

Copyright (c) 2004 Melbourne University Law Review Association, Inc.
Melbourne University Law Review

April, 2004

28 Melbourne U. L.R. 253

LENGTH: 7133 words

BOOK REVIEW: Law and Bioterrorism by Victoria Sutton

(North Carolina: Carolina Academic Press, 2003) pages i-xxi, 1-306. Price US \$ 65.00 (hardcover). ISBN 0 89089 071 4.

NAME: JEFFREY F ADDICOTT *

BIO:

* BA (Hons) (Maryland); JD (Alabama); LLM (Judges Advocate General School of Law); LLM, SJD (Virginia); Assistant Professor of Law and Director, Center for Terrorism Law, St Mary's University School of Law. This book review was prepared under the auspices of the Center for Terrorism Law located at St Mary's University School of Law, San Antonio, Texas.

SUMMARY:

... More than two years have passed since the terrorist attacks of 11 September 2001 and the subsequent anthrax attacks which actualised the issue of **bioterrorism**, not only as part of the American dialogue of homeland security, but as an issue of global concern. ... The recent SARS epidemic further emphasised the need not only to assess and prepare for the next bioterrorist attack, but for the international community to understand the complex maze of legal issues associated with **bioterrorism**. ... Sutton argues that legislation tailored to meet the narrow purpose of national defence against the threat of **bioterrorism** is an essential responsibility of our federal government'. ... If one is concerned with navigating the myriad federal terrorist' criminal statutes, Sutton does an admirable job identifying and addressing the key provisions and statutes relating to the new laws promulgated in response to **bioterrorism**. ... Understandably, discussion focuses on the question of where the balance should rest between protecting fundamental freedoms associated with civil liberties, and providing adequate safety to the nation from the threat of a devastating bioterrorist attack. ... *Zadvydas* seemingly exempted suspected alien terrorists as a small segment of particularly dangerous individuals' that the government could subject to indefinite detention. ... The *BWC* is not a legally binding document, and Sutton acknowledges the disturbing reality that only 40 of the 141 signatories have adopted laws in compliance with the *BWC*, which makes the production, development or possession of biological agents for weapons purposes a crime. ...

TEXT:

[*253] More than two years have passed since the terrorist attacks of 11 September 2001 and the subsequent anthrax attacks which actualised the issue of **bioterrorism**, not only as part of the American dialogue of homeland security, ⁿ¹ but as an issue of global concern. While the perpetrators of the anthrax attacks remain at large, the spectre of a large-scale bioterrorist attack continues to haunt the civilised world. The recent SARS epidemic ⁿ² further emphasised the need not only to assess and prepare for the next bioterrorist attack, but for the international community to understand the complex maze of legal issues associated with **bioterrorism**.

In this regard, the best primer for constructing the legal framework surrounding **bioterrorism** is a wonderfully researched and incisive book by Professor Victoria Sutton, ⁿ³ appropriately titled *Law and Bioterrorism*. ⁿ⁴ As the Director of the Center for Biodefense, Law and Public Policy at Texas Tech University School of Law, Sutton brings a vast background of experience and expertise to her book, which is in fact the first legal textbook in the field of law and **bioterrorism**.

The book begins with a brief examination of the history of law and **bioterrorism**, from ancient biological warfare to modern times. For instance, it is suggested that one of the first intentional uses of a biological agent by one army against another occurred in 67 BC between Roman General Pompey and King Mithridates of Pontus.ⁿ⁵ Pompey's troops were led to the coast of the Black Sea, [*254] where they consumed honeycombs tainted with grayanotoxin, a toxin present in honey produced by bees gathering nectar from laurels and rhododendrons. This resulted in the complete collapse and subsequent slaughter of Roman troops by the waiting troops of King Mithridates.ⁿ⁶ By setting the stage with a chronology of historical anecdotes ranging from this early example to the attacks on America of 11 September 2001,ⁿ⁷ Sutton draws the reader's attention to the magnitude of biological warfare and the far-reaching effects it has had and will continue to have on the global community.

Drawing upon the lessons of history, Sutton discusses historical events such as the use of anthrax in World War I, which was the occasion of the first use of biological weapons against the United States. A German veterinarian infected cattle and horses with anthrax (*Bacillus anthracis*) and glanders (*Pseudomonas pseudomallei*) before sending the animals to Allied forces in Europe as food and transportation.ⁿ⁸

Sutton further examines the rapidly growing concern over the use of biological weaponsⁿ⁹ which led to the negotiation of the 1925 Geneva Convention. The Geneva Convention sets forth rules of warfare under the *Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare* ('*Geneva Convention*').ⁿ¹⁰ Sutton notes the interesting fact that neither the United States nor Japan signed the *Geneva Convention*.ⁿ¹¹ These developments help set the stage for the overriding question posed at the beginning of the book: why examine law and **bioterrorism?**ⁿ¹² The remaining chapters reveal Sutton's prodigious efforts at answering that question.ⁿ¹³

One of Sutton's themes is that a shift in power from the state to the federal government is inevitable in creating a dependable American national security strategy.ⁿ¹⁴ The engine of reform would see each federal agency take affirmative and coordinated steps with three major United States governmental bodies -- the Federal Emergency Management Agency ('FEMA'), the National Security Agency and the Office of Homeland Security -- to install preventive measures and create response capabilities in the event of a bioterrorist attack. Sutton argues that coordination with these three major governmental departments is [*255] imperative, and that failing to enforce a strict and workable plan will place the United States in a very vulnerable position where it is open to attack or invasion.ⁿ¹⁵ Sutton supports her contention with a thorough examination of the role of the federal government, paying close attention to the role of the Federal Bureau of Investigation ('FBI') and the overlapping responsibilities of the Public Health Serviceⁿ¹⁶ regarding issues such as quarantine.ⁿ¹⁷ She also highlights the role of other federal agencies such as the Federal Trade Commission.ⁿ¹⁸

In a more generalised vein, Sutton closes a gap which much needed filling in the historiography of the evolution of federalism concerning the balance between a federal system of defence and the preservation of the interests of state sovereignty. Sutton argues that legislation tailored to meet the narrow purpose of national defence against the threat of **bioterrorism** is an essential responsibility of our federal government'.ⁿ¹⁹ Yet she also notes that the state itself has inherent police power to regulate crisis situations in the interest of public health. Furthermore, Sutton emphasises the importance of constructing and approving legislation prior to a **bioterrorism** disaster, particularly in light of the shared responsibilities of state and federal governments. She contends that Congress must face the challenge of taking the lead in United States national security sooner rather than later.ⁿ²⁰ The strongest step forward in this agenda has been achieved through the President's proposal for a Department of Homeland Security,ⁿ²¹ becoming the third largest department in the President's Cabinet.ⁿ²²

Sutton extends her discussion with a transition from the federal aspects of national defence to the powers given to the states. She gives an excellent analysis of landmark cases to illustrate governmental powers encompassing quarantine and vaccination, and common law applicable to the problems in the bioterrorist arena.ⁿ²³ Proper attention is given to the *Model State Emergency Health Powers Act* (2001)ⁿ²⁴ which addresses

planning, measures for detection and tracking public health emergencies, declaring a state of public health emergency, special powers during a state of public health emergency concerning both persons and property, public information regarding public health emergencies, and miscellaneous provisions such as liability, strict liability, constitutional taking, and other issues.ⁿ²⁵

[*256] Sutton promotes awareness of this valuable measure, which codifies powers essential to defining the importance of the states, including their role in preparation, surveillance and implementation as part of a national defence scheme. ⁿ²⁶

If one is concerned with navigating the myriad federal terrorist' criminal statutes, Sutton does an admirable job identifying and addressing the key provisions and statutes relating to the new laws promulgated in response to **bioterrorism**. Based on the commerce clause of the *United States Constitution*, ⁿ²⁷ the United States Congress has enacted federal criminal statutes as a means to deal with the increasing threat of biological terrorism. ⁿ²⁸ Sutton masterfully interrelates recent court decisions using the new statutes as evidence of the willingness of federal courts to deal with and punish those individuals with a biologically destructive agenda. Particular emphasis is given to relevant sections of the *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ('USA PATRIOT Act')*, ⁿ²⁹ along with the notable compromise (a 2005 sunset clause for some provisions) that was necessary for its overwhelming approval. ⁿ³⁰ Sutton provides a brief but comprehensive discussion of four primary issues of the *USA PATRIOT Act*. Specifically, these include new federal crimes, ⁿ³¹ Fourth Amendment concerns, ⁿ³² sharing information ⁿ³³ and immigrants. ⁿ³⁴

Sutton also considers issues of attorney-client privilege where the defendant is an alleged terrorist, noting that a controversial intrusion on this privilege occurred on 31 October 2001, when

the Bureau of Prisons, Department of Justice, promulgated a regulation permitting the monitoring of attorney-client communication if the Attorney-General determines that unmonitored communication could result in death or serious bodily harm to others. ⁿ³⁵

Sutton recognises the debate associated with the provision and gives the reader a neutral collection of the respective viewpoints in favour of and opposed to the new regulation. In fact, the strength of *Law and Bioterrorism* is that it is not afraid to tackle the hard questions. Indeed, the text serves as an excellent source [*257] and teaching document for a variety of controversial matters relating to **bioterrorism**, including the application of environmental statutes, ⁿ³⁶ the *Federal Tort Claims Act*, ⁿ³⁷ federal labour law, ⁿ³⁸ vaccine liability ⁿ³⁹ and private insurance liability. ⁿ⁴⁰

The civil law cases which have been filed against private individuals and corporate entities as a result of the terrorist attacks on 11 September 2001 and the subsequent anthrax attacks of that year are discussed in the book. The individuals responsible for the anthrax attacks will face not only criminal charges, but also associated claims in tort. For example, the civil action which has emerged as a result of the death of United States Postal Service employee Thomas Morris from inhalation of anthrax sets out claims against the hospital that misdiagnosed him and other third parties. ⁿ⁴¹ The legal claims against various individuals, corporate entities and nations made by survivors or relatives of the victims of the attacks on the World Trade Centre and the Pentagon, as well as those who perished in the crash of Flight 93 in Pennsylvania, are also explored. ⁿ⁴² Sutton points out that the legal basis for these civil actions could also provide a basis for claims against the operative and funding entities' of acts of **bioterrorism** against citizens of the United States, as well as foreign nationals. ⁿ⁴³

Given the continuing struggle to balance civil liberties with defence, ⁿ⁴⁴ Sutton is forthright in her treatment of civil liberties and liabilities. Understandably, discussion focuses on the question of where the balance should rest between protecting fundamental freedoms associated with civil liberties, and providing adequate safety to the nation from the threat of a devastating bioterrorist attack. ⁿ⁴⁵ Sutton notes with approval portions of the *USA PATRIOT Act* that provide for increased efforts to identify terrorists and enable additional legal tools to ensure the success of homeland security. ⁿ⁴⁶ Sutton also includes discussion from a related article on the readiness of the United States to deal with a bioterrorist attack. The article states that

the threat of **bioterrorism** requires a federal presence long before we have a national security emergency -- which in the case of the new threat of **bioterrorism**, would be far too late to be adequate. And therefore, federal legislation [*258] which ignores jurisdictional boundaries -- as do biological agents -- is essential to address this new threat. ⁿ⁴⁷

Additionally, Sutton gives equal coverage to the concerns of many civil rights groups opposed to changes in the law which they see as an unacceptable shift away from civil liberty. Sutton notes that while the *USA PATRIOT Act* does

not explicitly address **bioterrorism**, it provides for more efficient investigations, a greater ability of the FBI to monitor internet and telephone communications, and a longer detention of aliens who are suspected of terrorism. ⁿ⁴⁸

Due to the fact that almost all of the provisions in the *USA PATRIOT Act* amend or add to existing federal statutes, it will be some time before the meaning and impact of many of the provisions can be fully evaluated in terms of constitutionality. For example, § 203 of the *USA PATRIOT Act* amends the *Federal Rules of Criminal Procedure* ('*FRCP*') ⁿ⁴⁹ to allow the sharing of grand jury information between interested agencies if it relates to foreign intelligence, § 219 amends the *FRCP* ⁿ⁵⁰ to authorise nationwide search warrants for terrorism cases, and § 213 adds a subsection to 18 USC § 3103a (2001) in order to authorise a delayed notice of execution of a search warrant (under specific conditions).

Although Sutton does not provide an in-depth analysis of the changes brought about by the *USA PATRIOT Act*, she does spend some time analysing the provision giving the Attorney-General broad powers to authorise the taking into custody and detention of illegal aliens suspected of terrorism. ⁿ⁵¹ The power to detain illegal aliens indefinitely raises at the very least a constitutional due process issue under the Fifth Amendment to the *United States Constitution*, ⁿ⁵² a matter which will most certainly require resolution by the federal judiciary. ⁿ⁵³

Section 412(a) of the *USA PATRIOT Act* adds a provision to the *Immigration and Nationality Act*, ⁿ⁵⁴ allowing the Attorney-General to authorise the taking into custody of any alien *certified* to be inadmissible or deportable on one of six grounds: (1) espionage, (2) sabotage, (3) export restrictions, ⁿ⁵⁵ (4) attempt to overthrow the United States government, ⁿ⁵⁶ (5) terrorist activities ⁿ⁵⁷ and (6) any **[*259]** other activity that endangers the national security of the United States'. ⁿ⁵⁸ Section 412(a)(5) of the *USA PATRIOT Act* then requires the government to begin either criminal or deportation proceedings within seven days of the detention. However, § 412(a)(6) ostensibly empowers the government to indefinitely detain particular certified illegal alien terrorists who are not likely to be deported in the foreseeable future due to the continuing nature of an investigation. Concern is raised by the question of how long a certified individual terrorist may be detained and under what conditions. ⁿ⁵⁹

Sutton notes that the United States Supreme Court has yet to rule on the constitutionality of § 412(a)(6). Nevertheless, from the decision in *Zadvydas v Davis*, ⁿ⁶⁰ it seems likely that the Court will find that § 412(a)(6) is constitutionally permissible. In *Zadvydas*, the Court was concerned with whether the government can detain a removable illegal alien indefinitely, or only for a period reasonably necessary to secure the aliens' removal from the country'. ⁿ⁶¹ The Court construed the applicable section of the *Immigration and Nationality Act* ⁿ⁶² narrowly, firmly disapproving of the indefinite detention of aliens who were not likely to be deported. ⁿ⁶³ However, the Court did recognise that suspected terrorists could be held for indefinite periods in preventive detention. ⁿ⁶⁴ *Zadvydas* seemingly exempted suspected alien terrorists as a small segment of particularly dangerous individuals' that the government could subject to indefinite detention. ⁿ⁶⁵

Sutton provides a forum for the debate which pits civil liberties against security concerns by walking through the major steps of a bioterrorist attack and addressing the civil rights issues which might arise at each step. She comprehensively covers surveillance in all aspects possible, from the constitutional right to privacy that individuals enjoy ⁿ⁶⁶ to surveillance systems and capabilities extending **[*260]** from the federal government to international surveillance systems. ⁿ⁶⁷ The complexity of the matter is also surveyed by examining the following issues: characterisation and detection, equal protection, substantive due process, response and protection from taking the Fifth Amendment. Sutton has successfully given readers an all-inclusive overview of significant case law and relevant areas affected and constantly debated when dealing with responses to biological warfare.

The impact of international law also plays a part in global security and therefore is addressed in the book. Sutton does a superb job examining the international agreements and treaties regarding **bioterrorism**, including the first steps taken by the international community to limit the threat of biological warfare through the signing of the *Geneva Convention*. ⁿ⁶⁸ This Convention originally banned the use of chemical weapons in war, and has been extended to include biological weapons through the *Convention on Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and Their Destruction* ('*BWC*'). ⁿ⁶⁹ The *BWC* is not a legally binding document, and Sutton acknowledges the disturbing reality that only 40 of the 141 signatories have adopted laws in compliance with the *BWC*, which makes the production, development or possession of biological agents for weapons purposes a crime.

Initially the *BWC* sustained a severe blow when the USSR, within months of signing the treaty, violated it by launching an intensive biological weapons program, which was overseen by a new state entity called Biopreparat. ⁿ⁷⁰ Not only did the Soviet Union expand its stocks of traditional biological war agents and toxins, but it undertook extensive research into creating particularly lethal strains of anthrax and other toxins. ⁿ⁷¹

In tandem with the Soviet Union's duplicity, the *BWC* was again brought to the attention of the global community in December 2001 when Cuba and Iran, two totalitarian regimes, criticised the United States for pulling out of ongoing *BWC* negotiations geared towards the adoption of a legally binding enforcement mechanism.ⁿ⁷² Indeed, the Bush administration has refused outright to even entertain *BWC* negotiations until the next scheduled meeting in 2006, because such efforts are not in the best interest of the United States'.ⁿ⁷³ 'The Americans have cited this so-called impasse as a time to think creatively on alternatives'.ⁿ⁷⁴ [*261] Clearly, in light of the proliferation and use of weapons of mass destruction by totalitarian states who are eager to sign international agreements but never intend to abide by them, the Bush administration fears a modern recurrence of this type of blatant disregard for the rule of law. Two clear examples of this fear might be cited: the continuing efforts by Iran to obtain weapons-grade nuclear material,ⁿ⁷⁵ and North Korea's efforts to produce fissionable material for a nuclear weapon in direct violation of a 1994 pact with the United States.ⁿ⁷⁶

Sutton also articulately explores the relatively recent establishment of the International Criminal Court ('ICC'), which has the power to exercise its jurisdiction over individuals who engage in the most serious crimes of international concern -- genocide, crimes against humanity, war crimes and crimes of aggression.ⁿ⁷⁷ At present, these crimes do not include the use of biological weapons per se. Nevertheless, the first use of chemical agents during war has long been held to constitute a grave breach of the *Geneva Convention*, which is within the jurisdiction of the ICC.ⁿ⁷⁸ The desire to include the use of biological agents as a matter subject to the ICC is not far-fetched, considering that the *BWC* prohibits the use of biological weapons in armed conflict.

Sutton explores the attempts made by the United States and India to introduce amendments to the ICC which would contain a list of weapons, the use of which would be considered a serious violation of international law and custom, and the possibility of the ICC's jurisdiction extending over crimes associated with **bioterrorism**.ⁿ⁷⁹ The domestic laws of other countries, including the former Soviet Union,ⁿ⁸⁰ Russia,ⁿ⁸¹ Japanⁿ⁸² and France,ⁿ⁸³ are highlighted and compared to United States law. This part of the book is vital to a clear understanding of the current world view on **bioterrorism**.

Addressing the future of biodefence and the necessary response from the legal community, Sutton highlights the legal issues surrounding the First Amendment to the *United States Constitution*ⁿ⁸⁴ and restrictions on biological weapons information,ⁿ⁸⁵ laboratory security,ⁿ⁸⁶ and vaccines and immunities.ⁿ⁸⁷ Sutton [*262] underscores the importance of merging science and the law in order to develop an adequate and meaningful union between state, federal and global components. Such a union is essential for the development of an effective responsive plan to a bioterrorist attack. In this light, Sutton does a clear and crisp job discussing several legal and historical events which have shaped the national and global legal framework on **bioterrorism**.

Sutton's work is a great resource document for counter-terrorism efforts,ⁿ⁸⁸ as most of her work centres on the necessity of dealing with legal issues that arise as a result of a bioterrorist event. Although beyond the scope of her important contribution to the field, the only area Sutton leaves for future analysis is the concept of exploring a long-term anti-terrorismⁿ⁸⁹ solution to **bioterrorism**, which could answer the question of how a civilised nation can stop a terrorist from engaging in **bioterrorism**. For instance, the Bush administration has embraced the concept of pre-emptive self-defence in response to nations or groups that clearly express a desire to engage in aggressionⁿ⁹⁰ by means of a weapon of mass destruction (which includes **bioterrorism**) against the United States.ⁿ⁹¹ The concept of pre-emptive self-defence was perfectly orchestrated by Israel in its raid on the Iraqi Osirak reactor, which posed such a clear threat to the Middle East and the global community as a whole that an anticipatory strike before the reactor became hot' was accepted as self-defence and not a violation of international law.ⁿ⁹²

Even at the criminal justice level, all democracies unquestionably need to shift their traditional tactical focus from punishing individuals who commit terrorist crimes -- including **bioterrorism** -- to new techniques designed to thwart such criminal acts in the first place. Clearly, significant changes must be implemented to alter the traditional focus of the current legal system from punishing completed crimes to a more aggressive approach capable of preventing crimes, particularly suicide terrorist attacks.

In a speech delivered in 1984, Jeanne Kirkpatrick spoke of a coming terrorist war [against the United States, that] is part of a total war which sees the whole society as an enemy, and all members of a society as appropriate objects for violent actions'.ⁿ⁹³ Sadly, these words came to pass on 11 September 2001. If the [*263] world community of democratic nations is to avoid massive terrorist events, measured action must be taken to reduce the likelihood of such attacks. In the long term, the most troubling aspect in addressing **bioterrorism** is the question of what propels people or governments to commit acts of terrorism using weapons of mass destruction. Clearly, this is a critical issue as it is di-

rectly related to the attendant matter of how best to prevent terrorism and aggression. Thus, the ultimate question becomes whether there is a way to rid the planet of the scourge of terrorism apart from the use of armed force. ⁿ⁹⁴

Law and Bioterrorism is without question a must-have textbook for anyone teaching or studying in this critical area of the law. Whether in terms of the history of **bioterrorism**, the laws of **bioterrorism** or the policy matters associated with **bioterrorism**, Victoria Sutton performs admirably. In short, she has successfully created a valuable tool to aid the international dialogue in assessing the threat of a bioterrorist attack. *Law and Bioterrorism* should be compulsory for any academic course in this area.

Legal Topics:

For related research and practice materials, see the following legal topics:
 GovernmentsAgriculture & FoodProcessing, Storage & DistributionGovernmentsFederal GovernmentDomestic SecurityImmigration LawDeportation & RemovalAlien Terrorist Removal

FOOTNOTES:

n1 *Homeland Security Act of 2002*, Pub L No 107-296, 116 Stat 2135. See generally Editorial, Seeking Homeland Security', *New York Post* (New York), 7 June 2002, 32. The Department of Homeland Security incorporates more than 100 different government divisions from eight separate Cabinet departments into a single agency whose sole mission is homeland security.

n2 See Rob Stein, John Pomfret and DeNeen Brown, Travel Alert Widened as SARS Toll Grows', *The Washington Post* (Washington), 27 April 2003, A3.

n3 MPA (Old Dominion), PhD (Texas), JD (American University); Director of the Center for Biodefense, Law and Public Policy, and Adjunct Professor of Law at Texas Tech University. Before teaching at Texas Tech, she was the Assistant Director of the White House Office of Science and Technology Policy between 1989-93. Prior to that, she worked for the United States Environmental Protection Agency as a Special Assistant in Policy, Planning and Evaluation.

n4 Victoria Sutton, *Law and Bioterrorism* (2003).

n5 *Ibid* 4.

n6 *Ibid*. Sutton is citing Strabo, *The Geography of Strabo* (Horace Jones trans, 1967 ed) and Adrienne Mayor, Mad Honey!' (1995) 48(6) *Archaeology* 32.

n7 Sutton, above n 4. Sutton gives the total number of deaths from the attacks on 11 September 2001 as 6000. The actual total was just over 3000. According to a *New York Times* tally, along with billions of dollars in property loss, approximately 3161 people were killed, not including the 19 terrorists. This figure includes 184 dead at the Pentagon (counting the 59 passengers on the hijacked plane) and 40 dead in Pennsylvania. See A Nation Challenged: Dead and Missing', *The New York Times* (New York), 1 January 2002, A12.

n8 Sutton, above n 4, 5, citing George Christopher et al, Biological Warfare: A Historical Perspective' (1997) 278 *Journal of the American Medical Association* 412.

n9 Sutton, above n 4, 6.

n10 Opened for signature 17 June 1925, 94 LNTS 65 (entered into force 8 February 1928).

n11 Sutton, above n 4, 6.

n12 Ibid 10.

n13 Sutton's experience as a White House scientist, responsible for coordinating the President's major science initiatives at the level just below Cabinet, more than establishes her credentials to do justice to the topic.

n14 Sutton, above n 4, 41.

n15 Ibid 25.

n16 Ibid 44.

n17 Ibid 51.

n18 Ibid 69.

n19 Ibid 80.

n20 Ibid.

n21 See *Homeland Security Act of 2002*, Pub L No 107-296, § 101, 116 Stat 2135.

n22 Sutton, above n 4, 81.

n23 Ibid 85, 88, 109.

n24 The Centre for Law and the Public's Health, Georgetown and John Hopkins Universities, *Model State Emergency Health Powers Act* (2001).

n25 Sutton, above n 4, 108. The *Model State Emergency Health Powers Act* (2001) is designed as a template statute for states to follow when implementing legislation compliant with anti-terrorist measures.

n26 Sutton, above n 4, 108.

n27 The *United States Constitution*, art I, § 8, cl 3, gives the United States government power to legislate in matters regarding commerce.

n28 Sutton, above n 4, 113. See *Biological Weapons and Anti-Terrorism Act of 1989*, 18 USC § 175-8 (Supp 2001); *Anti-Terrorism and Effective Death Penalty Act of 1996*, 18 USC § 2332a (Supp 2001).

n29 Pub L No 107-56, 115 Stat 272.

n30 The Bill passed the Senate by a landslide vote of 98 to 1: 147 Cong Rec S11,059-60 (daily ed 25 October 2001). The House of Representatives passed their version by a similarly lopsided vote of 357 to 66: 147 Cong Rec H7224 (daily ed, 25 October 2001).

n31 Sutton, above n 4, 130.

n32 Ibid 131. The Fourth Amendment to the *United States Constitution* reads:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

n33 Sutton, above n 4, 131.

n34 Ibid.

n35 Ibid 158.

n36 Ibid 189. See *Resource Conservation and Recovery Act*, 42 USC § 6972 (2004); *Comprehensive Environmental Response, Compensation and Liability Act*, as amended by the *Superfund Amendments and Reauthorisation Act of 1986*, 42 USC §§ 9601-75 (2004).

n37 *Federal Torts Claims Act* 28 USC § 2671 et seq.

n38 Sutton, above n 4, 199.

n39 Ibid 203.

n40 Ibid 223.

n41 Ibid 225, 227.

n42 Ibid 232.

n43 Ibid 225.

n44 See Henry Black, *Black's Law Dictionary* (7th ed, 1999) 239. Black defines civil liberty as freedom from undue government interference or restraint.'

n45 Sutton, above n 4, 249.

n46 Ibid 130-2. See *USA PATRIOT Act* Pub L No 107-56, §§ 203(a), 213, 218, 411, 412, 802, 115 Stat 272.

n47 Sutton, above n 4, 251, citing Victoria Sutton, **Bioterrorism** -- Life and Legal Changes' (2001) 17(35) *Texas Lawyer* 45, 45.

n48 Sutton, above n 4, 249.

n49 Fed R Crim P 6(e)(3)(C).

n50 Fed R Crim P 41(a).

n51 Sutton, above n 4, 132-5.

n52 The Fifth Amendment to the *United States Constitution* reads:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

n53 Protection from detention by the government rests at the heart of constitutional due process concerns. See, eg, *Foucha v Louisiana*, 504 US 71 (1992).

n54 8 USC §§ 1101-537 (2004). The changes are codified as 8 USC § 1226A (2004).

n55 *Immigration and Nationality Act*, 8 USC § 1227(a)(4)(A)(i) (2004).

n56 *Immigration and Nationality Act*, 8 USC § 1227(a)(4)(A)(iii) (2004).

n57 *Immigration and Nationality Act*, 8 USC § 1227(a)(4)(B) (2004).

n58 *Immigration and Nationality Act*, 8 USC § 1226a(a)(3)(B) (2004).

n59 A collateral question also arises in terms of the Attorney-General's power to determine who qualifies as a terrorist. This question will certainly be argued along the lines of how much deference is to be given by the courts to the political branches in matters of national security. See, eg, *Cooter & Gell v Hartmarx Corp*, 496 US 384, 400 (1990) (O'Connor J).

n60 533 US 678 (2001) ('*Zadvydas*').

n61 *Ibid* 682 (Breyer J) (emphasis omitted).

n62 8 USC § 1231(a)(6) (2004).

n63 *Zadvydas*, 533 US 678, 689 (2001) (Breyer J).

n64 *Ibid* 691. See also *Kansas v Hendricks*, 521 US 346 (1997), which the court in *Zadvydas* cited with approval.

n65 *Kansas v Hendricks*, 521 US 346, 368 (1997) (Thomas J). The provisions on indefinite detention for certified detainees that the *USA PATRIOT Act*, Pub L No 107-56, 115 Stat 272 inserts into the *Immigration and Nationality Act*, 8 USC §§ 1101-537 (2004) are likely to pass constitutional muster, because they actually exceed the *Zadvydas* standard regarding suspected terrorists held on an indefinite basis. First, § 236A(b) of the *Immigration and Nationality Act* specifically provides that judicial review of detentions of suspected alien terrorists is via habeas corpus. Second, the new law prescribes fixed time limits for review of the Attorney-General's certification. Section 236A(a)(6) provides that an alien whose removal is unlikely in the reasonably foreseeable future may be detained for additional periods of up to six months if release threatens national security, the safety of an individual or the community. Furthermore, § 236A(a)(7) requires the Attorney-General

to review the certification every six months and allows the suspected illegal alien terrorist to request a reconsideration of the certification every six months. If these provisions are satisfied, the terrorist suspect may be held indefinitely.

n66 Sutton, above n 4, 252.

n67 Ibid 259.

n68 Ibid 281, referring to the *Geneva Convention*, opened for signature 17 June 1925, 94 LNTS 65 (entered into force 8 February 1928).

n69 Opened for signature 10 April 1972, 1015 UNTS 163 (entered into force 26 March 1975). The *BWC* set forth the goal of permanently and completely excluding the possibility of bacteriological and other biological agents and toxins from ever being used as weapons. See Sutton, above n 4, 271-8.

n70 Biopreparat was a Soviet civilian pharmaceutical and vaccine company that served as a cover for biological weapons work. It was established in 1973, less than a year after the Soviet Union signed the *BWC*: Sutton, above n 4, 280.

n71 Sutton, above n 4, 280.

n72 Peter Slevin, 'US Drops Bid to Strengthen Germ Warfare Accord', *The Washington Post* (Washington), 19 September 2002, A1.

n73 Ibid.

n74 Ibid.

n75 Glenn Kessler, 'Nuclear Sites in Iran Worry US Officials: White House Cites "Pursuit of Weapons"', *The Washington Post* (Washington), 14 December 2002, A18.

n76 Doug Struck, 'Nuclear Program Not Negotiable, US Told N Korea', *The Washington Post* (Washington), 20 October 2002, A18. In the 1994 pact, North Korea promised to end its nuclear program.

n77 Sutton, above n 4, 295.

n78 *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, [2002] ATS 15, art 8(1)(a) (entered into force 1 July 2002).

n79 Sutton, above n 4, 295.

n80 Ibid 289.

n81 Ibid 292.

n82 Ibid 291.

n83 Ibid 292.

n84 The First Amendment to the *United States Constitution* reads: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.'

n85 Sutton, above n 4, 298.

n86 Ibid 299.

n87 Ibid 300.

n88 See Jeffrey Addicott, *Winning the War on Terror: Legal and Policy Lessons from the Past* (2003) 18, 60. Counter-terrorism efforts involve all tactical actions taken in response to a terrorist attack. In contrast, anti-terrorism involves all proactive steps taken to decrease the probability of a terrorist incident.

n89 Ibid.

n90 See *Resolution on the Definition of Aggression*, GA Res 3314, UN GAOR, 34th sess, 2319th plen mtg, UN Doc A/Res/3314 (1974).

n91 See White House, *National Security Strategy of the United States of America* (2002) 15. The so-called Bush Doctrine' adopts the use of pre-emptive force in self-defence and is designed to prevent the marriage of al-Qa'eda-styled terrorism with weapons of mass destruction.

n92 Slevin, above n 72, A1. Note that this position is not universally accepted. See *Armed Israeli Aggression against the Iraqi Nuclear Installations and Its Grave Consequences for the Established International System Concerning the Peaceful Uses of Nuclear Energy, the Non-Proliferation of Nuclear Weapons and International Peace and Security*, GA Res 40/6, UN GAOR, 40th sess, 59th plen mtg, UN Doc A/Res/40/6 (1985).

n93 Jeanne Kirkpatrick, 'Untitled Speech' (Speech delivered at the Jonathan Institute Conference on International Terrorism, Washington, 25 June 1984).

n94 Addicott argues that the spread of human rights and democracy benefits American national security. See Addicott, above n 88, 218.