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978-0-521-87763-3 - In the Common Defense: National Security Law for Perilous Times

James E. Baker

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IN THE COMMON DEFENSE

The United States faces the realistic and indefinite threat of catastrophic terrorist attack. Whether the United States is successful in preventing a nuclear, biological, or other security catastrophe depends on how effectively we wield the instruments of national security. It will also depend on how effectively we manage national security processes and whether we apply the law in a manner that both enhances security and upholds our core constitutional values. Therefore, lawyers, not just presidents, generals, and intelligence officers, will decide the outcome of this conflict.

This book is essential for anyone wanting to understand national security law and process. The book includes chapters on constitutional law, the use of force, and homeland security, presented in the context of today's threats and as applied to issues such as rendition and electronic surveillance. Emphasis is placed on national security process and intelligence, as well as the role of the lawyer. Written in a style accessible to both the general reader and the specialist, the book offers a unique inside look at the practice of national security law from the perspective of a president's national security lawyer.

James E. Baker is a judge on the United States Court of Appeals for the Armed Forces and an adjunct professor at the Georgetown University Law Center and University of Iowa College of Law, where he teaches national security law. He previously served as special assistant to the president and legal advisor to the National Security Council, where he advised the president, the national security advisor, and the National Security Council staff on U.S. and international law involving national security, including the use of force, intelligence, and terrorism. Judge Baker has also served as counsel to the President's Foreign Intelligence Advisory Board, an attorney advisor at the Department of State, an aide to a U.S. Senator, and an infantry officer in the United States Marine Corps. He is a recipient of the Colonel Nelson Drew Memorial Award, the National Security Council's highest honor, and co-author of *Regulating Covert Action*, as well as of numerous articles on national security and criminal law. He holds degrees from Yale College and Yale Law School.

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To my teachers.

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Acknowledgments

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Abbreviations

APNSA	Assistant to the President for National Security Affairs (also known as the National Security Advisor)
BWC	Biological Weapons Convention
CBP	Customs and Border Protection
CBRN	chemical, biological, radiological, nuclear
CJCS	Chairman, Joint Chiefs of Staff
CWC	Chemical Weapons Convention
DAPNSA	Deputy Assistant to the President for National Security Affairs
DCI	Director of Central Intelligence (now DNI)
DHS	Department of Homeland Security
DNI	Director of National Intelligence
DOD	Department of Defense
EOP	Executive Office of the President
FISA	Foreign Intelligence Surveillance Act
FISC	Foreign Intelligence Surveillance Court
FRCP	Federal Rules of Criminal Procedure
FRP	Federal Response Plan
HHS	Department of Health and Human Services
HSPD	Homeland Security Presidential Directive
HUMINT	human intelligence
IAEA	International Atomic Energy Agency
IC	intelligence community
ICC	International Criminal Court; established by the Rome Treaty
IEEPA	International Emergency Economic Powers Act
IRTPA	Intelligence Reform and Terrorism Prevention Act
JCS	Joint Chiefs of Staff

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Abbreviations

JTTF	Joint Terrorism Task Force
LOAC	law of armed conflict
IOB	Intelligence Oversight Board
NCTC	National Counterterrorism Center
NEST	Nuclear Emergency Search Team
NIE	National Intelligence Estimate
NIMS	National Incident Management System
NORAD	North American Air Defense Command
NPT	Treaty on the Non-Proliferation of Nuclear Weapons
NRP	National Response Plan
NSA	National Security Agency
NSC	National Security Council
NSPD	National Security Presidential Directive
OHS	Office of Homeland Security
OIPR	Office of Intelligence Policy and Review (at the Department of Justice)
OLC	Office of Legal Counsel (at the Department of Justice)
OMB	Office of Management and Budget
OSD	Office of the Secretary of Defense
OVP	Office of the Vice President
PDD	Presidential Decision Directive
PFIAB	President's Foreign Intelligence Advisory Board
POTUS	President of the United States
PSI	Proliferation Security Initiative
SCI	sensitive compartmented information
SIGINT	signals intelligence
SNS	Strategic National Stockpile
TTIC	Terrorism Threat Integration Center (now NCTC)
UCMJ	Uniform Code of Military Justice
USC	United States Code
WHO	White House Office
WMD	weapons of mass destruction
WPR	War Powers Resolution

To make common defense a national priority without giving too much power to one branch of government, they divided defense duties between Congress and the president. The intent was to create a military that could protect the American public, but that would not be so powerful that it encroached on governmental affairs. The Founding Fathers had a strong distrust of centralized government and intended the Constitution to keep the U.S. army and navy as civilian-governed. Therefore, in addition to granting the president the power to control the army and oversee its operations, the Constitution appo