Jill D. Rhodes, Editor

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AN ANTHOLOGY

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A Brief History of the Field of National Security Law

Peter Raven-Hansen, Stephen Dycus, and William C. Banks

There are few things more fascinating in our jurisprudence than the organization of what comes, almost immediately, to be perceived as a new "field" of law.[1]

It is easy to show that national security law is today widely perceived as a field of law practice and study. Lawyers practicing national security law are dispersed throughout the government, some even calling themselves the "National Security Division" of the Department of Justice. The Bar Association of the District of Columbia has a Committee on National Security Law, Policy and Practice, and the American Bar Association has had a proactive Standing Committee on Law and National Security since 1962.[2] A growing number of large law firms have established National Security Law practice groups.[3] National Security Law is taught as such in more than 125 law schools, and subtopics like Counterterrorism Law or Intelligence Law are taught in many as well.[4] No fewer than five law school casebooks have National Security Law in their title (one in its fifth edition), and even more address Counterterrorism Law. The Association of American Law Schools—effectively, the law professors' union shop—has had a permanent section on National Security Law since 2006, which currently has more than 125 members, including ten teachers who have taught the subject for more than ten years. And these metrics do not include the National Security Law-related courses and instructors at the military services Judge Advocate General (JAG) schools and academies.

Showing where the field of national security law came from, on the other hand, is much harder. The lineage is murky, there is still no published intellectual history, and there is no general template for field evolution—fields of law do not all evolve in the same way. But "[t]he study of war is a product of war,"[5] and wars provide a timeline for the evolution of national security law. We follow that timeline below and show that the Cold War, the Vietnam War, and the "War on Terror" each contributed to the critical mass of lawyering and

scholarship, and to the institutionalization of that mass by the bar and academy which established the field.

The Timeline of the Field

The Civil War

Although war and armed conflict had prompted "national security lawyering" much earlier in the form of briefs, opinions, and arguments, the Civil War was our first "'more or less' total war[]," requiring the "politically ordered participation" of all of the nation's resources.[6] It therefore also marshaled lawyers and legal scholars. The lawyers helped produce two of the most important national security law opinions of the U.S. Supreme Court—*The Prize Cases*[7] and *Ex parte Milligan*[8]—and the scholars produced the first written code of the law of war in 1863—the Lieber Code[9]—as well as the first (and surprisingly still relevant) treatise on war powers.[10] Although neither the lawyering nor the scholarship prompted by the Civil War yielded a self-conscious identification of a new field, the war did generate content for the field that was to come.

World War I

This war opened a new domestic front in national security law with the passage of the 1917 Espionage Act[11] and the 1918 Sedition Act,[12] although neither occasioned much significant scholarly response at the time. The war did, however, prompt an important work of national security law scholarship: George Sutherland's *Constitutional Power and World Affairs* (1919). His book set forth the theory of an extra-constitutional and plenary executive foreign affairs power that he later enshrined in his opinion for the Supreme Court in *United States v. Curtiss-Wright Export Corp.*[13]

World War II

Like its predecessor, this war prompted a string of seminal national security law Supreme Court opinions (including *Korematsu*,[14] *Endo*,[15] and *Quirin*[16]), and an influential work of scholarship by Edwin Corwin which presciently foresaw that the "war Constitution" would be "adapted to peacetime uses in an era whose primary demand upon government is no longer the protection of rights but the assurance of security."[17] But even this total war did not prompt any mass of scholarship on national security issues. Professor Luddington explains why. First, many legal scholars were diverted to the war effort. Second, there

was broad agreement on the war. Third, although national security law would eventually form a dialectic relationship with civil rights law, the field of civil rights was itself still in its infancy.[18]

The Cold War

"The cold war changed us," Daniel Patrick Moynihan said. "We used to be pretty much what we started out to be: a republic that expected normally to be at peace."[19] We mutated into a republic perpetually at war. Concerns about the "Communist menace" and government initiatives against perceived subversives produced several new domestic national security law judicial opinions (including *Greene v. McElroy*,[20] *Dennis v. United States*,[21] and *United States v. Robel*[22]). The Cold War also laid the seeds for the institutionalization of a national security bar. Lewis Powell's 1961 pamphlet for the ABA, *Instruction on Communism and Its Contrast with Liberty Under Law*, not only urged the study of communism in schools and colleges, but gave impetus to the ABA's establishment in 1962 of a Standing Committee on Education About Communism. That Committee evolved into the Standing Committee on Law and National Security in 1978, which provided the first professional focal point for lawyers who dealt with national security issues and a forum for discussing such issues.

The passing of the McCarthy era also sparked a seminal student note (actually, a collection of student comments filling an issue of a law review), bringing together for the first time under the rubric of "national security" a catechism of national security law, including warrantless electronic surveillance, criminalization of speech and association, loyalty screening, information security and classification, and emergency powers.[23] Although the note's introduction admitted that "'[n]ational security' is not a term of art, with a precise, analytic meaning," it defined it, "[a]t its core," as "the government's capacity to defend itself from violent overthrow by domestic subversion or external aggression."[24] Furthermore, the emergence of the field of civil liberties law also gave the collection a focus: those national security programs that posed conflicts with civil liberties. The note thus took a dialectical approach that has characterized much of national security law ever since.

The Vietnam War

Seminal though it was, the *Developments* collection still fell well short of a mass of national security scholarship. It was the Vietnam War which "led to an enormous outpouring of legal activity,"[25] and over time, legal scholarship. For example, Louis Henkin wrote his path-breaking study, *Foreign Affairs and the*

Constitution, in 1972, explaining that "I complete this volume in the quicksands of Vietnam."[26]

The ABA again played an important, if unusual role. Recognizing that "the War in Indochina has raised serious questions as to the respective powers under the Constitution of the President and of Congress to enter into and conduct war," and that for "members of the Bar to uphold and defend the Constitution, . . . it is necessary to have a clear understanding of said respective powers," an ABA Resolution in 1971 called for an objective historical study of those powers.[27] An ABA committee secured necessary funding and commissioned Columbia Law School Professor Abraham Sofaer to undertake a seminal study of the early U.S. history of war and foreign relations powers.[28] The Vietnam War thus reinserted war powers and foreign affairs into the national security law catechism suggested by the *Developments* note.

At the same time, the My Lai massacre gave impetus to renewed indoctrination of our military in the law of war.[29] A 1974 Army directive appointed the Army Judge Advocate General's Corps as the lead organization in implementing a unified law of war program for the armed forces. This inserted military attorneys for the first time into the operational planning process and thereby also launched the development of Operational Law, "that body of domestic, foreign, and international law that directly affects the conduct of military operations."[30]

The Vietnam War also added a powerful strain of critical distance—if not sometimes cynicism—to the emerging national security law scholarship. The war "turned us into a people who know we can't believe anybody anymore, including ourselves."[31] The new distrust of government was not confined to issues of war powers. It was reflected even in the 1972 *Developments* note, which found that the chief lesson of conflicts "is the need for a skeptical approach to national security claims."[32]

A third lesson of the Vietnam War—captured in the intra-governmental memoranda that made up the Pentagon Papers—was that national security law is not just, or even mainly, case law, but also the law that is argued within the executive branch and between the political branches without ever reaching the courtroom. The *Developments* note also reflected this lesson, asserting that it "would not confine itself to a judicial mode of analysis—since courts may be reluctant or unable for institutional reasons to impose their judgments."[33]

The war also prompted "teach-ins," at first focused on war policy, but likely evolving in many cases into homespun courses on war powers and the Constitution. In 1978, Professor Donald Zillman and others published the first casebook in the field under the title, *The Military in American Society*. The book's opening chapters treated war and emergency powers, the use of the military in

domestic society, and foreign relations law, and its last chapter dealt with the law of armed conflict. Two years later, Thomas Franck and Michael Glennon published a three-volume collection of primary materials entitled *United States Foreign Relations Law: Documents and Sources*, which dealt not only with treaties and executive agreements, but also with the War Powers Resolution and congressional purse-strings controls over war-making, topics clearly stimulated by the Vietnam War. In 1987, they edited these materials to publish the first casebook to use national security law in its title, *Foreign Relations and National Security Law*, signaling the affinity between foreign relations law and national security law.

Breakout: The Gulf War to 9/11

In 1990, two new casebooks, both entitled *National Security Law*, helped demarcate the field and separate it from foreign relations law. John Norton Moore drew on more than a decade of teaching national security-related courses at the University of Virginia School of Law to publish (with Frederick S. Tipson and Robert F. Turner) a casebook addressing "a new field in American law and legal education" built on the "synergy between the international law of conflict management and emerging areas of national law concerned with security matters . . . ."[34] This book covered selected topics in both international law and domestic law.

Stephen Dycus, Arthur Berney, William Banks, and Peter Raven-Hansen took a different approach in their casebook published in the same year. They omitted coverage of general foreign relations law, public international law, and the law of war—deliberately sacrificing breadth for depth on U.S. domestic national security law. This editorial choice recognized that the omitted topics were already the subject of separate courses. These authors regarded domestic national security law as "the core of this emerging field" (and the law most directly pertinent to U.S. lawyers), thus justifying their effort to "fill a gap" in existing teaching materials.[35]

The year 1990 was also pivotal in the emergence of the field in another way. In that year the ABA Standing Committee on Law and National Security held its first annual "Review of Developments in the Field." These conferences have highlighted current issues and brought national security law practitioners (still chiefly in the government) together with national security law teachers and students. They have also indicated by their title that there *is* a "field." John Norton Moore's Center for National Security Law at the University of Virginia co-sponsored and organized the early reviews, and in 1993 it was joined by Duke Law School's Center on Law, Ethics, and National Security, headed by Scott Silliman.

The development of operational law in the military followed a parallel track. In 1986-87, an Operational Law curriculum was introduced in the Army; and in the fall of 1987, its International Law faculty produced the first *Operational Law Handbook*,[36] itself a landmark in the evolution of the broader field of national security law. By 1991, the *ABA Journal* could justifiably describe the Gulf War as a "lawyer's war," because the military lawyers were deeply integrated into operations.[37] By 1992, these two tracks for the institutionalization of national security law came together when a faculty member from the JAG School spoke on "National Security Law: An Overview of the New Field" at the ABA Standing Committee's annual review.[38]

9/11 and the "War on Terror"

The slow and steady development of the field was dramatically accelerated by the attacks on U.S. soil on September 11, 2001 ("9/11") and the ensuing "War on Terror." In due course, the new war generated a series of blockbuster national security law opinions, including *Hamdi*,[39] *Boumedienne*,[40] *Hamdan*,[41] and *Holder v. Humanitarian Law Project*.[42] Partly because the intellectual framework had already been put in place by the efforts of the ABA, law professors, and the lawyers who taught in the JAG schools, the attacks also immediately caused an outpouring of scholarship that exceeded the volume generated by the Vietnam War.

At least a dozen law school casebooks on aspects of national security law were published between 2002 and 2012.[43] A decade after the 9/11 attacks, the subject is taught at the majority of U.S. law schools. Many schools have also started clinical programs and research/practice centers dedicated to the study and litigation of national security law issues.[44] In 2009, George Washington University Law School created the first LL.M. in U.S. Foreign Relations and National Security Law, followed by Georgetown University Law Center two years later. These graduate law programs signal a maturing of the field, because they evidence the expansion of a curriculum beyond what were merely introductory (survey) courses in national security law. Meanwhile, the gap between law school scholars/teachers of national security law and military teachers of operational law has narrowed with the ABA Standing Committee's sponsorship of annual joint conferences on teaching in the field beginning in 2010.

This post-9/11 surge in national security law practice and scholarship has shaped the field in several ways. First, it has expanded its boundaries more clearly to include selected principles of the law of war, and at the same time has ignited a still-simmering controversy about the role of international law as part of our own law. Second, it has reemphasized a lesson of the Cold War: that

national security law looks ominously inward as well as outward, implicating core civil liberties. Third, it has applied that lesson to the rights of aliens and immigrants, resurrecting the issues of discrimination that were raised but not resolved by *Korematsu*. These issues have now materialized in connection with terror prevention, screening, and profiling, as well as immigration law. Finally, it has added the legal issues surrounding consequence management, emergencies, and disaster relief to the national security law mix.

Today, national security law still has at its core the government's capacity to defend itself and our society from domestic subversion and external aggression. But it now also includes limits and authorities from the law of war; neutrality law; war crimes; intelligence collection and operations; surveillance; the collection and data-mining of third-party information; screening and profiling; preventive and military detention; habeas corpus; interrogation; extraordinary rendition; national security crimes and extraterritorial jurisdiction; problems of prosecuting such crimes; trials by military commissions; the domestic role of the military; consequence management and disaster relief; continuity of government; classification of national security information; access to such information; espionage; prior restraints; international conflict management; arms control; arms and technology export controls; and national security and the environment.

Issues in the Continued Development of the Field

Power v. Law

Henry Kissinger once complained that "[i]t is part of American folklore that, while other nations have interests, we have responsibilities; while other nations are concerned with equilibrium, we are concerned with the legal requirements of peace."[45] His derisive equation of law with "folklore" reflected his oft-stated belief that the problem with American foreign policy is that it has too many lawyers; that abstract legalisms interfere with the cold-blooded pursuit of interests.[46] This is a sentiment shared even by many law students (and some lawyers), who doubt the relevance of law in the corridors of national security power—asking, "*Do answers to National Security Law questions really matter?*" Judge David Sentelle of the United States Court of Appeals for the D.C. Circuit, himself a classroom teacher of National Security Law, responds convincingly that "[t]he very fact that we are asking these questions is strong evidence that national security law is law: that the United States conducts its foreign affairs under the rule of law."[47] Still, teachers and advocates of national security law carry a recurring burden of persuading their students that there is such law and that it is relevant.

Law Outside the Courtroom

A related issue is the persistent belief that law only matters if it is declared or enforced in the courtroom. This is an unfortunate byproduct of the case method of legal education, so deeply ingrained in those who learn their law primarily through judicial opinions that it persists in experienced practitioners. But in a system dedicated to the rule of law, law matters outside the courtroom, too: it supplies the vocabulary of debates and arguments about authority within and between the political branches and ultimately, too, the basis of appeals for popular approval. Franck and Glennon thus explained their reliance on largely non-judicial materials in their casebook by noting that "[t]he contours of the law are best revealed by the arguments and justifications offered by those vying for power," and emphasized the importance of legal rhetoric for making a "record" in the court of public opinion.[48] Moore, Tipson, and Turner likewise assert that "the legal process is in practice frequently the battleground on which the struggle to define and prioritize national security objectives occurs."[49] Dycus, Banks, and Raven-Hansen are also agreed on the "significance of law outside the courtroom and . . . the interaction of law and politics."[50] Still, this lesson needs to be drummed home with each new national security law student (and some old practitioners).

Boundary Policing: International Law v. Domestic Law

National security law traces its lineage to both international law and what has come to be called foreign relations law. But it has arguably outgrown both. Law schools have long offered dedicated courses in international law, and the practice of international law has long had its own professional organizations and institutional support. One issue for national security law teachers is therefore how much international and foreign relations law to include in a course in the field—and *how much can fit*. The principal national security law casebook that focused initially on domestic national security law has now grown through five editions from 736 pages to 1,319 pages, while adding chapters on the incorporation of international law into U.S. law and on selected aspects of the law of war.[51] Another casebook still emphasizes international law and conflict management over domestic national security subjects.[52] Perhaps the curricular answer lies in a suite of national security law courses, such as those supporting the LL.M. programs; but for casebook authors in the field, boundary policing remains a serious challenge.

Boundary Erosion: Spinoff Subjects

A closely related issue is the evolution of spinoff topics. Just as national security law can be seen as a spinoff of international law, constitutional law, and foreign relations law, so now subtopics of national security law have begun to emerge as distinct fields. Counterterrorism Law, Bioterrorism Law, Intelligence Law, Disaster Law (or Emergency Management Law), and Cybersecurity Law are current examples. Several of the largest law schools now offer courses in Homeland Security Law,[53] and the ABA has begun sponsoring an annual review of this law separately from its annual review of national security law.

Conclusion

If the "study of war is a product of war,"[54] it is clear that the boundaries of the field of national security law will continue to be set chiefly by events, with the help of a now self-identified and growing body of national security lawyers and teachers. The field of national security law has distinctly emerged. But it will surely continue to change with every new challenge to our national security.