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National Security Law

Fifth Edition

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To our teachers

Preface

As we approach the tenth anniversary of the terrorist attacks on the World Trade Center and the Pentagon on September 11, 2001, the field of National Security Law continues to evolve rapidly. After an aggressive assertion of executive power by the Bush administration in the first few years after 9/11, we saw a push back by the courts (on surveillance, detention, and military commissions), to some extent by Congress (on coercive interrogation), and eventually by the voters. But the Obama administration has changed the rhetoric more than the content of counterterrorism policies—continuing to rely heavily on military force, indefinite detention, military commission trials, expansive electronic surveillance programs, and frequent use of the state secrets privilege to restrict access to national security information in litigation. Nevertheless, these judicial challenges, legislative initiatives, and executive reforms have produced more durable structures, processes, and institutions for counterterrorism, if not for the field generally. The Fifth Edition of National Security Law reflects these trends.

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 features two new cases—one on the political question doctrine and a second on the state secrets privilege, an increasingly common basis for judicial avoidance.

Mindful of the growing importance of International Law as “our law” in the national security field, we have created a new Part II that addresses not only the processes for incorporation of international law into our own, but also the content of the law concerning resort to war (*jus ad bellum*) and law concerning the conduct of war (*jus in bello*). These new materials are referred to repeatedly in later chapters.

Part III, on the Use of Force Abroad, applies the core materials from the framework and international law chapters to studies of the Vietnam War, the War Powers Resolution, collective defense, self-defense and rescue, and humanitarian operations, with the addition of a new chapter on targeted killing. Included here are new materials on continuing U.S. military operations in Afghanistan and the northwest territories of Pakistan, as well as U.S. participation in NATO operations over Libya.

We have completely reorganized Part IV, Intelligence Operations and Collection, to make the structure and legal regulation of the intelligence community easier to teach and understand, while continuing to dissect critical developments in the law of surveillance. A new chapter on Programmatic Surveillance authorized by the 2008

FISA amendments rounds out a case study, begun in the Fourth Edition, of the Bush administration's warrantless surveillance program.

In Part V, Detaining Terrorist Suspects, we have significantly restructured chapters on habeas corpus and detention, reflecting the many developments in this area since the last edition. Likewise, in Part VI, Interrogating Terrorist Suspects, we have expanded our treatment of interrogation and extraordinary rendition, using old and new materials that we believe will be even more provocative than before.

Part VII, Prosecuting Threats to National Security, treats the evolving law and procedures in criminal trials for material support and terrorism-related offenses. And an expanded chapter on military commissions supplies a basis for examining the ongoing controversy over whether to try terrorist suspects in civilian or military courts.

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

Finally, Part IX updates our extensive treatment of legal issues in Protecting National Security Information—from citizens' access to government records to the punishment of leaks. The latter topic has taken on new importance with recent prosecutions of suspected leakers under the espionage laws.

But if the order and priority of topics within National Security Law have changed, the reasons for studying this subject 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 as current and provocative. Long before the terrorist attacks on 9/11, 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, it includes many primary materials, such as judicial opinions, executive orders, statutes, and official correspondence. 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. To simulate their experience, and to help focus your study, we have posed many hypothetical questions of the sort faced by national security professionals. Few of the answers 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, we have to rely on an uneven variety of primary sources.

We have tried to fill in some of the blanks with relatively fulsome notes and questions, which are not intended as optional reading, but are of equal importance with the primary materials. They should be reviewed with equal care in preparing for class. We have tried to supply all the information you need to answer the 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 important stories will play themselves out 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.

Finally, 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.

The manuscript for this Fifth Edition was completed in June 2011. Given the incredibly dynamic nature of our field, important developments will require its augmentation almost immediately. Ours is truly a work in progress. We invite you to join this work, and we welcome your reactions, comments, and suggestions.

Stephen Dycus
William C. Banks
Peter Raven-Hansen

June 2011

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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* (19th ed. 2010). 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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