

ASPEN CASEBOOK SERIES

*CORN
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**NATIONAL SECURITY LAW
AND THE CONSTITUTION**



Wolters Kluwer

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NATIONAL SECURITY LAW AND THE CONSTITUTION

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Preface

The Preamble to the Constitution tells us that providing for the “common defense” and “securing the blessings of liberty” were principal objectives that motivated our forefathers to adopt this new charter and form a “more perfect union.” Both of these objectives are related to protecting the nation, and the values the nation represents, from external and internal threats. It should therefore come as no surprise that we view the Constitution as the foundation for the exercise of all national security powers.

National security is, at the most basic level, protecting the nation from the range of threats that endanger the people and the constitutional government that serves them. The use of national power to “preserve, protect, and defend the Constitution against all enemies, foreign and domestic” is the obligation assumed by national leaders pursuant to their oath of office. The tools of national power provided to achieve this objective are as diverse and powerful as the people in whose name they are wielded. National security policy involves the complex task of managing and synchronizing these tools—diplomatic, informational and intelligence, military, economic, and criminal—to achieve national objectives. National security law, therefore, is the legal and regulatory framework that authorizes, guides, and limits the use of these tools.

In some cases, the text of the Constitution will provide relatively clear guidance to national security policy-makers or others assessing the legality of their conduct. However, in most cases, constitutional authority and limitations on the exercise of power to advance national security interests will not be easily derived solely from textual analysis, but will instead require a much more complex interpretation of text, history, judicial interpretation, practice, and pragmatic considerations.

To that end, our text is focused on the constitutional foundation for the use and regulation of national security powers. The text begins by exploring the general principles of this foundation, and then explores common areas of national security practice. While constitutional law is the unifying theme of all chapters, many will also require analysis of other sources of law, such as domestic statutes, treaties, customary international law, executive orders, and policies implementing these many sources of law.

Through this text we hope to offer students insights into the complex process of national security legal practice by focusing on essential legal sources and national security issues touching on the full spectrum of national security powers. This will ideally lead to a comprehensive understanding of our national security legal framework, and the numerous “friction” points that arise in the exercise of national security powers. Among these points of friction, two are particularly central to this text. First, the friction that arises as the result of the allocation of national security powers between Congress and the President, and the challenge associated with exercising these intertwined powers. Closely related to this aspect of national security practice is the role of the judiciary in resolving national security related disputes. Second, there is the friction that is inherent in efforts to secure both national security and individual liberties protected by the Constitution and other sources of law. Whether seeking to protect national security information in the context of criminal or civil litigation, restrict media access to, and publication of, national security information, or collecting information considered necessary to protect national security, government action will frequently implicate some of the most fundamental individual rights protected by the Constitution. How the interests of security and liberty are reconciled is central to the understanding of national security law.

In exploring interwoven government powers, and how those powers are leveraged and limited in order to preserve the liberties that define our nation, we hope to provide students with an appreciation of the challenges that confront national leaders (and their legal counsel) as they seek to manage these friction points in the interests of the nation.

We are grateful for colleagues in the field who blazed the national security law trail that we, like so many others, have followed. But for the visionary efforts of icons like professors William Banks, Peter Raven-Hansen, Stephen Dycus, John Norton Moore, and Robert Turner, national security law might never have become a distinct discipline of legal study. We owe much to their efforts. We are also grateful for the devoted efforts of our research assistants: Andrew Culliver Michelle Haws, and Mariko Badders from Houston College of Law; Alyssa Hughes and Norris Ham from Notre Dame Law School; and Nathaniel Lee and Tonya Maksimenko from Southern Methodist University Dedman School of Law; and the outstanding editors at Wolters Kluwer. We authors are responsible for any lingering errors in the text, which we know would have been more apparent but for their efforts.

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