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Foreign Relations and National Security Law

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BOOK REVIEW

FOREIGN RELATIONS AND NATIONAL SECURITY LAW. By Thomas M. Franck & Michael J. Glennon, St. Paul, Minnesota: West Publishing Co., 1987. Pp. lxv, 941.

*Reviewed by Stuart S. Malawer**

"Foreign relations law" as it relates to foreign policy and national security is an area of specialization that has recently witnessed publication of two significant works. A third major publication has already appeared in final draft and is about to be printed. These publications evidence the growth of foreign relations law and validate it as a separate field of study. This distinct area of the law draws subjects from other areas, which are all too often given minimal attention, into a coherent course with a specific focus.

Foreign relations law should be the introductory course in international studies in law schools in the late 1980s and beyond. It is designed for students aiming at the public aspects of international law or private trade areas. As a distinct course, foreign relations law provides more of a relevant and pragmatic focus on international practice for United States lawyers than the traditional public international law course, which developed since the post-war era with greater emphasis on, among other areas, human rights, international organizational matters, and air and space law. Foreign relations law focuses on the foreign policy process, decision-making and execution, and ancillary private and public aspects. It encompasses both constitutional and international law and both case and statutory law.

Foreign relations law has seen an explosion of litigation over divisive policy issues during and since the Vietnam era. This has been increasingly true during the contentious Reagan era, which has been marked by increased unilateralism and by challenges to both constitutional and international law.[1] Consequently, schools of law, public policy, interna-

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1. *See generally* Malawer, *Reagan's Law and Foreign Policy, 1981-1987: The*

tional affairs, and public management have developed a greatly heightened academic interest in this field.

The above institutions, as well as business schools, graduate economic programs, and various political, economic, and national security think tanks, have begun to scrutinize particularly the international trade aspects of foreign relations law. The Congress, agencies, and courts are wrestling with an ever-expanding range of issues, legislative initiatives, and judicial developments in foreign affairs. Older legal concepts and practices, such as the "political question doctrine" and treaty interpretation are being revisited. Many issues confronted by the federalists of the eighteenth century are now being debated again in their late twentieth century context.

For the first time, a traditional casebook has been published in this field. *Foreign Relations and National Security Law*[2] establishes the parameters of this newer area of the law. This absolutely outstanding book appears at a time when foreign relations law has become a matter of great importance to lawyers practicing in a wide variety of fields and of tremendous interest to politicians, policy makers, and the public.

In addition to *Foreign Relations and National Security Law*, two other major publications in foreign affairs law appearing at the same time are *The Report of the Congressional Committees Investigating the Iran-Contra Affair* (*The Iran-Contra Report*) and *The Restatement of*

"Reagan Corollary" of International Law, 29 HARV. INT'L L.J. 85 (1988).

2. T. FRANCK & M. GLENNON, FOREIGN RELATIONS AND NATIONAL SECURITY LAW (1987) [hereinafter FRANCK & GLENNON]. Precursors of this field of law are, of course, the RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1965) by the American Law Institute and L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION (1972), published by Foundation Press. A number of other studies during the 1970s emphasized the constitutional, legal, and political aspects of the foreign policy process, in part as a reaction to the Vietnam experience. *See* THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY (1976), sponsored by the American Society of International Law; T. FRANCK & E. WEISBAND, FOREIGN POLICY BY CONGRESS (1979). The traditional works have examined congressional-executive relations in foreign affairs either from a political science perspective or a legalistic one. *See generally* E. CORWIN, THE PRESIDENT'S CONTROL OF FOREIGN RELATIONS (1917); Q. WRIGHT, THE CONTROL OF AMERICAN FOREIGN RELATIONS (1922). Professor Henkin stated in 1972,

> Volumes about the American Constitution and about American foreign relations abound, but they are two different mountains of books. Those that deal with the Constitution say little about American foreign relations; the others expound, scrutinize, dissect and criticize the international relations, foreign policy, and the "foreign-policy-making process" of the United States, but the controlling relevance of the Constitution is roundly ignored.

L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION vii (1972).

the Foreign Relations Law (Third) of the United States (Restatement (Third)),[3] by the American Law Institute. This review article describes the material in the new casebook. Specifically, I identify the major issues and areas treated by the authors, then reflect upon these issues in the context of *The Iran-Contra Report* (both the majority and minority reports) and of the *Restatement (Third)*, and finally draw various conclusions concerning the authors' treatment of these topics, especially their inclusion and exclusion of particular subject areas.

The authors define the area of foreign relations law as containing material often found in other fields, particularly constitutional law and international law.[4] The thrust of this emerging field is constitutional law concerning the conduct of United States foreign relations. While the authors do not specifically say so, they also establish the parameters of this subject by including various statutory and judicial doctrines.

The authors declare that "[t]he foreign relations power is different, however, from such areas of interaction as the regulation of commerce."[5] Consequently, they unfortunately omit any significant and particular coverage of trade and economic domestic legislation and related international agreements. This is strange since much of this legislation is specifically intended to further foreign policy and national security goals rather than traditional economic, trade, or financial objectives. Significant international treaty material bears directly on these issues. It is also unusual that the authors do not include material from the jurisprudence of the International Court of Justice. Material such as the recent Nicaragua litigation against the United States[6] and related domestic and international documentation is of tremendous relevance to the legal story concerning the right to use force in United States foreign relations.

Franck and Glennon are exactly right when they state that many of the issues they are now considering, as illustrated by a large number of very recent writings and cases, are "questions [that] have been debated, of course, since the earliest days of the Republic, and many contemporary arguments are but replays of previous disputes."[7] They go on to politely color the Reagan administration's challenges to the constitutional and international legal systems, when, in describing the currency and

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3. The Revised Restatement was approved by the American Law Institute and it is scheduled to appear as the RESTATEMENT (THIRD) in 1988.

4. FRANCK & GLENNON, *supra* note 1, at xvii.

5. *Id.*

6. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 1 (Merits Judgment of June 27).

7. FRANCK & GLENNON, *supra* note 2, at xviii.

urgency of this book, they write that "[u]nprecedented threats are posed, not only to the nation but also to values at the heart of our legal structure."[8]

The authors identify and discuss in nine chapters the following areas as constituting the breadth of this nascent field of law: (1) separation of powers doctrine; (2) incorporation of customary international law; (3) treaties and executive agreements; (4) "recognition" and litigation; (5) war powers and neutrality; (6) congressional funding; (7) states and federalism; (8) justiciability ("political question doctrine" and standing); and (9) first amendment and national security.

Within the chapters, the authors present a surprisingly large number of recent cases, although they are at times too severely edited. This evidences the rapid growth of foreign relations law and indicates that it is a field with an increasing number of divisive problems. Moreover, these issues are accentuated by a decreasing consensus, which has been aggravated by the Reagan administration's frequent rejection of the traditionally accepted approaches of mainstream United States foreign policy, of the United States foreign policy elite, as well as those expected by foreign observers friendly to the United States.

The authors also include a significant amount of historical data that is of great relevance. The historical notes by the authors, which are placed throughout the volume, are well done and of immense value to the reader.

Franck and Glennon very correctly begin their consideration of foreign relations law by presenting material on separation of powers.[9] The issues concerning separation of powers and delegation of authority are clearly at the heart of the historical and current debates concerning authority over foreign affairs. The authors correctly indicate the nature of the power as one of concurrence and overlap between the Congress and the President. They save material relating to the role of the judiciary for later in the book. They provide coverage of the expected cases of *Youngstown,*[10] *Curtiss-Wright,*[11] and the most recent and long-running litigation of *Korematsu* (from 1944 to 1984),[12] concerning the disgraceful treatment of Japanese-Americans during World War II. They then include excerpts from various congressional and presidential perspectives

8. *Id.*

9. Chapter 1 is entitled "Foreign Relations and the Separation of Powers Doctrine."

10. Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952).

11. United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

12. Korematsu v. United States, 323 U.S. 214 (1944); Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal. 1984).

and, in balance, include even those of Attorney General Meese. The authors fairly present material on the various sides of this divisive issue and correctly stake out the well-accepted position that there is a concurrence of congressional and presidential authority in foreign policymaking and foreign relations laws generally.

The authors then present material on customary international law and its incorporation into the United States legal system as domestic law.[13] The extent to which customary international law is incorporated into domestic law, providing a basis for private litigation and foreign policymaking, as well as impacting on statutory law, is a hot public-policy issue of the day. The authors start at the beginning with *The Paquete Habana*[14] and immediately provide material on the most recent aspect of this doctrinal issue which has great current relevance—human rights litigation in the United States. They present cases dealing with torture[15] and terrorism[16] and the authors spend just enough time on the act of state doctrine and sovereign immunity.

Some additional information on the rights of aliens in the United States would be desirable. The recent prison disturbances in response to the United States agreement to repatriate illegal Cuban nationals highlight the growing significance of immigration rules and related international conventions and custom as part of foreign relations law. The growing issue of economic rights of aliens, particularly with respect to their property within the United States, as a result of massive direct and portfolio investment and cash flows into the United States in the wake of the depreciation of the United States dollar, dictates a more extended examination of customary law rules in this area. The freeze on Iranian assets during the Iranian hostage crisis and the peculiar and long-lived United States tendency to use trade sanctions as part of its foreign policy further emphasizes the need to examine the nature of the rights of aliens in the United States economy under customary international law.

Generally, a separate chapter on the rights of individuals, both aliens and United States nationals, under customary international law and as related to foreign relations of the United States would be desirable. Such a chapter should include not only human rights but constitutional rights

13. Chapter 2 is entitled "The Law of Nations as Incorporated into United States Law."

14. The Paquete Habana, 175 U.S. 677 (1900).

15. Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

16. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985). This is particularly interesting since Judge Bork refused to find an international legal rule or a cause of action against terrorism despite numerous international resolutions and agreements condemning it.

of United States nationals as well as the rights of United States nationals abroad to protection of their economic interests and their own well-being.

Next, Franck and Glennon consider treaties and executive agreements in one of the book's longer chapters.[17] The major issues of the day include: presidential authority to enter into classes of executive agreements that are not mentioned in the Constitution; their effect on domestic law; treaty interpretation; and the role of the executive in interpreting treaties both generally and in court proceedings. These issues, debated for generations, have particular urgency today. The authors present material concerning the older cases that raise issues of federalism (*Missouri v. Holland*,[18] of course) and then move on to the Panama Canal Treaty case[19] and the termination of the Taiwan Defense Treaty case,[20] both arising during the Carter administration.

The authors then present various lead cases concerning the conclusion and domestic effect of executive agreements such as the Iranian Hostage Agreements,[21] decided early in the Reagan administration, and older cases relating to the recognition of the Soviet Union by the Roosevelt administration.[22] The issue of the impact of executive agreements on prior congressional legislation is still very much alive.

The entire problem of delegation of authority and executive agreements in foreign trade and foreign affairs is generally unsettled. Unfortunately, the authors barely reflect on this. Presidents continue to find means to avoid executive agreements in order to escape constitutional and statutory restraints, by using, for example, such instruments as "voluntary restraint arrangements" as a tool or weapon in the combative field of international trade politics. The use of executive agreements, such as the recent United States-Japanese semiconductor agreement, continues to raise antitrust questions with regard to market sharing and predatory pricing.[23]

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17. Chapter 3 is entitled "Treaties and Other International Agreements."

18. Missouri v. Holland, 252 U.S. 416 (1920).

19. Edwards v. Carter, 580 F.2d 1055 (D.C. Cir.), *cert. denied*, 436 U.S. 907 (1978).

20. Goldwater v. Carter, 481 F. Supp. 949 (D.D.C.), *rev'd*, 617 F.2d 697 (D.C. Cir.), *vacated*, 444 U.S. 996 (1979).

21. Dames & Moore v. Regan, 434 U.S. 654 (1981). The authors also present a case discussing "voluntary restraint arrangements." Consumers Union of the United States, Inc. v. Kissinger, 506 F.2d 136 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975).

22. United States v. Belmont, 301 U.S. 324 (1937).

23. They also raise the basic issue whether the President can conclude such agreements pursuant to any inherent authority. This is particularly important because unlike

Franck and Glennon present the still developing Sofaer-Nunn dispute over the reinterpretation of the ABM Treaty in the concluding material. The authors offer this material in an even-handed manner although the Reagan administration's position is outrageous. Similar problems of interpreting the recently concluded INF treaty already exist.[24] Interpretation of the U.N. Headquarters Agreement and the threatened closing of the P.L.O. Observer Mission by the Reagan administration pursuant to congressional legislation only highlights the multivarious nature of treaty law.[25] The combination of the President's inherent authority in foreign affairs and the exclusive role that the Constitution gives Congress to regulate foreign trade obviously clashes and results in a state of uncertainty, particularly since trade is increasingly becoming a foreign policy issue. More material on this would have proven beneficial.

The thrust of the chapter on recognition is that recognition of a state or government carries with it dispositive effects, principally the necessary standing to sue in United States courts and the application of the sovereign immunity and act of state doctrines.[26] It is precisely these lesser known consequences which are the major issues of the day. None seriously debate the supremacy of the president's recognition authority. The authors present materials concerning the domestic litigation consequences of recognition. They provide similar material concerning non-recognition and recognition of the Soviet government, revolutionary Mexico during the interwar period, and Vietnam after the fall of Saigon, as well as recent cases concerning Angola, the German Democratic Republic, and the People's Republic of China.

While many view foreign relations law as a body of law with principal focus on foreign policy as it relates to national security measures, it also involves an ancillary area encompassing the juridical consequences of constitutional and judicial rules on private parties and litigants. The chapter on recognition of foreign governments and their actions demonstrates the very real impact of doctrines concerning presidential authority on the everyday world of private litigation. It is an often overlooked but very important area of the law and is well done by the authors.

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the President's general foreign affairs authority the Constitution gives exclusive authority to regulate foreign trade to the Congress. Any exercise of such authority is a matter of delegation of authority within the broad doctrine of separation of powers.

24. *Missile Pact Bars Exotic Arms, Soviet Agrees*, N.Y. Times, Apr. 14, 1988, at A6, col. 3; *Democrats Clash with Reagan Over Arms Treaty*, N.Y. Times, Mar. 20, 1988, at 3, col. 1.

25. *U.S. Assailed at World Court on P.L.O. Office*, N.Y. Times, Apr. 12, 1988, at A15, col. 1.

26. Chapter 4 is entitled "Recognition."

Franck and Glennon also offer material on war powers and neutrality legislation.[27] The war power is clearly an area at the center of foreign relations law. Neutrality, an often overlooked area of legislation and international law, has a revived and continuing relevance to contemporary foreign policy. Is the United States violating the rules of international neutrality in the Persian Gulf? Is President Reagan violating the statutory rules concerning neutrality in Nicaragua? The essential issue today in United States foreign policy is the nature and extent of the President's authority to use force in international relations. Witness the Reagan Doctrine and the use of force in Central America, Lebanon, and the Persian Gulf. This involves considerations of the war power generally under the Constitution and the congressionally enacted War Powers Resolution. It also involves the rules of international law concerning the use of force.

The authors present substantial material on the War Powers Resolution and some material on the lingering issue of neutrality. Unfortunately, they do not offer any significant material from the international legal arena in either of these areas. This is unusual since there is a large number of treaty and customary international law obligations binding upon the United States and thus upon the President. The full consequence of the interplay of these rules is by no means clear. Issues concerning justiciability of the war powers are properly presented in the later chapter on justiciability. The authors include such basic materials in this chapter as the Meeker brief on the Vietnam War, "The Prize Cases,"[28] the War Powers Resolution, the Neutrality Act and a recent case concerning the Reagan administration's involvement in Nicaragua.[29] The historical notes appearing in this chapter are particularly well done.

One of the shortest chapters in this book is entitled "The Power Over the Purse." Paradoxically, the power of the purse may be the most important power concerning congressional control of foreign policy and a cardinal aspect of foreign relations law. This is a raging issue today. To what extent does congressional power of the purse entitle the legislature to participate and control foreign affairs? The constitutional provision requiring congressional appropriation prior to executive spending and

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27. Chapter 5 is entitled "The War Power."

28. The Prize Cases, 67 U.S. (2 Black) 635 (1863).

29. Dellums v. Smith, 573 F. Supp. 1489 (N.D. Cal. 1983), *motion to alter judgment denied*, 577 F. Supp. 1449 (N.D. Cal. 1984), *rev'd on other grounds*, 797 F.2d 817 (9th Cir. 1986). The authors also present a case concerning the Nixon administration's bombing of Cambodia. Holtzman v. Schlesinger, 361 F. Supp. 553 (E.D.N.Y.), *rev'd*, 484 F.2d 1307 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974).

statutory provisions requiring government expenditures only from appropriated funds were issues during the Vietnam War and the Iran-Contra debacle. Other legislation, such as the Boland Amendment, typically prohibits the spending of funds for particular purposes. The authors include only the barest of material, including a leading 1946 case[30] and several short comments from Franck and Glennon themselves. In light of the ever-growing significance and ever-present nature of this issue, additional information is necessary.

Another short chapter in this book is entitled "Federalism." Federalism is an issue which is by no means dead in the area of foreign relations. It is particularly alive in state economic development programs, state taxation of foreign income and actors, and extension of other economic rules to foreign practices (for example, civil rights and bribery). It is also an issue concerning local government disinvestment programs aimed toward South Africa. This appears to be the conduct of unilateral foreign policy by an individual state, which is a throwback to the days of the Articles of Confederation. As international trade becomes more important in foreign relations and as states and counties continue to respond to the globalization of local economies by imposing newer taxes and fostering economic development programs, the demarcation line between state and federal authority, which is still an unresolved area of contention, needs greater clarification. Amazingly, the State of Texas is on the verge of negotiating with OPEC concerning price and supply of oil.[31] The authors' inclusion of the three leading cases on the taxation dimension and some material on South Africa only scratches the surface of this latent but very relevant subject.

The most lawyer-like of all issues is in the chapter devoted to justiciability of foreign relations issues.[32] The burning issue of the day is why, by-and-large, do courts refuse to hear any foreign affairs litigation dealing with the big issue of war and the use of force? From the Vietnam War cases to those concerning United States involvement in Central America the courts simply do not hear these cases.[33] They rely on either

30. United States v. Lovett, 328 U.S. 303 (1946).

31. *Texas Looks at OPEC for "Cooperation,"* Wash. Post, Apr. 17, 1988, at H8, col. 1.

32. Chapter 8 is entitled "Justiciability of Foreign Relations Issues."

33. Crockett v. Reagan, 558 F. Supp. 893 (D.D.C. 1982), *aff'd*, 720 F.2d 1355 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984); Sanchez-Espinoza v. Reagan, 568 F. Supp. 596 (D.D.C. 1983), *aff'd*, 770 F.2d 202 (D.C. Cir. 1985). *But see* Ramirez de Arellano v. Weinberger, 745 F.2d 1500 (D.C. Cir. 1984), *vacated*, 471 U.S. 1113 (1985), *on remand*, 788 F.2d 762 (1986) (but involving an American plaintiff overseas).

the *Baker v. Carr* formulation of the "political question doctrine,"[34] standing, or some other excuse not to adjudicate these most important life and death questions. The authors present a wealth of material in this chapter. It is precisely this area of the law in which the courts need to reevaluate existing doctrines that preclude the adjudication of the most important issues facing the United States. Congress should reverse some of the dysfunctional judicially-developed doctrines that prevent the rule of law from applying in this core area of foreign relations law.

The last chapter treats freedom of expression and national security.[35] Reliance on national security is often the last refuge of the superpatriot and the disingenuous. While this chapter has little to do with foreign policy, it has a lot to do with basic rights of individuals. A major issue today is whether or not rights of individuals will continue to be respected when national security (covert actions and secrecy) is at stake or alleged to be involved. It is a continuing battle. The authors include material from the Pentagon Papers case concerning prior restraint,[36] from *Snepp* concerning CIA non-disclosure agreements,[37] and some material concerning security clearance. The authors should have included more information pertaining to the entire intelligence community and foreign policy, especially covert operations, in a separate chapter.

Franck and Glennon have done a remarkable job in editing this first casebook on foreign relations law and national security law. Here are some additional observations in a nutshell.

First, the authors have clearly succeeded in defining the parameters of this vital and emerging area of law and practice. I would have included additional information on the rights of individuals (including corporations) in the foreign relations area. What about the rights of United States nationals to compensation when the President exercises his claims-settlement authority, as President Carter did in the Iranian hostage situation? What are the rights of aliens in the United States under the Constitution when an administration freezes its assets, as with the freeze on Iranian assets, or agrees to repatriate them to Cuba? What are the rights of United States-owned foreign corporations when caught between conflicting demands of United States and foreign obligations (for example, when United States-owned firms in Panama are prohibited to make financial transfers to the Panamanian government)?[38] What are the rights

34. Baker v. Carr, 369 U.S. 186 (1962).
35. Chapter 9 is entitled "National Security and Freedom of Expression."
36. New York Times Co. v. United States, 403 U.S. 713 (1971).
37. Snepp v. United States, 444 U.S. 507, *reh'q denied*, 445 U.S. 972 (1980).
38. *Panama Curbs Puzzle Companies*, N.Y. Times, Apr. 12, 1988, at A6, col. 4.

of United States nationals abroad to protection either by the United States military or against actions of the United States itself? I would have included some additional material on diplomatic immunity and diplomatic relations generally.

Second, it is clear to me the essence of foreign relations law is the constitutional law aspect relating to the foreign policy process, both as to formulation and execution. The authors could, in some manner, make it more clear that this includes a number of ancillary issues of great practical importance. It also includes some material from the international legal system, more aspects concerning the intelligence communities than presented, and a great deal more from the world of international trade including foreign economic and security assistance (for example, arms transfers and supplying insurgent movements), and participation in international organizations. The recent United States trade sanctions against Panama and surprising statements by the World Court concerning United States economic measures against Nicaragua highlight the need for more systematic treatment of trade and economic measures as part of foreign relations law.

Third, there are a number of recurrent themes that run through the area of foreign relations law. Some have been touched upon and some have only been alluded to by the authors. These intellectual themes need to be more explicit. A final chapter pulling them together would be extremely helpful. For example, although never fully assessed, the legal-moral component of United States foreign policy has been an historical constant throughout the existence of the Republic. This is a unique character of United States foreign policy. Reliance upon national interests and the uncertain manner of their determination and formulation should be examined. Cultural aspects of United States foreign policy, including interest-group input, is particularly important. Less-known and more subtle themes could be explored, such as "individual rights, economic development, and free nations" as a legal-policy goal throughout United States diplomatic history. What are the legal implications of the sometimes contradictory historical tendencies of the United States toward unilateralism, isolationism, and internationalism?

Generally, there is a great body of writing by United States diplomatic historians, economic historians, political scientists, international relationists, and foreign policy experts that bears directly on the foreign relations of the United States with particular significance to United States statutory responses. The relationship of Smoot-Hawley tariff legislation, isolationism, and neutrality legislation during the 1930s is an area ripe for examination by students of United States foreign relations law. While the authors have defined the parameters of this field of study, I would

adjust it somewhat and add more depth.

What are the domestic political currents and cultures responsible for differing foreign policies and legal conflicts? Why have conservatives today, who at one time espoused tradition so strongly, so openly disparaged and disdained laws concerning foreign affairs? The Iran-Contra hearings have keenly raised moral and philosophical implications, in addition to legal ones, concerning lying and deceit in the United States foreign policy process and conducting secret policies contrary to public diplomacy. What are the implications and reasons for the increase of congressional micromanagement, legislation, and criminalization of foreign policy (for example, the recent indictments of former national security aides for their conduct in the United States foreign policy process)?[39] Is bipartisanship generally possible or is politicization of foreign affairs really the normal situation that lurks behind broad and bland generalizations? Foreign relations law is more than just some constitutional law with a sprinkling of international law. It is an old, yet new, and unique field of inquiry.

Fourth, the authors posit what they call fourteen simulations or hypothetical problems for students to utilize. They are typical questions found on a final examination, based on reality and professorial imagination. They seem interesting enough; however, my concern is that they might detract from the process of utilizing the 941-page book in one semester. As an educational tool, the inclusion of a set of historical case studies from non-law disciplines might have enhanced the work more than these hypotheticals. Why not include a three to five page study of the historical use of economic sanctions by Presidents throughout United States history? In terms of public policy analysis, this would be much more useful than a series of hypothetical problems which bears little resemblance to the well-developed and monitored simulation exercises developed by foreign policy experts throughout the late 1960s and 1970s, and which are somewhat questionable in their educational or research usefulness.

Fifth, rather than shying away from the extensive literature in the fields of international relations theory, contemporary foreign policy analysis, and decision-making, the authors might consider specifically raising the current problems, such as the "Reagan Doctrine" and assessing it in terms of legal implications and historical context. For example, a comparison with other presidential doctrines and their relationship to ideology and national interests as well as their impact on the constitutional

39. *For Reagan, Bizarre Turn*, N.Y. Times, Mar. 18, 1988, at D27, col. 1.

and international legal environments would prove intriguing. The authors might consider the different institutional and bureaucratic processes followed by various Presidents in conducting foreign policy or the varying degrees of reliance on international law by Republican and Democratic administrations. This is not making a new field of law less law-like, but more policy relevant. Such empirical assessments are necessary in order to move legal writing, and especially constitutional/international legal analysis, away from sterile doctrinism.

A final assessment of *Foreign Relations and National Security Law* must include reflection on two highly important and recent publications in the field.

The Iran-Contra Affair Report[40] contains three chapters of obvious and direct relevance to the cardinal issues of foreign relations law today: "Power of Congress and the President in the Field of Foreign Policy" (Chapter 25); "The Boland Amendments and the NSC Staff" (Chapter 26); and "Rule of Law" (Chapter 27).

As to the role of the Congress the majority report states,

> Under our Constitution, both the Congress and the Executive are given specific foreign policy powers. The Constitution does not name one or the other branch as the exclusive actor in foreign policy. Each plays in our system of checks and balances to ensure that our foreign policy is effective, sustainable and in accord with our national interests.
>
> Key participants in the Iran-Contra Affair had serious misconceptions about the roles of Congress and the president in the making of foreign policy.[41]

It explicitly rejects the view that Congress has a minor role to play in the foreign policy process. There is no exclusive presidential authority to conduct foreign affairs. As far as reliance on *Curtiss-Wright*[42] by witnesses before the committee was concerned, the report states, "Their reliance on this case is misplaced."[43] That case authorized the President to act but "it did not involve the question of the President's foreign policy powers when the Congress expressly forbids him to act."[44] The report

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40. SENATE SELECT COMM. ON SECRET MILITARY ASSISTANCE TO IRAN AND THE NICARAGUAN OPPOSITION & HOUSE SELECT COMM. TO INVESTIGATE COVERT ARMS TRANSACTIONS WITH IRAN, REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN-CONTRA AFFAIR, 100th Cong., 1st Sess. (with Supplemental, Minority, and Additional Views) (Comm. Print 1987) [hereinafter IRAN-CONTRA REPORT].

41. *Id.* at 387.

42. United States v. Curtiss-Wright Export Co., 299 U.S. 304 (1936).

43. IRAN-CONTRA REPORT, *supra* note 40, at 388.

44. *Id.* at 388-89.

cites recent cases cautioning against "undue reliance" on *Curtiss-Wright.*

In the discussion of the Boland Amendments, the majority report discusses both *Curtiss-Wright* and the power over appropriations. "Beginning in 1983, Congress responded to the President's policy toward the Contras principally through its power over appropriations—one of the crucial checks on Executive power in the Nation's system of checks and balances."[45] After analyzing the three Boland Amendments (in various statutory enactments) the report concludes the "support for the Contras was systematic and pervasive . . . [and] the diversion [of funds] was a flagrant violation of those proscriptions."[46] It rejects the administration position that the Boland Amendments violated *Curtiss-Wright*'s assertion of the President's inherent authority. "Here, Congress relied on its traditional authority over appropriations, the 'power of the purse,' to specify that no funds were to be expended by certain entities in a certain fashion."[47] The report further states, "It strains credulity to suggest that the President has the constitutional prerogative to staff and fund a military operation without the knowledge of Congress and in direct disregard of contrary legislation."[48]

In finally assessing the constitutionality of the secret Contra-support operation the report concludes it "violated cardinal principles of the Constitution."[49] Referring to raising and spending of funds the report concludes,

> When members of the executive branch raised money from third countries and private citizens, took control over that money . . . and used it to support the Contras war in Nicaragua, they bypassed this crucial safeguard in the Constitution.[50]

The report reminds the reader that the "take care" clause that the laws be faithfully executed in the Constitution was derived from the English Bill of Rights, which prohibited the King from disregarding laws he did not like. This clause "embodies the principle of accountability."[51] The report concludes "[T]here has been a failure in the leadership and supervision that the 'take care' clause contemplated."[52] Unlike the prior Tower Board Report, which found only a flawed process and a

45. *Id.* at 395.
46. *Id.* at 405.
47. *Id.* at 406.
48. *Id.*
49. *Id.* at 411.
50. *Id.* at 412.
51. *Id.* at 419.
52. *Id.*

failure of responsibility,[53] this report found a violation of key statutory and constitutional restraints in the foreign policy process in the Reagan White House.

The minority report argues that the President has greater authority in foreign affairs than the majority contends. It also contends that the administration did not make any serious legal missteps concerning the Boland Amendments.[54] It concludes that the administration was not "behaving with wanton disregard for the law."[55] Well, no one ever said that foreign affairs is not politicized.

From a quick overview of the *Iran-Contra Report*, Franck and Glennon were directly on point by emphasizing the congressional-executive confrontation as the core of foreign relations law. However, additional coverage of the statutory aspects of foreign relations law, with particular relevance to intelligence and arms transfer legislation (export controls), would prove to be timely and necessary. Anyone with even just a passing knowledge of *Legislation on Foreign Relations*,[56] published annually by the House and Senate Committees on Foreign Relations, would most likely second that proposition. The minority report's extensive material on the history of Justice Sutherland's "sole organ" language pertaining to the President's authority in foreign affairs in *Curtiss-Wright*, tracing it back to Justice Marshall and the Federalists, is very exciting and evidences the need for some additional historical notes in this type of casebook.[57]

The American Law Institute's *Restatement (Third) of the Foreign Relations Law of the United States* treats many issues concerning international law but specifically focuses on several topics which have proven both to be controversial during the long process of adoption and to be of particular relevance to foreign policy. For example, the question of the relevance of customary international law in providing norms for United

53. REPORT OF THE PRESIDENT'S SPECIAL REVIEW BOARD IV-1, IV-10 (Feb. 1987).

54. IRAN-CONTRA REPORT, *supra* note 40, at 539.

55. *Id.* at 441.

56. The most recent publication is LEGISLATION ON FOREIGN RELATIONS THROUGH 1986 (2 vols. 1987) (and incorporating vol. 3 from 1985), which has about 6,000 pages of statutory excerpts on foreign assistance, agricultural commodities, arms control and disarmament, foreign economic policy, financial institutions, United Nations, war powers, aviation, etc. *See also* S. MALAWER, FEDERAL REGULATION OF INTERNATIONAL BUSINESS (6 vols. 1981-1987), treating in 6,500 pages a multivarious collection of federal legislation pertaining to foreign economic and trade policies of the United States.

57. IRAN-CONTRA REPORT, *supra* note 40, at 457-70.

States decision-makers and whether it is binding on the United States has been particularly troublesome.[58] It seems to me this is one area in which Franck and Glennon might give some additional thought. For example, to what extent is the President of the United States free to observe an international agreement that is void according to international law because it was brought about by illegal duress? Or, to what extent may he violate a valid international agreement? Another area debated at length relates to the many sections treating international trade and monetary provisions and those regarding economic injury to nationals.[59] Without going into many of the finer aspects of those disputes, the inclusion of extensive provisions on international economic law indicates to me the broad importance of economic legislation and rules for foreign affairs law generally. I believe more extensive coverage of this area is warranted.

The extensive coverage of particular areas such as executive agreements by the *Restatement (Third)* convinces me that the general coverage of the field of foreign relations law by Franck and Glennon is fairly well accepted. Again, it is only a matter of readjusting the boundaries a little and adding more depth. Foreign relations law is too important to be treated in a narrow legalistic manner.

As the authors have already shown, foreign relations law is a subject drawing from several well-defined areas of the law. However, it is a dynamic field with great relevance and can benefit from an even broader approach. Franck and Glennon have made a wonderful start in defining and focusing the subject and presenting the basic legal material. In the future, more interdisciplinary material needs to be added by these authors or others. The book provides an exciting teaching tool and impetus for greater research and learning.

58. *See, e.g.*, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 135 (1988).

59. *See, e.g., id.* § 712.