Homeland and National Security Law and Policy

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Cases and Materials

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Contents

Introduction

Thank you for your purchase of *Homeland and National Security Law and Policy: Cases and Materials*. If you are reading this, there is a good chance you are an undergraduate or graduate student taking a class in national security law or a related subject. This book has been specifically written for individuals like you who have no formal legal training or education beyond what you learned in high school government or social studies classes and, perhaps, similar courses earlier in college.

Overview

This book is intended to expose you to the highly diverse range of legal issues tackled by national security professionals. The topics covered by this book include but are not limited to the following: criminal procedure, interrogation, stop-and-frisk, warrants, electronic surveillance, domestic surveillance, foreign surveillance, foreign searches, state secrets, classified information, war powers, litigation, civil rights, free speech, military justice, international law, detainees, drones, military justice, rules of engagement, and much more.

Although this book is a mile wide in terms of the subjects covered, it is only an inch deep in the depth given to each topic. Each of the subjects touched upon in this book can be (in fact, often are) the subject of much more detailed and specialized texts. But the approach we have taken in writing this book is to provide a survey of the field in a manner that makes this text an excellent source from which to learn the basic principles of national security law. This book is intended for a wide variety of audiences including aspiring law enforcement, diplomats, intelligence analysts, military officers, civil rights advocates, and others who simply want to know more about the issues in the news every day. It is very possible you are a student in one of the following disciplines: criminal justice, homeland/national/international security, prelaw, international relations, political science, intelligence studies, or public policy to name but a few. Or maybe you are taking a class in national security because the class you really wanted was full and this was the only one you could fit in your schedule. Whatever your aspiring path or discipline may be, this book will give you the basics of the legal issues in homeland and national security.

Now, the definitions of homeland security and national security tend to be difficult to pin down. Those who have looked at the issue have found as many as seven different definitions in the guidelines of different agencies. For our purposes here,

we will rely on the vision of homeland security that is used by the Department of Homeland Security:

> A homeland that is safe, secure, and resilient against terrorism and other hazards, where American interests, aspirations, and way of life can thrive.[1]

Compare this to the definition of homeland security provided by the Department of Defense:

> A concerted national effort to prevent terrorist attacks within the United States; reduce America's vulnerability to terrorism, major disasters, and other emergencies; and minimize the damage and recover from attacks, major disasters, and other emergencies that occur.[2]

National security is defined in the same document as:

> A collective term encompassing both national defense and foreign relations of the United States with the purpose of gaining: a. A military or defense advantage over any foreign nation or group of nations; b. A favorable foreign relations position; or c. A defense posture capable of successfully resisting hostile or destructive action from within or without, overt or covert.[3]

You can see there is a fair bit of overlap in the terms, and so this one text is designed to give you a sense of the law and, in some cases, the policies that provide a framework for authorities to seek these goals.

How This Book Works

Each chapter of this book introduces you to legal issues and concepts which are summarized and explained. Excerpts of relevant statutes, directives, and case law are provided. In this text, more so than in many undergraduate texts, we provide you edited versions of the governing court decisions and opinions rather than relying on a summary or analysis of those opinions. The analysis will come out as you discuss the cases with each other, in class or out.

Now, many of the cases we include are very long, in some cases more than a hundred pages in length. In addition, some of the writing of the cases may be difficult to understand, with arcane legal language and lists of in-text citations. In an effort to make the cases shorter and more easily read, we have tried to paraphrase parts of the decisions that may be difficult for undergraduate students to understand, and we have edited out parts of the cases that do not bear directly on the issues we are highlighting in the text. We've also eliminated many of the in-text references, quotation marks, and other aspects that we think would just confuse the reader. Now, you may want to read the case as originally written, so we have provided the accurate case title and source. That way you can look up the full text of the case if you wish.

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1. Department of Homeland Security, *The 2014 Quadrennial Homeland Security Review*, p. 14.
2. Joint Publication 1-02, Department of Defense Dictionary of Military and Associated Terms.
3. Id.

We will spend a bit more time on the law regarding search and seizure and due process than you might find in other textbooks on homeland security law or national security law. Because much of the effort to protect our nation from terrorist attacks is actually good police work, it is important to have a good foundation in these areas of the law. Terrorism is a crime that presents certain challenges often not found in the more common crimes our authorities deal with. The need to act in a way that catches these perpetrators before they commit their acts is so much more important, the laws regarding surveillance and searches, detention and use of force, have been applied by the authorities and considered by the courts in new and complicated ways.

We also spend a chapter talking about the laws that apply to disaster relief. Our nation has long recognized that the effect on the nation and its people from large-scale attack is, in many ways, similar to the effects from natural disasters like hurricanes, wildfires, and floods. So some laws have been written in ways to allow first-responders at the federal, state, local, and tribal levels to work together.

While we include portions or summaries of some key statutes, regulations, and policies, most of this book uses the case law and opinions of the U.S. Supreme Court and other federal and state courts to discuss what the law is.

Now, you may be wondering just what are "case law" and "opinions"? Case law is law that is written and explained by judges. As you learned in high school government, the legislature makes the law, and the judges interpret the law. Often, disputes arise as to how the law, which may not be very precise, applies in a particular case or controversy. When that happens, it is up to the judges to interpret and clarify the law and apply it to the specific facts before them. When judges do this, they write an opinion to explain their interpretation of the law and how it applies to a particular case. These opinions are in turn considered and relied on by other judges in cases that arise under slightly different facts. The opinions are also relied on by attorneys, law enforcement officers, and other individuals. When this is done, the case law is referred to as "precedent." Because the facts of every case are slightly different, it is important that the reasoning of the court be explained so that the actual decision can be understood and applied as precedent in the best possible manner. The opinions, in other words, provide the "why" of the law's development as much as the "what."

In an opinion, the judges give you the facts and events that led to the case and legal issue in question, and then lead you through a discussion of the legal issues and the applicable law. In this discussion, the judges explain how the law applies to the facts before them and how that analysis leads them to an eventual legal conclusion. The law and reasoning the judges give in an opinion for one case will be applied in the future to other cases which raise similar (but often slightly different) legal or factual issues.

The challenge in dealing with case law is that the opinions are often written in a manner difficult to understand, especially for those who have not handled case law before. The judges who write case law are among the most experienced, brilliant, and respected attorneys in the country. Unfortunately, they write at a level beyond the education and experience of the average individual, especially those who are untrained

in the law, using advanced legal terminology, Latin phrases, and a vocabulary beyond that of the average individual.

What the authors of this book have done is edit the opinions written by judges in matters concerning national security. In preparing the opinions you read in this book, we have removed some of the complicated legal jargon, extensive footnotes and references, obscure Latin phrases, and discussions of topics other than those that apply to the concepts we are trying to help you understand, leaving only the part of the decision that addresses the national security issues on which you should be focusing. Essentially, the authors have abridged the cases to make them more friendly and understandable for an undergraduate audience without any legal training. In some cases you will see parts of decisions are underlined or in bold print. The authors have added these in order to make sure you see a key point made in the decision. All this has been done to make the judicial opinions not only readable, but more easily understood by a non-lawyer like you. If you are interested in reading the unedited versions of these cases, most are publicly available and can be found online with a simple Google search.

Some Cautions

It is common for anyone interested in a particular field to watch television shows, read novels, or see movies related to your interest. That is fine, so long as you remember that what you are watching or reading is entertainment and not information. Even those shows that are "documentaries," "docudramas," "inspired by a true story," or "based on the events of . . ." will be extremely inaccurate and can give you the wrong ideas about the subject. They have been written and edited to entertain, not to inform.

This is especially true when these shows get into a field as complex and as necessarily precise as the law. These shows often get more wrong about the law than they get right. Just as you would not try to learn physics from watching *Star Trek* and science fiction, do not try to learn the law by watching these shows or other legal fiction. After you complete this class, the next time you watch a police drama or movie involving national security or the law, you will have a completely different outlook.

Be warned, the knowledge you gain from this book just might ruin your enjoyment of those shows!

Next, we ask you to be careful of bias or preconceived ideas about the law that block your learning. As a free people, we have many disputes over what the law is or what the law should be. Reasonable minds can disagree as to what should be legal or how the U.S. Constitution should be interpreted. For example, there is considerable controversy in the U.S. over the meaning of the Second Amendment and the right to keep and bear arms. It is likely that you have your own opinion as to how the Second Amendment should be interpreted. But how you think this law *should* be applied may be different than the way the law *is* applied. Both are useful and valuable, but it is important to know the difference.

The Latin terms for this distinction are *lex lata* (what the law is) and *lege ferenda* (what the law should be, or how the law should develop). You will need to

know the difference and be able to distinguish between the two. Here is an easy test—*lex lata* is contained in the words of the Constitution, a treaty, or a statute, and in the majority (deciding) opinion of a court case (usually the Supreme Court). If you are reading a scholarly article, a newspaper account, or someone else's analysis of the law, you are very possibly reading what that writer thinks the law *ought* to be (*lege ferenda*).

As much as possible, this book seeks to refrain from offering an opinion as to what the law should be, focusing on what the law is as interpreted by the courts. Unless it specifically states otherwise, this textbook seeks to present the law as it is and explains why it is a certain way, informing the reader as to the debates which occur in society concerning these issues. That is why most of the textbook consists of actual court decisions and the language of the statutes, and not a summary or analysis provided by the authors. It is up to you, the reader, to decide for yourself whether the law is proper or right, or should be changed. You are more than welcome to disagree with the laws of this country. In fact, throughout this book you will encounter laws and decisions you not only disagree with, but which you may also find odious to civil liberties, laws which you believe actually endanger national security, or which simply do not make sense. Just remember, no matter how much you disagree with a law, it is still the law unless and until it is changed by a court decision or legislation.

Finally, in this field perhaps more so than in any other, the law changes, and in some respects changes quickly. A president may issue an order that changes how a law is applied, or Congress may pass a law responding to a Supreme Court decision. The laws we include in this book have been chosen to ensure you understand the concepts and principles, but no textbook can be fully up to date in this day and age. So make sure that you learn how to find the law from outside sources to keep up with it as it evolves.

Sources of Law

So what are the sources of law contained in this book?

First we will discuss the U.S. Constitution. It is, as most of us know from grade school, the founding document on which our system of government and its laws are based. The Constitution controls the government by providing express and implied powers for the branches of the federal government, by limiting the powers of the federal government, and by protecting individual rights from infringement by the government. The Constitution also provides for the federalist system we have in the United States, with different roles for the federal and for state governments. It provides, as we'll discuss later, for international law—treaties and other international agreements—to be a part of our law. The Constitution, as we will explain in the next chapter, established the legislative, executive, and judicial branches of government. "The law" can be found in official documents and decisions that flow from each of these. In fact, the Constitution itself tells us what the law is in Article VI:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land

Often, when people think of "the law" they are thinking about the statutes that Congress passes. Congress may pass laws that establish the law's content (such as laws that prohibit certain behavior, such as human trafficking or torture) or laws that establish procedures (such as the Foreign Intelligence Surveillance Act), providing guidance to the executive branch on how things should be done. Law is established through executive regulations that the president or individual federal agencies issue pursuant to inherent Constitutional authority or through a statutory grant of authority. In the case of executive action involving national security, these regulations can take the form of an executive order (such as E.O. 12333 that regulates the intelligence community by prohibiting assassinations), or through National Security Decision documents that may or may not be classified. Finally, law is established through decisions of the U.S. Supreme Court and the subordinate courts, giving us interpretations of the Constitution, statutes, and regulations as they apply to specific cases and controversies arise.

Other sources of the law we will discuss in this text include treaties and other international agreements, as well as the statutes, court decisions, and regulations enacted by the states, territories, and tribal authorities in the U.S. We will talk about HOW the courts use these treaties and agreements to tell us what the law is. It's not an automatic process, as you will come to see.

All of these sources together provide "the law." But even then, in our system, "the law" is sometimes established by custom and practice. This is often the case because the legislature or the courts have not acted. In the field of national security more so than in any other, understanding the law often requires an understanding of history and what the president has done in the absence of (or sometimes in disagreement with) actions and decisions of Congress or the courts. When Congress or the courts then act (if they do), the law changes. What "the law" is, then, can shift as each of these actors (Congress, the president, agencies, courts, states) takes a turn pronouncing the law. And it is important to understand that this shifting, this interplay between the different branches of government, is not a flaw in our system, but is in fact exactly how our system was designed to work.

So, for example, the president may act pursuant to what he considers his inherent authority as commander-in-chief—say by directing certain surveillance of individuals considered threats to the nation. And, pursuant to that, he issues an executive order to the Department of Defense. That order would apply only to the executive branch (in this case the Department of Defense) and affects only how they do their business. This is just like any boss telling a subordinate office what to do. From the perspective of that agency (or the executive branch as a whole), that executive order has "the force of law." In other words, they have to follow it.

Now, the courts may get a complaint in the form of a case from a person claiming that this surveillance constitutes an illegal search and violates the Fourth Amendment.

A scholarly article published in a law journal, tracing the history of search and seizure law and concluding that the case has merit, is NOT the law. It might be convincing, and may or may not convince the president's lawyers, but they are not obliged to follow the law review article's analysis. On the other hand, if the case does go to court, and the courts agree with the complainant, then that court decision IS the law, and the president, and his subordinate agencies will have to change their behavior to comply with the court decision.

Now, let's say that Congress thinks that, while the Supreme Court had some valid points, the need exists for this type of surveillance to be conducted. So Congress passes a law providing some guidelines. Based on that law, the president revises his executive order, and the Department of Homeland Security and Justice Department issue regulations telling federal agents how to obey the president and Congress. Each of these—the court decision, the statute, the revised (or new) regulation—is a part of understanding what the law is at this point in time.

In making the regulations, the executive branch may be guided by the Administrative Procedure Act,[4] which in many cases requires that proposed regulations be issued in draft form and published, so that the public has notice and an opportunity to comment on the proposed rule. The agency is then required to consider that comment before writing and issuing the final regulation. This is intended to ensure that the public is aware of what the government is doing when rules are made. There are some circumstances where this procedure is not necessary, but in most cases it is.

In the court decision, the majority opinion establishes what the legal ruling is—what the law is, as applied to the specific case before it. Other opinions, concurring or dissenting with the majority opinion, are not the law but often provide valuable insight into how the law is developing or point out ways that the next case ought to frame an issue. So, in reading court decisions, reading the concurring and dissenting opinions are important, but it is also important to keep in mind the limited role these other opinions play.

In addition to federal laws (from whatever source) are state laws. Each state has its own constitution, which cannot conflict with the U.S. Constitution, federal statute, or (by extension of federal statute) administrative laws. Within a state, no state law can conflict with the state's constitution. Finally, there are municipal laws. These are local ordinances passed by cities and counties.

The paragraphs above show that the sources of law can be presented in the following hierarchical structure:

1. The Constitution
2. Federal statutes and treaties
3. Federal executive decisions: administrative law and executive agreements

4. The Administrative Procedure Act (APA), Pub.L. 79–404, 60 Stat. 237, enacted June 11, 1946, is the federal statute that governs the way in which administrative agencies of the federal government of the United States may propose and establish regulations.

4. State constitution, state statutes, and state common law
5. Municipal law (cities and counties)

Case law (or judge-made law) is not included in this list because judges do not make laws in the same manner, by simply creating a new law or regulation. Instead, judges, as we have said before, interpret the laws that already exist and apply them to the cases and controversies that come before them.

However, the reality is that judges do in fact "make law" when they write their opinions. This is because these decisions provide a level of detail and specific guidance that might not exist in the text of the Constitution, or in the statute, treaty, or regulation being applied. Another way that judges "make law" through deciding cases is by balancing provisions of the law that seem to contradict each other or serve contradicting values (such as liberty and security). And, in making these judgments, the courts change how we understand and apply the law.

For example, nowhere does the U.S. Constitution specifically require a person who is being arrested be informed of the right to remain silent and the right to an attorney before being interrogated. However, the U.S. Supreme Court, in applying the rights protected by the Fifth and Sixth Amendment to police interrogations, shaped a rule that requires law enforcement to do just that. That rule, now a part of the law, is known as the Miranda Warning.

Using the example from above involving Miranda, the U.S. Constitution has always included the right of a suspect to remain silent and to have the assistance of legal counsel. To give that preexisting civil right substance and prevent its abuse or avoidance by law enforcement, the Supreme Court added the requirement of a Miranda Warning in 1966. In fact, the Supreme Court actually did not order law enforcement to read people their rights prior to being interrogated when in custody. It merely created a rule making statements made without such a warning inadmissible because they presumably violate the Fifth and Sixth Amendments.

The Federal Court System

Article III of the U.S. Constitution vests the judicial power in "one Supreme Court, and in such inferior courts as the Congress may from time to time establish." Let's provide a little background on the federal judiciary in this country. Instead of starting at the top with the U.S. Supreme Court and going down, though, let's start at the bottom and work our way up.

All over the country, we have federal judicial district courts, which are presided over by district judges. There are 94 federal judicial districts, including at least one district in each state, the District of Columbia and Puerto Rico. Three territories of the United States—the Virgin Islands, Guam, and the Northern Mariana Islands—have district courts that hear federal cases, including bankruptcy cases. In total, there are over 670 federal district judges in the nation. The United States district courts are the trial courts of the federal court system. Within limits set by Congress and

the Constitution, the district courts have jurisdiction to hear nearly all categories of federal cases—both civil and criminal matters.

Criminal law is where the government brings charges against and prosecutes a person. For example, if Harry shoots and kills Bob, the government would prosecute Harry for murder. Some of the cases you will be reading came out of criminal prosecutions. Civil law, in this context, describes all law which is not criminal. Most commonly, this is where one party (which can be the government, a corporation, an individual, or any other entity) sues another person, government, corporation, or entity. In the lawsuit, the entity can ask for money, a court order (often one known as an "injunction"), or some other form of relief. For example, in a case that might be entitled "ACLU v. NSA," the ACLU would be suing the NSA, as part of the government, seeking a court order, or an injunction, which would order the NSA to halt surveillance of U.S. citizens on the grounds that such surveillance violates the U.S. Constitution. In a case that arose after the Civil War known as *Totten v. U.S.* (we will read this case later in the text), a former spy sued the U.S. government for money he said he had been promised in a contract. Many cases in this text arose from civil law suits. Decisions that are handed down by a federal district court judge are binding only within that district and not in others.

The 94 U.S. judicial districts are organized into 12 regional circuits, each of which has a United States court of appeals. A court of appeals hears appeals from the district courts located within its circuit, as well as appeals from decisions of federal administrative agencies. Although over a dozen judges will sit on a circuit court, the judges will typically hear appeals in a panel of 3 judges, who then give an opinion. If the person who is appealing, known as the "appellant," does not like the decision, he or she can appeal again, and all of the judges from the court would hear the case. When this happens, it is known as the court sitting "en banc." Any decisions issued from these circuit judges are binding upon the districts courts within their circuit, but not those that lie outside of their circuits. These circuit courts are named by number: The First Circuit Court of Appeals, the Second Circuit Court of Appeals, and so on. The only federal circuit courts without a number are the D.C. Circuit Court of Appeals and the Federal Circuit Court of Appeals.

In theory, all circuit courts are equally important and no circuit court outranks another. However, the D.C. Circuit Court of Appeals most commonly handles cases involving national security, often some of the most complex and interesting cases.

And finally, at the top of the federal judiciary hierarchy is the highest court in the land, and it is the U.S. Supreme Court. Any judgments made by the U.S. Supreme Court are final. If the case involves interpretation of a statute or regulation, the statute or regulation must be changed or the court opinion will control. Alternatively, the decision can be overturned or changed by either a new Supreme Court opinion or a change to the Constitution.

Now, this pattern is repeated in slightly different ways in each of the state court systems. Keep in mind that the state court system is much more a parallel to the federal system than a subordinate system. In the case of applying federal law—including

the federal Constitution—the decisions of the federal courts are supreme. In the case of state law and the application of state constitutions, the state courts have the last word—at least up to the point where state law involves federal constitutional rights.

How to Study Court Opinions

Taking notes in a legal class that relies on case law or judicial opinions is different than taking notes in other subjects such as government or history. Although this class is reading comprehension intensive and involves many historic and governmental issues, do not approach this text as if it is a political science textbook, simply reading the material for a general comprehension. Because law appears, on the surface, to be similar to government, history, or a related social science, many students make this mistake and subsequently struggle with the material. Interestingly, students of math or physics tend to do well at law. Although physics and law are very different, the process of studying and preparing is very similar, focusing on analysis rather than simple memorization. Just as you would do with mathematics or physics, you should read and familiarize yourself with the material and then try to apply the concepts to a new set of facts. In this text we provide practice problems where you apply the material to reinforce your understanding.

Performing an IRAC Analysis

As a student of the law, the way to read and familiarize yourself with the material (prior to doing practice problems) is by briefing a case. Briefing a case is how lawyers take notes on case law and certain items of information. This method, which is more or less common to all law schools, is to draft a short one- or two-page summary of the case while focusing on the following topics: Facts (including the procedural history), Issue, Rule, Analysis or Application, and Conclusion. Below is an explanation of how you should brief the cases in this book.

Prior to reading a case, it helps to prepare a document with the following items listed:

Facts:

Procedural History:

Issue:

Rule:

Application and Analysis:

Conclusion:

As you read each case, you should fill out each item with the information you learn from the case. This means in each part you would write out:

Facts: What events transpired in the real world that led to this case?

Procedural History: Prior to getting to this court, how did this case work its way through the legal system? What did the lower courts decide?

Issue: What is the underlying question that the case grapples with?

Rule: What is the specific rule of law the judges rely on in making a decision?

Holding: How did the court decide, and who does the court rule in favor for?

Reasoning: Why did the court decide the way it did?

Application and Analysis: How does the rule apply to the facts of this particular case? What is the reasoning of the judges? Why does prior law apply, or why is this case decided differently than prior law might suggest? Explain thoroughly.

Conclusion: What is the legal conclusion reached by the judges?

To demonstrate, let's write a case brief of the famous children's book, Green Eggs and Ham:

Facts: Despite Sam-I-Am's urging and pressure, unnamed person (P) will not try green eggs and ham, claiming he does not like them. (What facts led to this issue entering the courts)

Procedural History: Sam-I-Am asks P to try green eggs and ham in different areas and under different circumstances: here and there, moves on to foxes and boxes, and concludes on a boat where, out of a sense of fatigue, P tries them. (Which courts, how they ruled, what they ruled on)

Issue: Whether it is worth trying new things. (What it's about)

Rule: Be open to try new things. (How to act when facing this issue)

Holding: Green eggs and ham are good. (The court's decision)

Reasoning: If another person is very insistent that "you may like it," you may, in fact, like it. When they say "try it you will see," it is, perhaps, worth trying. New things might taste good. (Why it reached this decision)

Application: In trying green eggs and ham, P learned he likes a new food and will eat them anywhere. (What happens when the rule is applied to the facts)

Conclusion: As green eggs and ham tasted good, despite one's initial bias, new things should be tried in other situations. (Similar to holding)

This method of briefing a case is how you learn the fundamental concepts of law and legal reasoning. In this textbook, you learn how to apply the law by doing practice problems that provide a hypothetical fact pattern based on real world events and end with a legal question for you to solve. In solving the legal question, you will have to apply what you learned from reading the applicable statutes and case law and then try to solve the question very much the same way you might solve an equation or puzzle. Many of the hypotheticals you will be asked to solve involve national security issues actually handled by professionals in the field.

You have to solve these situations by going through the formula discussed above (commonly called "IRAC"). First, read the fact pattern and try to spot the underlying legal issue. You should then state the rule, or the law, which applies to the type of legal issue raised in the fact pattern. Then, you should apply the rule to the

specific facts of your hypothetical situation. When you do this successfully, you will reach the proper legal conclusion. Let's apply this to the pretend case law of Green Eggs and Ham to the following fact pattern.

> Lisa is three years old and has never gone down the slide at the playground. It looks tall and scary. Other children on the playground, who are themselves going down the slide, urge her to try, indicating she will enjoy it. Use the IRAC approach to decide what Lisa should do, applying the "legal" precedent established in Green Eggs and Ham.
>
> **Issue**: Whether Lisa should try going down the slide.
>
> **Rule**: People should try new things because they might enjoy them.
>
> **Application**: If Lisa goes down the slide, she might find it fun and not at all scary. She sees others trying it, and they are not scared; in fact, they are safe and having fun.
>
> **Conclusion**: Lisa should try going down the slide.

You will have noticed that this Issue, Rule, Application, and Conclusion (IRAC) approach you use to answer the hypothetical are the same components as in a case brief. This is no accident. Applying the "IRAC" approach is a fundamental tool of the practice of law.

One reason the study of law is more like studying mathematics and less like government or history, is that, just like briefing a case, the process of learning to IRAC is a skill acquired over time. When you first started doing long division, someone initially explained the concept to you, just like in this book, where case law written by judges explain a legal concept to you. Once the concept of long division was demonstrated to you, you completed many practice problems. The more you did long division, the easier it got. You must do the same with law. Just like long division, there is a learning curve, but the more you do it, the easier it gets.

Another way math and law are similar is that in math, you do not memorize every equation or numerical sequences that might exist. Instead, you learn concepts and procedures that apply to many different situations. If you learn the concepts of long division, such as how to divide 9 into 687, then you can work through the same procedures to divide 7 into 1,049.

Let's start out with a very easy IRAC for you to solve. Suppose Congress passed a law, which the president signed, forbidding the practice and observance of Buddhism in America. Laura, a practicing Buddhist, is arrested for practicing Buddhism as she meditates in her bedroom. The American Civil Liberties Union (ACLU) sues the government, charging that Lisa's arrest was unconstitutional and the law should be struck down. Use the IRAC process to determine how the judge should rule.

Based on what you know from high school government, you should be able to solve this problem. You know that in America, people have the right to freely practice their religion. But how would you answer this question in an IRAC format? On the left hand margin of your own word document, write

Issue:

Rule:

Application:

Conclusion:

Now that you have written out the components of IRAC, try to fill in the blanks with what you think the ISSUE is in the problem, write out the RULE that applies to the situation here, APPLY the law to the facts in this hypothetical, and, in the end, give the appropriate legal CONCLUSION as to just how the judge should rule. Be advised, there can be more than one correct way to write the Issue.

Issue: Whether the act in question is Constitutional.

Rule: The First Amendment of the U.S. Constitution prohibits Congress from passing laws that interfere with the right to the exercise (free practice) of religion.

Application: This law forbids Laura's freedom to practice her religion.

Conclusion: The law violates the First Amendment, is unconstitutional, and should be struck down.

Let's get started now by reading a couple of court opinions. We will start with the 1957 Supreme Court decision *Reid v. Covert*. This is a good case for this subject because it covers a number of different issues involving criminal procedure, international law, civil rights, and military justice. As you read the opinion, try to brief the case by identifying the Facts, Procedural History, Issue, Rule, Holding, Reasoning, Application, and Conclusion.

Reid v. Covert, 354 U.S. 1 (1957)*

This opinion addresses two cases which raise basic constitutional issues of the utmost concern. They call into question the role of the military under our system of government. They involve the power of Congress to expose civilians to trial by military tribunals under military rules and regulations, for offenses against the United States, thereby depriving them of trial in civilian courts, under civilian laws and procedures and with all the safeguards of the Bill of Rights. These cases are particularly significant because, for the first time since the adoption of the Constitution wives of soldiers have been denied trial by jury in a court of law and forced to trial before courts-martial.

Mrs. Clarice Covert killed her husband, a sergeant in the United States Air Force, at an airbase in England. Mrs. Covert, who was not a member of the armed services, was residing on the base with her husband at the time. She was tried by a court-martial for murder under the Uniform Code of Military Justice (UCMJ).

Counsel for Mrs. Covert contended that she was insane at the time she killed her husband, but the military tribunal found her guilty of murder and sentenced her to

* The case has been heavily edited and paraphrased by the authors for clarity. See disclaimer in introduction.

life imprisonment. Her counsel petitioned the Federal District Court for a writ of habeas corpus, which is where a person is brought before a court to determine whether or not that person is being lawfully held. Her lawyer asked that the court set her free on the ground that the Constitution forbade her trial by military authorities. Interpreting the U.S. Supreme Court's past decision in a prior opinion stating that "a civilian is entitled to a civilian trial," the District Court held that Mrs. Covert could not be tried by court-martial, and ordered her released from custody. The Government appealed directly to the U.S. Supreme Court.

Mrs. Dorothy Smith killed her husband, an Army officer, at a post in Japan where she was living with him. She was tried for murder by a court-martial and, despite considerable evidence that she was insane, was found guilty and sentenced to life imprisonment. Mrs. Smith was then confined in a federal penitentiary in West Virginia. Her father filed a petition for habeas corpus in a Federal District Court. The petition charged that the court-martial was without jurisdiction because Article 2(11) of the UCMJ was unconstitutional insofar as it authorized the trial of civilian dependents accompanying servicemen overseas. Unlike with Mrs. Covert, the District Court refused to issue the writ of habeas corpus. The appeal went to this court and it is our holding that Mrs. Smith and Mrs. Covert could not constitutionally be tried by military authorities.

At the beginning, we reject the idea that, when the United States acts against citizens abroad, it can do so free of the Bill of Rights. The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution. When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land.

Among those provisions, Art. III, § 2 and the Fifth and Sixth Amendments are directly relevant to these cases. Article III, § 2 lays down the rule that:

> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury, and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

The Fifth Amendment declares:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; . . .

And the Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . .

The language of Article III, § 2 manifests that constitutional protections for the individual were designed to restrict the United States Government when it acts outside of this country, as well as here at home. After declaring that all criminal trials must be by jury, the section states that, when a crime is "not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed." If this language is permitted to have its obvious meaning, § 2 is applicable to criminal trials outside of the States as a group without regard to where the offense is committed or the trial held. From the very first Congress, federal statutes have implemented the provisions of § 2 by providing for trial of murder and other crimes committed outside the jurisdiction of any State "in the district where the offender is apprehended, or into which he may first be brought." The Fifth and Sixth Amendments, like Art. III, § 2, are also all inclusive with their sweeping references to "no person" and to "all criminal prosecutions."

This Court and other federal courts have held or asserted that various constitutional limitations apply to the Government when it acts outside the continental United States. While it has been suggested that only those constitutional rights which are "fundamental" protect Americans abroad, we can find no warrant, in logic or otherwise, for picking and choosing among the remarkable collection of "Thou shalt nots" which were explicitly fastened on all departments and agencies of the Federal Government by the Constitution and its Amendments. Moreover, in view of our heritage and the history of the adoption of the Constitution and the Bill of Rights, it seems peculiarly anomalous to say that trial before a civilian judge and by an independent jury picked from the common citizenry is not a fundamental right. As the famous English judge Blackstone wrote in his Commentaries:

> . . . the trial by jury ever has been, and I trust ever will be, looked upon as the glory of the English law. And if it has so great an advantage over others in regulating civil property, how much must that advantage be heightened when it is applied to criminal cases! . . . [I]t is the most transcendent privilege which any subject can enjoy, or wish for, that he cannot be affected either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbours and equals.

Trial by jury in a court of law and in accordance with traditional modes of procedure after an indictment by grand jury has served and remains one of our most vital barriers to governmental arbitrariness. These elemental procedural safeguards were embedded in our Constitution to secure their inviolateness and sanctity against the passing demands of expediency or convenience.

II

At the time of Mrs. Covert's alleged offense, an executive agreement was in effect between the United States and Great Britain which permitted United States' military courts to exercise exclusive jurisdiction over offenses committed in Great Britain by American servicemen or their dependents. For its part, the United States agreed that these military courts would be willing and able to try and to punish all offenses against the laws of Great Britain by such persons. In all material respects, the same

situation existed in Japan when Mrs. Smith killed her husband. Even though a court-martial does not give an accused trial by jury and other Bill of Rights protections, the Government contends that Art. 2 (11) of the UCMJ, insofar as it provides for the military trial of dependents accompanying the armed forces in Great Britain and Japan, can be sustained as legislation which is necessary and proper to carry out the United States' obligations under the international agreements made with those countries. The obvious and decisive answer to this, of course, is that no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution.

Article VI, the Supremacy Clause of the Constitution, declares:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof, and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; . . .

There is nothing in this language which intimates that treaties and laws enacted pursuant to them do not have to comply with the provisions of the Constitution. Nor is there anything in the debates which accompanied the drafting and ratification of the Constitution which even suggests such a result. It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights—let alone alien to our entire constitutional history and tradition—to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions. In effect, such construction would permit amendment of that document in a manner not sanctioned by Article V. The prohibitions of the Constitution were designed to apply to all branches of the National Government, and they cannot be nullified by the Executive or by the Executive and the Senate combined.

There is nothing new or unique about what we say here. This Court has regularly and uniformly recognized the supremacy of the Constitution over a treaty. For example, in *Geofroy v. Riggs*, it declared:

> The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government, or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent.

This Court has also repeatedly taken the position that an Act of Congress, which must comply with the Constitution, is on a full parity with a treaty, and that, when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null. It would be completely anomalous to say that a treaty need not comply with the Constitution when such an agreement can be overridden by a statute that must conform to that instrument.

In summary, we conclude that the Constitution in its entirety applied to the trials of Mrs. Smith and Mrs. Covert. Since their court-martial did not meet the

requirements of Art. III, § 2 or the Fifth and Sixth Amendments, we are compelled to determine if there is anything within the Constitution which authorizes the military trial of dependents accompanying the armed forces overseas.

III

Article I, § 8, cl. 14 empowers Congress "To make Rules for the Government and Regulation of the land and naval Forces." It has been held that this creates an exception to the normal method of trial in civilian courts as provided by the Constitution, and permits Congress to authorize military trial of members of the armed services without all the safeguards given an accused by Article III and the Bill of Rights. But if the language of Clause 14 is given its natural meaning, the power granted does not extend to civilians — even though they may be dependents living with servicemen on a military base. The term "land and naval Forces" refers to persons who are members of the armed services and not to their civilian wives, children and other dependents. It seems inconceivable that Mrs. Covert or Mrs. Smith could have been tried by military authorities as members of the "land and naval Forces" had they been living on a military post in this country. Yet this constitutional term surely has the same meaning everywhere. The wives of servicemen are no more members of the "land and naval Forces" when living at a military post in England or Japan than when living at a base in this country or in Hawaii or Alaska.

The tradition of keeping the military subordinate to civilian authority may not be so strong in the minds of this generation as it was in the minds of those who wrote the Constitution. The idea that the relatives of soldiers could be denied a jury trial in a court of law, and instead be tried by court-martial under the guise of regulating the armed forces, would have seemed incredible to those men, in whose lifetime the right of the military to try soldiers for any offenses in time of peace had only been grudgingly conceded. The Founders envisioned the army as a necessary institution, but one dangerous to liberty if not confined within its essential bounds. Their fears were rooted in history. They knew that ancient republics had been overthrown by their military leaders. They were familiar with the history of Seventeenth Century England, where Charles I tried to govern through the army and without Parliament. During this attempt, contrary to the Common Law, he used courts-martial to try soldiers for certain non-military offenses. This court-martialing of soldiers in peacetime evoked strong protests from Parliament. The reign of Charles I was followed by the rigorous military rule of Oliver Cromwell. Later, James II used the Army in his fight against Parliament and the people. He promulgated Articles of War authorizing the trial of soldiers for non-military crimes by courts-martial. This action hastened the revolution that brought William and Mary to the throne upon their agreement to abide by a Bill of Rights which, among other things, protected the right of trial by jury. It was against this general background that two of the greatest English jurists, Lord Chief Justice Hale and Sir William Blackstone — men who exerted considerable influence on the Founders — expressed sharp hostility to any expansion of the jurisdiction of military courts. For instance, Blackstone went so far as to assert:

> For martial law, which is built upon no settled principles, but is entirely arbitrary in its decisions, is, as Sir Matthew Hale observes, in truth and reality no law, but something indulged, rather than allowed as a law. The necessity of order and discipline in an army is the only thing which can give it countenance; and therefore it ought not to be permitted in time of peace, when the king's courts are open for all persons to receive justice according to the laws of the land.

The generation that adopted the Constitution did not distrust the military because of past history alone. Within their own lives, they had seen royal governors sometimes resort to military rule. British troops were quartered in Boston at various times from 1768 until the outbreak of the Revolutionary War to support unpopular royal governors and to intimidate the local populace. The trial of soldiers by courts-martial and the interference of the military with the civil courts aroused great anxiety and antagonism not only in Massachusetts, but throughout the colonies. For example, Samuel Adams in 1768 wrote:

> . . . Is it not enough for us to have seen soldiers and mariners forejudged of life, and executed within the body of the county by martial law? Are citizens to be called upon, threatened, ill-used at the will of the soldiery, and put under arrest, by pretext of the law military, in breach of the fundamental rights of subjects, and contrary to the law and franchise of the land? Will the spirits of people as yet unsubdued by tyranny, unawed by the menaces of arbitrary power, submit to be governed by military force? No, Let us rouse our attention to the common law — which is our birthright, our great security against all kinds of insult and oppression. . . .

Colonials had also seen the right to trial by jury subverted by acts of Parliament which authorized courts of admiralty to try alleged violations of the unpopular "Molasses" and "Navigation" Acts. This gave the admiralty courts jurisdiction over offenses historically triable only by a jury in a court of law, and aroused great resentment throughout the colonies. As early as 1765, delegates from nine colonies meeting in New York asserted in a "Declaration of Rights" that trial by jury was the "inherent and invaluable" right of every citizen in the colonies.

With this background, it is not surprising that the Declaration of Independence protested that George III had "affected to render the Military independent of and superior to the Civil Power," and that Americans had been deprived in many cases of "the benefits of Trial by Jury." And those who adopted the Constitution embodied their profound fear and distrust of military power, as well as their determination to protect trial by jury, in the Constitution and its Amendments. Perhaps they were aware that memories fade, and hoped that, in this way, they could keep the people of this Nation from having to fight again and again the same old battles for individual freedom.

In light of this history, it seems clear that the Founders had no intention to permit the trial of civilians in military courts, where they would be denied jury trials and other constitutional protections. There is no indication that the Founders

contemplated setting up a rival system of military courts to compete with civilian courts for jurisdiction over civilians who might have some contact or relationship with the armed forces. Courts-martial were not to have concurrent jurisdiction with courts of law over nonmilitary America.

On several occasions, this Court has been faced with an attempted expansion of the jurisdiction of military courts. *Ex parte Milligan*, one of the great landmarks in this Court's history, held that military authorities were without power to try civilians not in the military or naval service by declaring martial law in an area where the civil administration was not deposed and the courts were not closed. In a stirring passage, the Court proclaimed:

> Another guarantee of freedom was broken when Milligan was denied a trial by jury. The great minds of the country have differed on the correct interpretation to be given to various provisions of the Federal Constitution, and judicial decision has been often invoked to settle their true meaning; but, until recently, no one ever doubted that the right of trial by jury was fortified in the organic law against the power of attack. It is now assailed; but if ideas can be expressed in words, and language has any meaning, this right—one of the most valuable in a free country—is preserved to everyone accused of crime who is not attached to the army, or navy, or militia in actual service.

Because it violates the U.S. Constitution for the wives, who were not members of the military thus had all of the constitutional protections of U.S. civilians, to be tried by courts-martial, these convictions must be overturned.

END OF OPINION

Discussion:

Reid v. Covert touches on a number of legal issues. It may be one of the most frequently published cases, appearing in many textbooks because it contains information relevant to many different areas of the law, including national security, military justice, criminal procedure, international law, and constitutional law. For now, let's just focus on the main issue, which is why the court ruled that their conviction was unlawful. Hopefully you briefed the case while reading it. Below is a sample brief of the case that the reader can use to check your own effort. Do not to skip the mechanical effort of briefing cases, just looking at the answer. Learning to brief and IRAC a case takes practice. The more it is done, the easier it gets.

- Facts: Mrs. Covert, the wife of a service member stationed overseas, killed her husband and was tried at court-martial. This practice was consistent with how serious offenses committed by family members accompanying their military spouses were handled, and the statute authorizing this was enacted by Congress pursuant to an agreement between the U.S. government and the government of the countries in which they lived.
- Issue: Does the practice of trying civilians at courts-martial comply with the Constitution?

- Rule: U.S. citizens outside the U.S. are still protected by the Constitution. The U.S. Constitution is the highest legal authority, and no other law can violate its terms. The Sixth Amendment to the U.S. Constitution guarantees the accused the right in a criminal prosecution to a trial in a district court by a jury.
- Application: Courts-martial are not the same as federal district courts. In trying the wives by courts-martial, the wives were denied the fundamental right provided by the Sixth Amendment of a jury of their peers. The Constitution is the highest authority in the land, and it cannot be undermined by any statute, treaty, or executive agreement.
- Conclusion: The convictions were invalid.

Reid v. Covert is an important case. It is a reminder that, even though there may be entirely valid *policy* reasons to take an action, no law or act of a federal government entity or agent can contradict the U.S. Constitution. All U.S. citizens and any person subject to U.S. jurisdiction are protected by the Constitution. No one can make any law, rule, or regulation that takes away the protections you have under the Constitution. In *Reid v. Covert*, the protection provided by the Sixth and Fifth Amendments was under threat. At other times in history, government action was taken that risked diminishing other constitutional protections such as the right to free speech (First Amendment) and the right to be free from unreasonable government searches (Fourth Amendment). You will be reading cases in future chapters where the courts heard cases concerning these matters.

Review Problems

Now, let's apply what was learned in briefing *Reid v. Covert* to some hypothetical fact patterns. First, another example. Read the following fact pattern:

> The U.S. Senate ratifies a treaty sponsored by the United Nations and is joined in signing and ratifying the treaty by every other country on Earth. The treaty bans the private ownership of firearms anywhere in the world. Congress enacts a law to fulfill the requirements of the treaty. Jack owns a gun store in Texas and refuses to get rid of his guns. He is arrested by the local police and prosecuted for owning a firearm, in violation of the statute and Treaty.[5] Jack asks a federal judge to dismiss the case against him. To support his request, Jack points out the Second Amendment of the U.S. Constitution, which guarantees the right to keep and bear arms. The local prosecuting attorney makes his case by pointing out that there is a treaty banning private ownership of firearms and Congress was supporting this treaty when it passed its law banning all private possession of firearms. Go through the IRAC analysis to determine how the judge should rule.

5. At a later point we'll discuss how a treaty may or may not be enforced as part of our laws, but for now just assume the local policeman wants to comply with the treaty, and makes the arrest on that basis.

Now, here is an example of an IRAC analysis of that fact pattern:

> Issue: Whether a treaty that outlaws private firearm ownership can be constitutionally enforced.
>
> Rule: No treaty, statute, or any other law can violate the Constitution. (Reid v. Covert)
>
> Application: Here, the treaty conflicts with the Second Amendment of the Constitution. But the treaty applies to relations between nations, not situations between a nation and its citizens. Applying the provision of the treaty to citizens of the United States would violate the Constitutional right to keep and bear arms under the Second Amendment. Even if Congress passed a law enacting the treaty as federal law, this statute also would violate the Second Amendment.
>
> Conclusion: Although the treaty seems to be invalid because it violates the Second Amendment of the U.S. Constitution, treaties only govern relations between nations, not individuals. However, when Congress passed a law, and then when the local police and district attorney tried to prosecute a person for owning a firearm, that prosecution was unconstitutional. Jack's arrest was unlawful.

Notice that "Reid v. Covert" was written in parentheses after the Rule. This is what is known as "citing your authority." Whenever a memorandum or other document makes a claim of law, the document should also provide some reference to the source of that legal authority. The source can be a case, a statute, the U.S. Constitution, a regulation, or any other source that serves as the legal authority relied upon. Citing the source of a rule offers "proof" that the rule asserted is in fact the law, and that the writer did not make it up. Get in the habit of citing authority.

Now, consider a second hypothetical set of facts and perform an IRAC analysis:

> American tourists are getting a bad reputation overseas. Many Americans go into other countries and, proclaiming America to be the greatest country on the planet, start insulting the country they are visiting. This is generating international ill-will towards America. To stop this from happening, Congress passes a law which prohibits an American overseas from criticizing the country he or she is visiting. Soon after this law is signed by the President, a U.S. citizen named Jill is visiting France and she criticizes the French as a bunch of "smelly, cheese eating, chain smoking, surrender-monkeys." Once she is back in the United States, she is arrested and prosecuted for insulting the French. Jill says she was simply engaged in free speech, which is protected by the First Amendment of the Constitution, but the government says that does not apply because she was overseas. Chart out your IRAC analysis of how the judge should rule in this dispute. Do not let the fact that she was in France affect your decision in this case. For purposes of this hypothetical, you can assume that the fact that she is a U.S. citizen means that she is always subject to U.S. laws.

> Be aware that, although the American Congress cannot pass a law limiting Jill's right to free speech without violating the Second Amendment, France can always pass its own laws concerning speech. Americans who are in another country are subject to that nation's laws, just as much as foreigners in the U.S. are subject to U.S. laws. You should also be aware that the U.S. can pass laws governing the conduct of its citizens overseas. For example, under the statutes which have been enacted, if an American goes abroad and engages in child sex tourism, the American can still be prosecuted upon return to the U.S., even though the conduct took place in a foreign country.

Let's move on to another legal issue and another case involving the right to privacy. Now, this is a book about national security law, yet it contains many cases which themselves are completely unrelated to national security. The case of *Griswold v. Connecticut* is one of those cases. *Griswold* involved a challenge to a law which prohibited people from using "any drug, medicinal article or instrument for the purpose of preventing conception." Essentially, it outlawed all forms of birth control.

Obviously, issues like the legality of using condoms are far removed from national security law. Although this case itself is not about national security, it does discuss legal issues which are relevant to national security, specifically, the right to privacy. This illustrates another important concept to remember about the law and court opinions. The rules which Courts establish will have effect, as precedent, on a wide variety of cases beyond the specific one involved in the decision. Similarly, quite a few of the cases in this book, which themselves are not about national security, establish legal precedents and rules that have a profound influence on national security law.

Griswold v. Connecticut is very important to national security law because, over the years since 9/11, many Americans have claimed that their right to privacy is being violated in the name of keeping us safe. If one reads the U.S. Constitution, there is nothing explicitly stating that "we the people" have a right to privacy. How can it be that even though the U.S. Constitution does not say we have a right to privacy, the idea that such a right exists is well entrenched in the American mind-set? Studying *Griswold v. Connecticut* helps that answer to emerge, that even though the Constitution does not directly say individuals have a right to privacy, as a matter of Constitutional *law*, they do have this right.

Griswold v. Connecticut, 381 U.S. 479 (1965)*

Appellant Griswold is Executive Director of the Planned Parenthood League of Connecticut. The other appellant, Buxton, is a licensed physician and a professor at the Yale Medical School who served as Medical Director for the League at its Center in New Haven — a center open and operating from November 1 to November 10, 1961, when appellants were arrested.

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* The case has been heavily edited and paraphrased by the authors for clarity. See disclaimer in introduction.

They gave information, instruction, and medical advice to married persons as to the means of preventing conception. They examined the wife and prescribed the best contraceptive device or material for her use. Fees were usually charged, although some couples were serviced for free.

The statutes whose constitutionality is involved in this appeal are §§ 53-32 and 54-196 of the General Statutes of Connecticut. § 53-32 states:

> Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned.

Section 54-196 provides:

> Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender.

The appellants were found guilty for violating these statutes and helping others violate them as well. They were fined $100 each. The legality of these laws has come before this Court.

The U.S. Supreme Court does not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions. This law, however, operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation. The association of people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of the parents' choice—whether public or private or parochial—is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the First Amendment has been construed to include some of those rights.

By *Pierce v. Society of Sisters*, the right to educate one's children as one chooses is made applicable to the States by the force of the First and Fourteenth Amendments. By *Meyer v. Nebraska*, the same dignity is given the right to study the German language in a private school. In other words, the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read and freedom of inquiry, freedom of thought, and freedom to teach—indeed, the freedom of the entire university community. Without those peripheral rights, the specific rights would be less secure.

In *NAACP v. Alabama*, we protected the "freedom to associate and privacy in one's associations," noting that freedom of association was a peripheral First Amendment right. Disclosure of membership lists of a constitutionally valid association, we held, was invalid as entailing the likelihood of a substantial restraint upon the exercise by petitioner's members of their right to freedom of association. In other words, the First Amendment has a penumbra where privacy is protected from governmental intrusion. In like context, we have protected forms of "association" that are not political

in the customary sense, but pertain to the social, legal, and economic benefit of the members. In *Schware v. Board of Bar Examiners*, we held it not permissible to bar a lawyer from practice because he had once been a member of the Communist Party. The man's "association with that Party" was not shown to be "anything more than a political faith in a political party", and was not action of a kind proving bad moral character.

Those cases involved more than the "right of assembly" — a right that extends to all, irrespective of their race or ideology. The right of "association," like the right of belief, is more than the right to attend a meeting; it includes the right to express one's attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means. Association in that context is a form of expression of opinion, and, while it is not expressly included in the First Amendment, its existence is necessary in making the express guarantees fully meaningful.

The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment, in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner, is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment, in its Self-Incrimination Clause, enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

The Fourth and Fifth Amendments were described in *Boyd v. United States*, as protection against all governmental invasions "of the sanctity of a man's home and the privacies of life." We recently referred in *Mapp v. Ohio* to the Fourth Amendment as creating a "right to privacy, no less important than any other right carefully an particularly reserved to the people." We have had many controversies over these penumbral rights of "privacy and repose." These cases bear witness that the right of privacy which presses for recognition here is a legitimate one.

The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the use of contraceptives, rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.

Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.

We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

END OF OPINION

In this case the U.S. Supreme Court recognized that nowhere in the Constitution is there any specific statement that establishes a right to privacy. Nevertheless, the Court points out that many of the rights that are specifically guaranteed under the Constitution, when read together, create a general principle against government intrusions on people's private lives, thus creating the legal concept that in America the people have a constitutional right to privacy. As you read on in other chapters, this concept will come into play in a number of situations.

Majority, Concurring, and Dissenting Opinions

When *Griswold v. Connecticut* was decided, 7 of the 9 judges on the U.S. Supreme Court thought the law should be declared unconstitutional. It takes a simple majority of the justices (5 of 9) to reach a decision. That leads many to focus simply on the opinion written by the majority. Sometimes, however, not all of the judges will agree on how a case should be decided. Sometimes, individual justices agree with the outcome reached by the majority, but for a different reason. Those justices may write out their own reason and analysis in what is known as a *concurring opinion*. It is called a "concurring opinion" because, although the justice writing the decision agrees with the outcome of the case, meaning that he or she "concurs," his or her reasoning is different than that of one or more of the other justices. Other times, justices disagree with the majority, and vote another way on who wins a case. In layman's terms, these are the "losers" in the case as they were outvoted by the other justices. Sometimes justices vote with the losing minority, and still write an opinion as to why the majority decided the case incorrectly and why their own (losing) decision should be the correct one. This is what is known as the *dissenting opinion*. In *Griswold v. Connecticut*, Justice Stewart dissented and argued that the law should be upheld. Although he expressed the opinion that "this is an uncommonly silly law" (Yes, he really did write that!), Justice Stewart did not think that the law was unconstitutional.

Because the cases decided by the Supreme Court are often extremely difficult ones that have (at least before the decision) no clear answer, it is often important to read the concurring and dissenting opinions to fully understand the law involved. Although not binding law, concurring and dissenting opinions are very important and can still potentially be highly influential, especially in future cases. For example, in the 1896 case *Plessy v. Ferguson*, the U.S. Supreme Court, in a 7-1 vote, upheld segregation under the idea of "separate but equal." The one

vote against it was by Justice Harlan, who wrote a famous dissent where he argued:

> Our constitution is colorblind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful . . . The arbitrary separation of citizens on the basis of race, while they are on a public highway, is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the Constitution. It cannot be justified upon any legal grounds.

In the 1954 Supreme Court case *Brown v. Board of Education*, which declared segregation illegal, the Court cited Justice Harlan's dissenting opinion from *Plessy v. Ferguson,* adopting his reasoning as it overturned that 1896 opinion.

In the field of national security law, no court decision is more important than the decision called "The Steel Seizures case" which you will read in the next chapter and again later in the book. While that case ruled a particular action taken by President Truman to be unconstitutional, the case is best known for the concurrence written by Justice Robert Jackson. Jackson's "three-part test" for assessing the legitimacy of Presidential action is critically important.

For the sake of brevity and to help you focus on the law, many of the concurrences and dissents have been omitted from this textbook. Where we have left them in, it is because the reasoning used by the judges or justices is important for you to understand the issues addressed in the case or as they developed later. Should you be interested in getting a more complete picture of any case or a different perspective on a case, you should go online and find the full written decision along with the concurring and dissenting opinions, especially if you personally disagree with the majority opinion.

Finally, we want to emphasize again the importance of reading these opinions, not just to get the answer but also to see how the courts analyzed the issue. Remember, just as in physics or mathematics, it is the process of analysis that is most important — not just the answer. As you read these opinions, you will see how many issues that seem new to us now have, in fact, been considered before. Understanding that will give you a better understanding as to the "why" of the law as well as the "what."

By this point, you are ready to truly begin learning national security law. Good luck with the rest of this book.

Further Reading

Current policies of the United States (last accessed December 1, 2016), could be found in documents such as the following:

a. The National Security Strategy of the United States (2015), available at https://obamawhitehouse.archives.gov/sites/default/files/docs/2015_national_security_strategy.pdf

b. The Quadrennial Homeland Security Review, available at http://www.dhs.gov/quadrennial-homeland-security-review

c. The National Strategy for Counterterrorism (2011), available at https://www.whitehouse.gov/sites/default/files/counterterrorism_strategy.pdf

In addition, you may find useful information on sites such as these:

- U.S. Department of Justice Division of National Security (http://www.justice.gov/nsd)
- FBI website on terrorism (https://www.fbi.gov/about-us/investigate/terrorism)
- Department of Homeland Security (www.dhs.gov)
- State offices of homeland security, such as these for Maryland (http://gohs.maryland.gov/), Virginia (https://pshs.virginia.gov/), and New York (http://www.dhses.ny.gov/oct/)

Up-to-date commentary and analysis is increasingly available through online journals and blogs such as these:

- LAWFARE—Hard National Security Choices. http://www.lawfareblog.com/
- Just Security. https://www.justsecurity.org/
- Homeland Security Affairs Journal published by the Naval Postgraduate School Center for Homeland Defense and Security. https://www.hsaj.org/
- National Security Law Journal, published by George Mason University Law School. http://www.law.gmu.edu/students/orgs/nslj