human rights over United Nations Security Council sanctions
unauthorized disclosure punishment, Japan 137–8, 141
Uniform Code of Military Justice (UCMJ), ship-based detention 258–9
universalist approach to constitutional rights application 194
unlawful orders 286–90, 295 see also legality of military operations
unregulated and abusive treatment in detention and Eighth Amendment 308, 309, 311, 314 see also ill-treatment
US
Bill of Rights overview and constitutional protection 262–6, 273, 276
constitutional rights abroad 192–9
First Amendment see extra-territorial First Amendment
Foreign Intelligence Surveillance Act and PRISM program 102–3, 112–14, 148
Foreign Relations Law 275
Freedom Act 183 intelligence gathering and criminal evidence collection, separation of 153
material support as crime 157
military commissions instead of civilian courts 158
National Defense Authorization Act (NDAA) 249
National Security Agency (NSA) 169–70, 180–84, 186–7, 188
PATRIOT Act 101–2, 103, 113, 114–15
PRISM program 102–3, 112–14, 148 privacy law see reciprocal privacy, US privacy law right to remain silent 164
surveillance beyond borders, US and EU parallels 171
transnational proscription concerns 76
United States–Japan security framework 129–30, 132
War Crimes Act 258–9
US, cases
Aamer v. Obama 316
ACLU v. Clapper 114
Al Alwi v. Obama 249
Al Bihani v. Obama 249
Al Odah v. United States 277
Al-Aulaqi v. Panetta 205
al-Libi 237–40, 242, 245, 251, 255, 256
Al-Maqaleh v. Gates 120, 236–7
Al-Maqaleh v. Hagel 120, 236–7
Al-Marri v. Spagone 253
American Civil Liberties Union v. Clapper 183
Asahi Metal Indus. Co. v. Super. Ct. of Cal. 273
Atamirzayeva v. United States 197
Atkins v. Virginia 201
Balzac v. Porto Rico 262, 264
Berger v. New York 106
Best v. United States 206
Bivens 205
Index

254–5, 260, 265–6, 270, 271, 272, 274, 275–7, 278, 279, 313–16, 317

Bridges v. Wixon 272
Byars v. United States 2
California v. Greenwood 179
City of Ontario, Cal. v. Quon 109
Clapper v. Amnesty International 103, 112–13, 183
Corley v. United States 241
County of Riverside v. McLaughlin 241
Dickerson v. United States 256
DKT v. Agency for International Development 268–9, 270, 273
Dorr v. United States 262
Duncan v. Louisiana 262
Elkins v. United States 2
Florida v. Jardines 109
Ford v. Wainwright 201
Foucha v. Louisiana 201
Frisbie v. Collins 205, 257
Gambino v. United States 2
Garcetti v. Ceballos 278
Goldman v. United States 105–6
Gregg v. Georgia 201
In Re Guantanamo Detainees 277–8
Haig v. Agee 267, 270, 272
Hamdan v. Rumsfeld 236, 307, 318
Hamdi v. Rumsfeld 119, 210, 211, 249–51, 254, 305, 317, 319
Harbury v. Deutsch 318
Hernandez v. United States 197–8, 199
Hoffa v. United States 179
Holder v. Humanitarian Law Project 76, 269–70, 272
Hussain v. Obama 250
Insular Cases 262–6, 275
Jewel v. National Security Agency 113
Ker v. Illinois 205, 257
Khattalah 238–40, 241, 242, 256, 259
Kinsella v. Kreuger 193
Kinsella v. United States 263
Klayman v. Obama 102, 114–15, 118, 182
Kleindienst v. Mandel 268–9, 272
Kyllo v. United States 108–9
Lee v. United States 105
Lopez v. United States 106
Ludecke v. Watkins 316
McCall v. McDowell 288
McElroy v. United States 194, 201
McNabb v. United States 256
Mallory v. United States 256
Marbury v. Madison 33
Minnesota v. Carter 119
Miranda 164
Morse v. Frederick 278
Olmstead v. United States 105, 106
Padilla v. Hanft 253
Palestine Information Office v. Shultz 269
Perez v. Brownell 104
In re Production of Tangible Things 102
Rasul v. Bush 236
Rasul v. Myers 197
Reid v. Covert 193–6, 201, 263–4, 265, 274, 276, 279
Riley v. California 110–11, 114, 115, 182
Rodríguez v. Swartz 198–9
Roper v. Simmons 201
In re Ross 193, 262, 263
Schooner Exchange v. McFadden 203
Silverman v. United States 106
Smith v. Doe 200
Smith v. Maryland 103, 107–8, 110, 111, 113, 114, 115, 119, 179, 182
Tennessee v. Garner 201
In re Terrorist Bombings of US Embassies in East Africa 206, 211, 265, 272
Terry v. Ohio 201
United States v. Ahmed 203
United States v. Al-Bahlul 274–5
Constitutionalism across borders in the struggle against terrorism

United States v. Ali 197
United States v. Alvarez-Machain 257
United States v. Carpio-Leon 197
United States v. Demanett 273
United States v. Emmanuel 197
United States v. Ghailani 255–6
United States v. Miller 103, 179
United States v. Molin 113
United States v. Mohamud 113, 114
United States v. Peterson 122, 123
United States v. Place 109
United States v. Purvis 239
United States v. Quarles 240
United States v. Salvucci 119
United States v. Syokes 265
United States v. Toscanino 257, 273
United States v. United States District Court for the Eastern District of Michigan 104
United States v. United States District Court (‘Keith’) 112, 113–14, 119
United States v. Warsame 203
United States v. White 179
United States v. Yunis 239
United States v. Zakharov 211
USAID v. Alliance for Open Society 223, 260–61, 268, 269, 270, 272
Wabol v. Villacrusis 277
Warsame 237–40, 242, 245, 251, 255, 256
Wong Sun v. United States 106
Yahoo! Inc. v. La Ligue Contre Le Racisme et L’Antisemitisme 261
Youngberg v. Romeo 201

US Constitution Eighth Amendment, unregulated and abusive treatment in detention and Eighth Amendment 308, 309, 311, 314
US Constitution Fifth Amendment due process rights 191, 192–3, 197, 198, 199–200, 206
seizures of persons 199–207
targeted killing and detention operations abroad 207–12
US Constitution First Amendment, extra-territorial 260–80
US Constitution Fourth Amendment data disclosed to third parties 103, 119–20
limited extra-territorial scope 103–4, 119–20
national security and foreign intelligence investigations, call for distinction between 104
reference to ‘the people’ as term of art 194–5, 202–3
and right to privacy 105–15, 119–20
seizures of persons 199–207
sharing information with third party 179, 180–82
targeted killing and detention operations abroad 207–12
US officials’ searches of foreign nationals abroad 179–80
warrantless searches and Fourth Amendment, transnational seizures 194–6, 202–4, 211
US Constitution Suspension Clause 192, 196, 197, 236–7, 266, 272, 278, 314, 317
US Constitution Uniformity Clause 262–3
US constitutional protection against unreasonable searches and seizures 101–24
Canada and ‘reasonable’ searches and accountability 116–19
comparison with other constitutional democracies 115–23
data collection/surveillance and rights-protection challenges 103
data disclosed to third parties 103–119
dog sniffing searches 109
electronic surveillance 105–15, 119–20
extra-territorial application of constitutional constraints 119–23, 179–80, 194, 202, 235
Foreign Intelligence Surveillance Act and PRISM program (Section 702) 102–3, 112–14
FREEDOM Act 119
global positioning (GPS) device use 109–10
habeas corpus rights see habeas corpus
‘incident to arrest’ doctrine 110–11
limited extra-territorial scope 103–4, 119–20
multi-vocal constitutional judgments 112–15
national security and foreign intelligence investigations, call for distinction between 104
PATRIOT Act and telephonic metadata program 101–2, 103, 113, 114–15
privacy and dissent in Supreme Court 105–11
proportionality principles in privacy intrusions 118–19
right to privacy 105–15, 119–20
telephone data collection 107–8, 182, 183
thermal imaging 108–9
USA FREEDOM Act 119

Versteeg, M. 105
Vidmar, J. 35, 36, 37
Vladeck, S. 191, 193, 205, 211, 238, 242, 250, 251, 254, 257, 270
Voete, E. 329
Walker, C. 52–77, 94, 229, 324
Walker, N. 96
Walsh, D. 92
Walzer, M. 292, 293
war
law of see law of war, unraveling
POW status 243, 254, 307, 316
War Crimes Act, US 258–9
war-model, intelligence-gathering, war-model versus crime-model 146–7, 148–9, 153–4
warrantless searches 194–6, 202–4, 211
see also US constitutional protection against unreasonable searches and seizures
Waxman, M. 306, 318
Webber, D. 230
Weiler, J. 83
Weiser, B. 240
Weisman, J. 183
Whitehead, T. 178
Whitman, J. 170
Wildhaber, L. 330
Wills, A. 167
Wing, N. 156
Wittes, B. 309–10
World-Check 88–9
Yehezkeli, Z. 294, 301
Yoz, Y. 296, 302
Yoo, J. 235
Zimdado, P. 301
Zimmermann, A. 285, 286
Zumbansen, P. 81, 83, 330