
Preface

In the Third Edition of this casebook, which was published shortly after the terrorist attacks of September 11, 2001, we emphasized more than in previous editions the role of law in countering terrorism. Since then, the government has tried to rearrange the disparate programs and tools of counterterrorism into a better coordinated whole. We also have sought in this Fourth Edition to collect the various relevant components of National Security Law and arrange them more systematically to facilitate the teaching and understanding of counterterrorism law. In this edition, for example, we have added new chapters on the data mining and collection of third-party records, screening and profiling at airports and subways, suspension of the writ of habeas corpus, and preemptive war. We also have included some of the growing flood of judicial decisions in the field, including several blockbusters from the Supreme Court.

Because the post-9/11 evolution of National Security Law has been marked by a sharper demarcation of discrete subject areas, we have broken down many of the chapters from earlier editions into shorter, more thematically integrated chapters for this Fourth Edition. The result, we believe, provides a measure of coherence to this still young and somewhat unruly discipline, and makes it easier to teach and learn that discipline in pedagogically digestible units. Thus, the 17 chapters in the Third Edition have given way to 37 shorter chapters here.

Although the content of the “Framework” in Part I is largely unchanged, we have reorganized some materials in it to highlight separation-of-powers analysis for use in later parts of the book. In Part II, “Using Force Abroad,” we have distinguished among unilateral defense and rescue, collective self-defense, preemptive war, and humanitarian and peace/stability operations, following chapters on war in general and the War Powers Resolution. In Part III, “Conducting Intelligence Operations Abroad,” we have separated the origins and evolution of the law governing intelligence operations from the specific study of covert actions and of other legal problems in the intelligence field. In Part IV, “Fighting Terrorism,” we address the definition of terrorism, intelligence activities aimed at detecting and preventing terrorism, the detention and interrogation of terrorist suspects, punishment of terrorists through adjudicative proceedings, and responses to terrorist attacks and insurrection. This part of the book is the most changed from the last edition, as one might expect. Finally, we have streamlined

Part V, “Obtaining and Protecting National Security Information,” and have updated it to include materials on the constitutional right of access to “special interest” immigration hearings, state secrets, and leak investigations and laws.

But if the order and priority of topics within National Security Law keep changing, the reasons for studying this discipline remain the same. The subject matter is still complex and difficult, the political and legal issues are perennially contentious, and there are few settled answers. Yet it is hard to think of another topic more current and provocative. Long before the terrorist attacks on September 11, 2001, it offered the opportunity to bring front-page news into the classroom and to better understand the special responsibility that comes with citizenship in a free and open democracy.

National Security Law helps advance other important educational goals, as well. These materials examine the structure and functioning of the government by focusing on the pervasive issue of national defense. They explore every aspect of the domestic legal process, and they integrate experiences from other courses in a new setting. Finally, they offer important insights about the significance of law outside the courtroom and about the interaction of law and politics.

While this book is designed for a course utilizing the “case method” of study, it also serves well as a background reader for lecture courses. In addition to descriptive text, the book includes many primary materials, such as judicial opinions, executive orders, statutes, and legislative history. Because such materials tend to be episodic, disorganized, and incomplete, reading and integrating them places a premium on the student’s initiative. Learning from such sources is not passive learning; it is hard but exciting work. This process resembles the work of lawyers and other decision makers in the national security field. Few of the answers to the questions they face every day can be found in a treatise or secondary treatment of the matter; the questions outpace academic production of such reference works. Like national security professionals, therefore, we and our students have to rely on an uneven variety of primary sources, even as the small body of case law grows.

We have tried to fill in some of the blanks with relatively fulsome notes and questions. The notes and questions, however, are not intended as optional addenda to the other materials; they are of equal importance and should be reviewed with equal care in preparing for class. On occasion, answering a question will require review of the “framework” law of Part I. Don’t hesitate to go back and reconsider these overarching materials. With the primary sources and notes, we have tried to supply all the information you need to answer these questions—to the extent they are answerable at all.

If you wish to read more or if you are using the book as an initial research source, the notes and questions also mention some of the most important authorities dealing with each topic. It is not necessary to go outside of these pages to get a well-rounded introduction to National Security Law, but an occasional excursion to the library will prove stimulating.

Even more stimulating—and central to a good National Security Law course—will be regular perusal of a national newspaper. National security issues are almost always front-page news, and it is inevitable that several will play themselves out in the news even as you read this book. Follow them and apply the analysis that you learn here. That application is, after all, the object of this study, not just a by-product.

We cannot claim in what follows that we have always been politically or ideologically neutral. But we have struggled to present a balanced view of every important issue, because we take seriously the persuasive power of the written word. National security is too important to be left to the “conservative” or the “liberal” alone; good legal analysis is neither.

A word about coverage is in order. This book addresses domestic legal issues that arise in providing for the national defense. We have concentrated on what we consider to be the core of this field of study. Unwilling to sacrifice depth of coverage for scope, we have deliberately omitted (except in passing) a number of relevant topics, including restrictions on travel and on transfers of critical technology, defense procurement, the security clearance process, foreign policy initiatives of state and local governments, environmental law and national defense, the draft, military law, and civil disobedience.

We have also provided a good introduction to the domestic recognition and application of public international law—what is sometimes called “foreign relations law.” Such law plays an increasingly important part in national security actions. The focus here is on sources of international obligations (treaties, executive agreements, and customary law), the respective roles of Congress and the President in their making, and their effect on domestic National Security Law. The *content* of international law is dealt with only episodically, where it is important to a fuller understanding of particular events, such as the Vietnam War or the alleged torture at Abu Ghraib. A systematic survey of the content of international law is left to other courses.

We have taught courses based on these materials for both two- and three-semester hours in large classroom settings and in seminars. We always do some exercises and simulations along the way. Occasionally we have covered aspects of National Security Law not addressed here. And inevitably we have culled at least one wonderful case study from the newspapers during the course of each term.

The manuscript for this Fourth Edition was completed in July 2006. A number of alterations were made during the editing process, however, to reflect some of the most important breaking developments in this extremely dynamic field, such as the Military Commissions Act of 2006, signed by the President on October 16, 2006. Yet like any work in the field the book is to some degree incomplete. It is truly a work in progress. We invite you to join in this work.

We welcome your reactions, comments, and suggestions.

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