

U.S. FOREIGN RELATIONS LAW

Cases, Materials, and Simulations

Fourth Edition

Thomas M. Franck • Michael J. Glennon •
Sean D. Murphy • Edward T. Swaine

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Fourth Edition

■ ■ ■

By

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DEDICATION

*This edition is dedicated to
Thomas M. Franck
1931–2009
Scholar, colleague, mentor and friend*

PREFACE

Every decade seems to present a cataclysm in the field of U.S. foreign relations and national security, whether it be the dramatic withdrawal of U.S. forces from Vietnam, the collapse of communism in the Soviet Union and Eastern Europe, the horrific terrorist attacks of September 11, the ensuing U.S. interventions in Afghanistan and Iraq, or the revolutionary wave of uprisings in the Arab world during 2011, triggering in part military intervention in Libya.

Between those cataclysms, less dramatic transnational events also occur that can deeply affect the U.S. polity, such as adherence to trade agreements that both help and hurt U.S. industry; pursuit of litigation in U.S. courts that seeks to promote respect for human rights abroad; enactment of state-level sanctions directed at foreign governments, which might also impede federal policy; leaking of national security information to the media; or the pursuit, extradition, and prosecution of alleged criminals located abroad.

The hard-cover version of this course book introduces law students, and upper-level undergraduate students, to the constitutional rules, principal statutes, and landmark judicial decisions applicable to such cataclysms and events in both the fields of “foreign relations law” and “national security law.” The nine chapters cover the core areas of substantive law and procedure, addressing the manner in which international law (the law of nations and treaties) becomes a part of U.S. law, and the manner in which power is allocated within the federal government and between the federal government and the several states. Each chapter is further sub-divided into topics appropriate for coverage during one or two classes. The cases and materials are designed to inform the reader and to provoke discussion about *de lege lata* (the law as it is) and *de lege ferenda* (the law as it should be). Detailed notes guide the reader through the major thematic elements, pose questions for further analysis, and provide suggestions for additional reading. An appendix sets forth various simulations related to the readings that may be used to enhance the classroom experience, by having students play particular roles for addressing fictional (but realistic) problems.

Why use this particular course book? Course books in constitutional, criminal, and international law touch upon various aspects of the field of foreign relations and national security law, but largely in a hit-or-miss fashion. Course books on particular subjects of transnational affairs, such as on trade law, terrorism, or human rights, provide a detailed look at a slice of the field, but at the expense of the broader range of substance and structure. By contrast, this course book provides a comprehensive overview of the field of foreign relations and national security law, thereby laying the groundwork for more detailed study. There are some course books that do focus on foreign

relations law, but do not address issues that more squarely fall in the field of national security law, such as the handling of national security information. Other course books focus on national security law, but neglect broader aspects of foreign relations law, such as the division of authority between the federal government and the several states on matters of international relations. This course book provides a survey of the law relating to both fields, allowing professors and students to select all or some of the topics spanning these fields, and to see their inter-relationship.

At the same time, some instructors may wish to teach only the foreign relations or national security materials, while leaving out the other materials. To support such courses, two soft-cover versions of this course book are available that focus exclusively on one or the other field. Thus, soft-cover versions exist for:

U.S. Foreign Relations Law: reproducing Chapters 1, 2 (Sections 1–6 only), 3, 4 (Sections 1–4 only), 6, and 7, as well as Appendix I and II

U.S. National Security Law: reproducing Chapters 1, 2 (Sections 1–2 and 7–8 only), 3 (Sections 1–4 only), 4, 5, 7 (Sections 1–2 only), 8, and 9, as well as Appendix I and II

These soft-cover versions retain the pagination of the hard-cover version, thus the soft-cover versions contain “gaps” where material from the hard-cover version was not reproduced. Our belief was that this will permit more convenient use of all three versions should instructors find a need to do so from year-to-year.

The issues addressed in this course book are of enormous importance—perhaps the most monumental that any lawyer ever confronts. In times of national emergency, such as a large-scale terrorist attack, how should one think about the relative allocation of the powers of Congress and the President? What are the effects on U.S. law and policy when the United States adheres to a treaty that, for example, prohibits torture? Should rules developed through the practice of nations worldwide be used as a part of internal U.S. law, including for interpretation of the U.S. Constitution? When can the President introduce U.S. armed forces into hostilities without congressional authorization? To what extent can individual rights—such as freedom of the press and freedom from otherwise illegal searches or seizures—constitutionally be constricted for reasons of “national security”? What role can the courts play in adjudicating such disputes?

Such questions have been hotly debated, of course, since the earliest days of the Republic, and many contemporary arguments are but replays of previous disputes. Consequently materials once written on parchment retain an enduring relevance. Yet, as the nation moves forward in the twenty-first century, with parchment replaced by hard drives, old controversies do take on new forms. Unprecedented threats are posed, not only to the nation but also to the values at the heart of our legal structure. These cases and materials provide students an opportunity to confront these difficult choices of law, policy, and social values in both an historical and contemporary context.

We welcome the comments of instructors and students who use this book. Subsequent editions will benefit greatly from your advice and counsel.

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