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**NATIONAL
SECURITY LAW**

*Sixth
Edition*



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NATIONAL SECURITY LAW

Sixth
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To our teachers

PREFACE

In the last edition of this casebook, we noted that, since the terrorist attacks of 9/11, judicial challenges, legislative initiatives, and executive reforms had produced more durable structures, processes, and institutions for counterterrorism, if not for the national security field generally. These trends continue. In this edition we expand and deepen our treatment of some subjects (especially electronic surveillance, military detention, and military trials), shorten others in which controversies have been at least partly mitigated through reforms (interrogation), and add new ones to keep abreast of change (cyber operations) or to improve comprehension (extraterritoriality).

The Framework chapters in Part I remain the core of the book, with materials on the President, Congress, and the courts sharpened and updated. The chapter on the judicial role in national security now treats not only what the late Judge Harold Greene used to call “the usual suspects” (as in, “The Justice Department has rounded up the usual suspects on the government’s motion to dismiss”), but also two other recurring obstacles to judicial review of national security activities: the unavailability of *Bivens* actions and the defense of qualified immunity.

The courts’ sometimes crabbed view of the extraterritorial reach of U.S. law has posed another barrier to judicial intervention. Thus, in Part II, International Law and “Our Law,” we have added a new chapter collecting key cases on extraterritoriality to give readers an early understanding of the basic principles. In addition to *Reid v. Covert* and *United States v. Verdugo-Urquidez*, the principal cases include *Kiobel v. Royal Dutch Petroleum Co.* and the Fifth Circuit’s controversial 2015 cross-border shooting decision, *Hernandez v. United States*.

In Part III, Using Force Abroad, we have streamlined chapters on the Vietnam War and the War Powers Resolution, and on the collective and unilateral uses of force abroad, adding ripped-from-the-headlines coverage of the ongoing fight in Syria and Iraq against the Islamic State. The chapter on Targeting Terrorists has also been revised to incorporate Department of Justice analyses. The most significant change, however, is the addition of a new chapter on Cyber Operations, including excerpts of the 2015 Department of Defense *Law of War Manual*.

In Part IV, Intelligence Operations and Collection, we have reorganized the chapters to make them more nearly comprehensible and easier to teach, especially in light of developments since the last edition. Chapter 16 now describes what the intelligence community does: collection and covert operations. Chapter 17 collects the relevant legal authorities in one place and describes the organization of the community. Chapters 18 and 19 then address covert operations and a range of secret

activities that may escape effective oversight. Chapters 20-23 focus on searches and surveillance. Given the controversy and litigation accompanying the disclosure of the NSA's bulk collection programs (in large part by the Edward Snowden leaks), we now have devoted a separate chapter to that subject. Finally, Chapter 24, on screening and profiling, has been enriched by the inclusion of recent cases that suggest a growing judicial willingness to tackle issues posed by watch listing, no-fly decisions, and profiling.

Part V, Detaining Terrorist Suspects, has also been reorganized. The importance of habeas corpus — and the typical unfamiliarity of our students with its origin, scope, and operation — justified separating treatment of the structure of the Suspension Clause from its scope, and separating both from the substantive law of military detention. We have also separated the treatment of military detention of U.S. persons and of non-U.S. persons, and re-framed the chapter on “preventive” detention to include a broader overview of *all* non-criminal detention authorities within the civilian law enforcement paradigm.

Part VI, Interrogating Terrorist Suspects, has been streamlined, and a case study of coercive interrogation is presented in a separate chapter.

The march of case law has also caused us to reorganize Part VII, Prosecuting Threats to National Security. We now treat separately the procedural path to terrorism trials (including the debate over *Miranda* warnings and the application of speedy trial protections) and the evidentiary issues that arise from the prevalence of classified information in such cases, before turning to trial by military commission — a subject that has also evolved dramatically in recent years.

Part VIII, Homeland Security, details in two chapters the legal components of the homeland security apparatus that has grown rapidly in the years since 9/11, as well as the domestic role of the military.

Finally, Part IX, Obtaining and Protecting National Security Information, continues to treat subjects ranging from citizens' access to government records, to the punishment of unauthorized leaks, to censorship. This material has taken on new importance with recent Espionage Act prosecutions of suspected leakers and related threats to freedom of the press.

* * *

The rapid growth of the field and, therefore, of these materials, underscores one of the main challenges to teaching and learning national security law. The original sources included here — judicial opinions, statutes, executive orders, and the like — often lack clarity or coherence, and they typically raise as many questions as they answer. We nevertheless rely on such materials because they are the stock in trade of lawyers working in the field and of political decision makers. They reflect the state of the law, such as it is, and they illustrate the law's very dynamic character.

A mastery of this subject necessarily requires considerable patience and devotion. In this edition of the casebook we have redoubled our efforts to guide students and faculty alike in their study. Each principal judicial opinion (and some other primary material) is now preceded by a visually distinct “read-in” box that identifies key issues raised by the opinion that follows. Notes and Questions have been reorganized and streamlined to address many of these same issues. Finally, we have provided a boxed “Summary of Basic Principles” at the end of each chapter. These are *not* intended and should *not* be used as “black letter law.” Instead, they provide an opportunity to rehearse and put into perspective what we believe to be

the core concepts in each chapter. They also serve as a reminder that in this complex, rapidly evolving field, there still are more questions than answers.

Even a book as up to date as this one is, however, unavoidably incomplete. Courts continue to write opinions at a rapid clip, new sausage is being made (if at a somewhat slower pace) up on the Hill, and officials in the defense and intelligence communities scramble to respond to a bewildering variety of new security threats. Constant attention to these developments is essential. We therefore urge our students to read a national newspaper, and in most classes a discussion of current events lends a special sense of urgency to our assigned readings. Further updates are provided by annual published supplements to this casebook and by additional edited original materials that will be made available to teachers on the book's web site throughout each year.

Perhaps because of the importance of the subject matter, hardly any course in the curriculum is likely to provoke stronger feelings or more spirited debate. In our classrooms we encourage that debate, while at the same time demanding respect for everyone's opinions. So in this casebook we have tried to fuel that debate by fairly presenting both sides of the most contentious issues. We also have repeatedly stressed the strong interdependence of law and policy, and of the critical role of politics in shaping and implementing law. We have opinions, too, however, and we dare not hope that we have always been politically or ideologically neutral. We only wish to emphasize that national security is too important to be left to either "conservative" or "liberal" characterizations. Good legal analysis and the nation's future security depend on a careful consideration of all points of view.

In spite of—and perhaps because of—its inherent difficulty and political sensitivity, we believe that teaching and learning National Security Law will be more fun and more rewarding than ever in the years to come. And we hope that this book contributes to the indispensable work that lawyers do in keeping this nation safe and free. As always, we welcome your feedback and suggestions.

Stephen Dycus
William C. Banks
Peter Raven-Hansen
Stephen I. Vladeck

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EDITORS' NOTE

In general we have adhered to the rules for citation of authority followed by most lawyers and courts. They are set out in *The Bluebook: A Uniform System of Citation* (20th ed. 2015). For reasons of economy we have omitted without notation many citations within excerpted materials, and we have removed almost all parallel citations. We have, on the other hand, sought to provide citations that will enable readers to locate and review original sources. We have included URLs for many materials available online, but not for those easily located by a Google search.

To make it easier to refer back to materials where they were originally published, we have preserved original footnote numbers in all excerpted materials. Editors' footnotes are numbered consecutively throughout each chapter. Additions to quoted or excerpted materials are enclosed in brackets.

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