

**National Security
Law & Policy**

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National Security Law & Policy

THIRD EDITION

Edited by

John Norton Moore

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Preface

It is “obvious and unarguable” that no governmental interest is more compelling than the security of the Nation.

— U.S. Supreme Court in *Haig v. Agee*

More than a third of a century has passed since two of the editors of this book, John Norton Moore and Robert F. Turner, co-founded the Center for National Security Law (CNSL) at the University of Virginia School of Law as a nonpartisan, nonprofit research institute to promote interdisciplinary advanced scholarship and education about legal issues affecting the national security of the United States. It was the first organization focused expressly on national security law in the nation, and probably in the world. One of the Center’s first projects was to design and publish a casebook in the anticipation of an exponential growth of the field of national security law and the need for other educational institutions to have the most comprehensive and up-to-date materials for use in the classroom and as a reference tool for national or homeland security professionals.

When the first edition of *National Security Law* was published in 1991, it was described as addressing “a new field in American law and legal education.” Today the field of national security law is firmly established. Courses in national security law and policy are taught at the large majority of American law schools and in many other graduate and undergraduate programs, and practitioners now abound throughout the government. The Association of American Law Schools has now recognized the new field and established a Section on National Security Law. The American Bar Association (ABA) Standing Committee on Law and National Security (chaired throughout most of the 1980s and early 1990s by either Professor Moore or Turner) now publishes a book on *Careers in National Security Law*. A parallel discipline called “operational law” has developed simultaneously within the military (and a chapter on this field is included in the casebook). Indeed, the United States military leads the world in incorporation of law into military operations.

Professors and government practitioners from around the world now routinely come to the CNSL National Security Law Institute’s programs, and copies of the previous edition of the casebook can be found in government libraries from Argentina and Australia to Ethiopia and Russia. The Center for National Security Law has also taken an active role in encouraging and supporting other universities to establish national security or homeland security programs. In 1994, for example, we assisted colleagues at Duke Law School establish their very excellent Center on Law, Ethics, and National Security, with which CNSL and the ABA Standing Committee annually co-sponsor a major national conference in Washington, DC. The two individuals who have served as director of the Duke center are both graduates of our National Security Law Institute, and the current director is a regular instructor at the Institute.

While there are now other casebooks titled *National Security Law*, we respectfully suggest that there is no other single volume that provides as authoritative and comprehensive review of the field. The other books, while of high quality, tend to focus on more limited

areas, particularly domestic legal issues such as war powers and First and Fourth Amendment freedoms and issues of homeland security. In contrast, this volume seeks a full synergy of international law, international relations, and national law and policy related to the security of the nation, the challenge of maintaining international peace and security, and the problem of unauthorized violence in the world. With that in mind, we believe we have successfully brought together the top scholars and legal experts in the field in a single volume that we believe will be of interest to practitioners, policy makers and students for years to come. A review of the brief biographies of our contributors will confirm that we have assembled leading authorities on their respective topics, and as a result, we have produced a volume of tremendous and continuing relevance to the post-9/11 national security challenges facing this country.

This third edition is not merely a modest revision of earlier editions as evidenced by the change in title to *National Security Law & Policy*. We changed the title believing that it more accurately reflects the scope of the material contained in the casebook and the self-evident fact that policy more often than not shapes the legal constructs under which governments and societies operate, and the law likewise can shape and impact national policies. As former President of the International Court of Justice Rosalyn Higgins, and one of our authors, cogently noted:

Policy considerations . . . are integral parts of that decision making process that we call international law; the assessment of so-called extralegal considerations is part of the legal process, just as is reference to the accumulation of past decisions and current norms. There is no avoiding the essential relationship between law and politics.¹

As the reader will quickly discern, in order to comprehensively deal with the subject matter many of the topics are addressed from both a policy and legal standpoint.

Several chapters that were of greater relevance in a Cold War setting have been deleted, other chapters have been substantially redesigned or updated, and important new chapters have been added to reflect, in part, the ever changing challenge of combatting terrorism and other national and international security threats which have only grown and diversified since the tragedy of the terrorist attacks on September 11, 2001. New chapters include: Law and Warfare in the Cyber Domain, Detention (treatment of detainees), Transnational Organized Crime (incorporating in part a chapter on counter narcotics from the second edition), “Lawfare” (the use of law as a means of struggle during armed conflict), The Foreign Intelligence Surveillance Act (FISA), and An Introduction to Economic Sanctions: A Brief History and the Basic Tools. The latter chapter is the first overview in print of the important, but highly technical, United States legal mechanisms for enforcing economic sanctions. Some chapters have been consolidated and most have been extensively revised or re-written to reflect the dynamic and constantly changing security environment.

Although the international law of conflict management is frequently presented in introductory international law courses, typically it is dealt with in cursory fashion. While it is gratifying to see more and more students taking courses on international security issues, it remains a fact that few graduates, and even surprisingly few teachers of international law, have a sophisticated knowledge and appreciation of the complexities of the international law of conflict management in all its dimensions—from initial determination of the lawfulness of coercion to efforts at arms control. Moreover, national

1. ROSALYN HIGGINS, PROBLEMS & PROCESS—INTERNATIONAL LAW AND HOW WE USE IT (Oxford: Clarendon Press, 1994) p. 5.

security matters are increasingly surrounded with a range of important national law issues such as the War Powers Resolution and congressional constraints on intelligence operations and arms transfers.

Indeed, one of the most dramatic trends of the past four decades in national security affairs has been the increase in congressional efforts to influence the decision-making process by the enactment of hundreds of new laws and statutory restrictions on the discretion of the Executive Branch. An illustration of the magnitude of this post-Vietnam legislative activism can be seen in the growth of the congressional publication *Legislation on Foreign Relations*. Some observers view this enhanced congressional role as a positive response to the tragedy of Vietnam and the abuses generically categorized as “Watergate,” while others contend that Congress has sometimes exceeded its constitutional authority and in the process endangered the security of the nation. As this casebook is being published, Congress and the President remain at loggerheads over a number of issues of national security concern (such as the closing of the Guantanamo detention facility, alleged abuses of intelligence gathering under the Foreign Intelligence Surveillance Act, and immigration policy) which has resulted in the President taking a number of actions that the leadership in Congress believes violate the Constitution—prompting calls for additional legislation to further restrict the powers of the President. Whatever view one takes in this heated debate, the plethora of new legislation in this area has made the study of national security law essential for anyone who wishes to understand the American national security process as the U.S. Government grapples with the multi-faceted multi-polar international security environment.

This casebook brings together teaching materials addressing a broad spectrum of important national security legal issues. It seeks to place such legal issues in historical and strategic context, and to acquaint the student with a wide range of recurring national security problems and issues. It is a carefully designed product integrating the expertise of the foremost authorities in each area with the editors’ overall structure of the new field of national security law. While the security challenges of the 21st century know no borders, we have re-organized the casebook into two sections: one focusing on national issues and U.S. domestic responses, and the other section focused on the national responses to challenges in the international security environment.

The arena of national or homeland security law and policy has grown exponentially since the terrorist attacks of September 11, 2001, as we believe we have captured in depth and scope in these chapters. Unlike other volumes that focus strictly on the legal aspects, we included, as we did in the previous edition, chapters devoted to the theoretic bases for understanding the development of international law and the formulation of policy supporting democratic principles and rule-based government. As such, it is designed for use not just in law schools but also in graduate programs in international relations and national security, and the nation’s war colleges and service academies—as well as to serve as a handy desk reference for professionals and practitioners in the field.

During our professional lifetimes the legal staff at the Central Intelligence Agency has grown from one or two lawyers to more than 120 in an explosion of litigation on national security issues. Issues once almost never raised in court are now increasingly the subject of litigation. The State Department’s Office of Legal Adviser has grown even larger with more than 200 attorneys and over 100 support staff, and since the terrorist attacks of 9/11 the FBI national security law legal team has increased more than five-fold. Three decades ago there was one lawyer on the National Security Council staff who focused primarily on Freedom of Information (FOIA) requests and an occasional contracting or personnel legal issue. Today there is not only a full-time NSC Legal Adviser focused heavily upon

policy issues, but a Deputy Legal Adviser and two other lawyers as well. And today's military commanders, given the many legal issues associated with deployments for peace-keeping, peace enforcement and combat operations, understands that the Staff Judge Advocate is among the most valuable resources available when planning and conducting these operations. This is amply reflected in our chapters on Operational Law and the Law of Armed Conflict and Neutrality.

The choice of *national security* as a focus for this book reflects the priority and deference generally given to this phrase in contemporary policy, and the resulting need for lawyers, social scientists, policy-makers—indeed, all citizens—to analyze and evaluate national security issues on a critical and continuing basis. We believe strongly that this effort will be enhanced by this book's comprehensive examination of the many ways in which law and national security interact. Consequently, the chapters of this book are comprehensive and often highlight the diversity of values and assumptions that underlie national policy on and current conceptions of national security. They explore the contemporary policy dilemmas and political tensions which such diversity can generate, as well as some of the traditional resolutions, tentative accommodations, and continuing contradictions embodied in the law applicable to each area.

As a principal outcome of past political accommodations, *law* is both a starting point and an end product of each new struggle by the institutions of government to balance the frequently imprecise demands of national security with the often equally vague advancement of other important values and objectives as reflected in national policies designed to meet these national security challenges. Broadly conceived as it must be, the legal process is in practice frequently the battleground on which the struggle to define and prioritize national security objectives occurs. Such struggles are seldom won or lost permanently; each generation typically feels compelled to reexamine and challenge the decisions and accommodations of earlier times as perceptions and priorities change, international realities shift, and circumstances require. It is an extraordinarily dynamic area with new challenges, such as terrorists and criminal organizations using drones to carry out their illicit activities, yet to be fully addressed by both policy and the law. We recognize, therefore, that the terrain will be a changing one in many of the areas covered in this book. Yet it is also likely that the issues posed in each area, the trade-offs that they present, and the approaches suggested for dealing with them will also be characterized by a remarkable continuity over the years. In any event, we are confident that the chapters that follow will provide a useful framework for policy analysis and decision as well as a current snapshot of the legal landscape, recognizing that the contours of the dynamic field of national security law are in constant flux, being shaped and reshaped each year in light of emerging challenges posed by globalization, the continuing threat of terrorism and the resurgence of traditional forms of state to state conflict.

The book does not propose a single grand theory or formula to assure rational choice or sound law in the realm of national security. Rather the purpose is, by the broad scope of the material covered, to expose students and practitioners to the real-world challenges and dilemmas facing decision makers and government officials in ensuring our national (and international) security. Consequently, in addition to the new chapters previously mentioned, the other chapters in the book address not only some of the central public preoccupations of our time—military force, arms control and nonproliferation, free speech, terrorism—but also a number of more esoteric corners of the law relating to national security, such as the environment and export controls, that are often ignored in public debate until, from time to time, some unexpected crisis thrusts them into the limelight and points up the need for wider discussion and understanding.

Periods of crisis can be the worst of times to consider the priorities and trade-offs that govern decisions about the making and application of law in matters of national security. As passions mount, positions tend to polarize around extremes. On the one hand, uncritical invocations of “national security” can become all-purpose justifications for disregarding or overriding values that the security of the country is in fact meant to ensure. On the other hand, skeptics of security considerations may underestimate the dangers inherent in a world that is all too frequently inhospitable to those same values. In balancing these competing considerations it is easy either to focus on the real constraints of national security or to neglect the realities of a world that is too frequently harsh in preoccupation with immediate preservation of equally real competing values. Only through an honest understanding of the realities of national security threats and competing interests can optimal and informed judgments be made about the efficacy of our national security law construct and the policies these laws are designed to implement. It should perhaps be remembered in this connection that democracies, for all their greatness, can all too easily misperceive serious totalitarian challenges and turn inward toward a more familiar and compatible world. While comforting in the short run, in a globalized multi-faceted world ignoring the many and diverse threats to international peace and security only emboldens aggressive conduct and undermines deterrence—thus increasing the risk of war.

During the last quarter-century, whether for good or for bad, the law has taken on a dramatically increased importance in the national security process. Policymakers, political scientists, historians, and citizens who seek to be informed voters all have a need to understand these changes. Members of the legal profession, in particular, have a special responsibility to understand these developments—not only because the past two decades have seen an explosion in the demand for lawyers trained in this field, but also because of the traditional role played by our profession in shaping informed public opinion about important public policy issues. Based on the reactions to previous editions, we have produced this third edition with the expectation that it will facilitate an interdisciplinary understanding of what we believe to be one of the most important public policy developments now facing the nation; and if it contributes in even a small way to that end our efforts—and those of the many scholars and practitioners who helped make this work possible—will have been justified.

In a work of this kind there will inevitably be errors. Every reasonable effort has been made to keep these to a minimum, but the breadth and dynamic nature of the subject matter—combined with the interactions of numerous contributors—virtually guarantee that there will likely be mistakes. The editors accept full responsibility for any errors, and invite readers to bring them to our attention so that future editions may be corrected.

Many of the substantive topics addressed in the volume are highly controversial and subject to legitimate differences in points of view. We believe, however, that one of the book’s strengths is the diversity of viewpoints represented by the distinguished authors who have contributed individual chapters. Each contributor is of course responsible for any value judgments reflected in his or her chapter, and readers are reminded to keep in mind that many of the subjects addressed in the pages which follow involve newly developing or rapidly changing fields of law which are not without controversy and continue to be shaped as our understanding of the national and international security challenges evolves.

Finally, as the brief biographical sketches of our contributors reveal, several of our chapters have been written by individuals currently employed by the federal government. It should be emphasized that the views expressed herein and responsibility for the accuracy

of facts stated are those of the contributors and should not be attributed to any department or agency of the government or any other entity with which they currently or in the past have been affiliated. Many of the chapters include lists of additional readings that will provide other insights on the subjects.

John Norton Moore, Guy B. Roberts & Robert F. Turner
Charlottesville, Virginia, March 2015

Acknowledgments

The academic field of “national security law” began at the University of Virginia School of Law more than forty-five years ago, when one of the editors (Professor John Norton Moore) offered the first American law school course on what was then called “Law and National Security.” That the field began at the University of Virginia was particularly fitting, as the University was founded by one of history’s greatest champions of the rule of law, Thomas Jefferson, whose personal interest in the interplay between law and national security issues while serving as U.S. Minister to France, America’s first Secretary of State, and two terms as our third president, is well known.¹ “Mr. Jefferson’s University” has a proud history of extraordinary scholarship and teaching in related fields and is associated with such luminaries as Permanent Court of International Justice Judge John Bassett Moore, American Political Science Association and American Society of International Law President Quincy Wright, and International Court of Justice Judge Hardy C. Dillard—who served for many years as our Law School’s Dean. It is not by coincidence that the U.S. Army Judge Advocate General’s Legal Center and School has since 1951 been located at the University of Virginia.

Known initially as “International Law II: Law and National Security,” then as “Law and National Security,” and finally as “National Security Law,” the original course was supplemented over the years by more specialized seminars focusing on the separation of national security powers, foreign policy goals, intelligence, arms control, foreign trade, and other areas. To promote the teaching of national security law across the nation, in 1981 Professors Moore and Turner co-founded the Center for Law and National Security (later renamed Center for National Security Law [CNSL]) at the law school and began work on the first edition of this casebook. In the past quarter-century, the number of American law schools offering at least one course or seminar in this area has grown from four to well over 100—encompassing the large majority of the nation’s accredited schools of law.

Over the decades, we have benefited greatly from the scholarship and expertise of some of the top authorities in the world on various issues related to national security law. They have traveled to Charlottesville to guest lecture in our classes or to take part in CNSL conferences, we have encountered them in our work with the American Bar Association Standing Committee on Law and National Security (to which one of us gave its current name and each of us chaired during most of the 1980s and early 1990s), they have lectured in our twenty-two past annual National Security Law Institutes, and/or we have met them

1. See, e.g., Jefferson’s *Opinion on the Treaties with France*, April 28, 1793, in 25 Papers of Thomas Jefferson 608 (John Catanzariti, ed. 1992) (“Compacts . . . between nation and nation are obligatory on them by the same moral law which obliges individuals to observe their compacts. . . . Of these, it is true, that nations are to be judges for themselves, since no one nation has a right to sit in judgment over another. But the tribunal of our consciences remains, and that also of the opinion of the world. These will revise the sentence we pass in our own case, and as we respect these, we must see that in judging ourselves we have honestly done the part of impartial and rigorous judges.”).

in other venues. Some have first come to us as students and then gone on to achieve distinction in their chosen fields.

With great sadness we note that, since the first edition of this work was published, some of the preeminent scholars and practitioners in this new field have passed from the scene. Myres S. McDougal, Sterling Professor of International Law at Yale Law School and perhaps the most able international lawyer in the world during the second half of the twentieth century, died in 1998. Thus far in this century we have lost former Yale Law School Dean Eugene V. Rostow, former State Department Legal Adviser Monroe Leigh, and other cherished scholars, practitioners, and friends. Howard S. Levie, draftsman of the Korean Armistice Agreement and former colonel in the U.S. Army's Judge Advocate General's Corps, died in 2009 at the age of 101. Ambassador Donald Mahley completed negotiation of the United Nations Arms Trade Treaty and helped update our Arms Control chapter just before his death in 2014. Each of them deserves to be recognized for their great contributions to the field of national security law, and we have all been influenced greatly by their scholarship, friendship, and wise counsel.

Rather than attempting to cover every aspect of the topic ourselves, we decided in 1981 to solicit chapters from those individuals we thought to be the leading experts in the nation—in some cases, in the world—on the specific issues being addressed. We were pleased with the result, and when we decided to produce a 2nd edition we again sought out the leading experts in each field. This same strategy was followed for our 3rd edition, again we believe with excellent results. We are deeply indebted to each of the men and women who have contributed to the 3rd edition.

Transforming chapters into a finished product required many hundreds of hours of painstaking copy editing, cite checking, and other administrative efforts. We are profoundly indebted to the casebook's project manager, our very able in-house editor Judith (Judy) Ellis. Judy labored tirelessly and without complaint for months—including many Saturdays—formatting, proofreading, updating, and corresponding with contributing authors to ensure that this new edition is as up-to-date and error-free as possible. She worked with contributors to meet tight deadlines, doing the necessary copy editing and coordinating the efforts of student assistants in checking, updating, and correcting countless details that are necessary to produce a first-quality casebook.

We are also deeply indebted to two extraordinary law students, Nathaniel (Nate) Freeman and Lauren Schwartz, who worked under Judy's supervision to check citations and assist in proofreading and other essential tasks. Both have demonstrated exceptional talents and a willingness to go far beyond the requirements with which they have been tasked, and we wish them continued success as they make the transition from law school into the professional world.

The publication of the first edition of *National Security Law* in 1991 marked our first association with Carolina Academic Press. The experience was so positive that since then we have turned to them for virtually all of our publishing needs, and with each new volume our respect and appreciation for their professionalism has risen even more. We would thus be remiss if we did not acknowledge our grateful appreciation to Dr. Keith Sipe, President of Carolina Academic Press, and to his colleagues Linda Lacy, Bob Conrow, and Tim Colton. They have made the preparation and publication of this edition a most enjoyable enterprise.

Both this project and virtually everything else our Center has done over the past thirty-four years has been made possible by the generous support of a number of philanthropic foundations and donors, to whom we owe a debt of gratitude that words cannot easily

express. Without such support, this work would not be possible. We are profoundly grateful to Dr. Ingrid Gregg, Montgomery Brown, and their colleagues and board members at the Earhart Foundation, both for their generous financial support for this edition and their funding of the first edition prepared in the 1980s. Without the support of the Earhart Foundation and other philanthropic organizations, neither our Center nor this volume would exist.

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John Norton Moore is the Walter L. Brown Professor of Law at the University of Virginia School of Law where he teaches numerous international and national security law courses. He also directs the University's Center for National Security Law and the Center for Oceans Law & Policy and was the Director of the Graduate Law Program at Virginia for more than twenty years. Viewed by many as the founder of the field of national security law, Professor Moore chaired the prestigious American Bar Association's Standing Committee on Law and National Security for four terms. He is the author or editor of over 45 books and over 180 scholarly articles and served for two decades on the editorial board of the *American Journal of International Law*. He is currently an honorary editor of the *Journal*. He is a member of the Council on Foreign Relations, on the Board of Directors of Freedom House, the American Law Institute, the American Society of International Law, the Order of the Coif, Phi Beta Kappa, and numerous other professional and honorary organizations. His most recent books include *Solving the War Puzzle* (2004) and *Civil Litigation Against Terrorism* (ed. 2004).

In addition to his scholarly career, Professor Moore has a distinguished record of public service. Among seven Presidential appointments, he has served two terms as the Senate-confirmed Chairman of the Board of Directors of the United States Institute of Peace and, as the first Chairman, set up this new agency. He also served as the Counselor on International Law to the Department of State, as Ambassador and Deputy Special Representative of the President to the Law of the Sea Conference, Chairman of the National Security Council Interagency Task Force on the Law of the Sea, and as a member of the United States' legal team before the International Court of Justice in the *Gulf of Maine* and *Paramilitary* cases (a Deputy Agent for the United States in the *Paramilitary* case). Professor Moore served as a Member of the Director of Central Intelligence's Historical Review Board from 1998–2002.

In the past, he has served as a Consultant to both the President's Intelligence Oversight Board and the Arms Control and Disarmament Agency. He has also been a member of the National Advisory Committee on Oceans and Atmosphere, the United States Delegation to the Conference on Security and Cooperation in Europe, the United States Delegation to the United Nations General Assembly, and the Presidential Delegation of the United States to observe the 1984 elections in El Salvador. In 1990, he served, with the Deputy Attorney-General of the United States, as the Co-Chairman of the United States-USSR talks on the Rule of Law. He also served as the legal advisor to the Kuwait Representative to the United Nations Iraq-Kuwait Boundary Demarcation Commission, and as a consultant to the OSS Society.

In 2013 he won the American Bar Association's Morris I. Liebman Award in National Security Law.

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He also served for 25 years in the US Marine Corps before retiring with the rank of colonel. In that capacity he held a wide range of assignments in policy formulation, operations support, negotiations, management, litigation and policy/legal advisor both in the US and during overseas assignments. Positions and responsibilities included legal counsel to a four-star Combatant Commander, and military representative for disarmament and arms control issues to the United Nations, Conference on Disarmament and the International Atomic Energy Agency. He received his law degree from the University of Denver, and he holds master's degrees in international and comparative law from Georgetown University, in international relations from the University of Southern California, and in strategic studies from the Naval War College where he graduated with highest distinction and won the Stephen B. Luce Award for academic achievement. He is admitted to practice in Colorado, California, Arizona and before the Military Court of Criminal Appeals and the United States Supreme Court. Mr. Roberts has written extensively on nonproliferation, arms control, terrorism and law of war issues.

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