

Teaching National Security Law

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Introduction

In comparison with other subjects currently taught at law schools in this country, national security law is relatively new. Traditionally, issues involving the constitutional separation of powers between the respective branches of government, including war powers, were covered within the context of an offering on basic constitutional law. If there were courses that touched on specific legal issues involving national security, they tended to be occasional seminars teaching military justice. These focused almost exclusively on the Uniform Code of Military Justice and the separate criminal legal system that it establishes for men and women in uniform. One such course, first offered at the University of North Carolina Law School almost 50 years ago and later at Duke University Law School, was taught by Robinson O. Everett, then a young faculty member at Duke.¹

In the 1970s, one of Professor Everett's former Duke students, a new law professor at the University of Virginia named John Norton Moore, started teaching a course at that school entitled "Law and National Security." In 1981, Moore went on to establish the Center for National Security Law, the first program at an academic institution dedicated to the study of the subject. Twelve years later, another center was established at Duke by Everett, modeled closely on the one at Virginia. During this time, courses in national security law began to increase dramatically, from just one in the mid-1970s to more than eighty in the early 1990s.² Today, especially in the wake of the September 11 terrorist attacks, the number continues to grow rapidly.

The increasing interest in teaching national security law as a discrete subject may have been prompted, at least in part, by the early work of a committee of the American Bar Association, originally called the Standing Committee on Education Against Communism, now named the Standing Committee on Law and National Security. The committee, founded in 1962 by then-ABA President and later Supreme Court Justice Lewis Powell, among others, originally

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1. Everett had been an Air Force legal officer and a commissioner on the United States Court of Military Appeals. Many years later he served as chief judge of that court.

2. Standing Comm. on Law and National Security, American Bar Ass'n, *Standing Committee on Law and National Security – 1962-2002: A Brief History* (n.d.), at 7.

focused on the growing communist threat. Later the scope of its work grew to encompass broader issues of law and national and international security.³ Conferences sponsored by the committee and by the two academic centers at Virginia and Duke attracted not only attorneys and law students, but also members of the lay public who sought a greater understanding of how the rule of law influences national security policy making.

The course of world events during the last half-century also served to stimulate a more specific and focused interest in national security law. Controversy over the Vietnam War spawned not only protests but also novel questions about the constitutionality of the conflict that, to a large extent, remain unanswered because of the courts' invocation of the political question doctrine.⁴ Attempts to enforce the War Powers Resolution,⁵ a law passed over President Nixon's veto that sought to limit presidential commitment of U.S. troops to combat in the absence of congressional approval, yielded much the same result in the courts.⁶ More recently, the horrific events of September 11, 2001, President Bush's declaration of a "war" against terrorism,⁷ and this country's announcement of a policy of pre-emptive self defense⁸ (one of the justifications for the invasion of Iraq in March 2003) have put a spotlight on the intersection of law and national security.

Although the study of national security law has always built upon a foundation of constitutional law, in recent years it has necessarily grown in scope to include coverage of fundamental principles of public international law, international criminal law, international humanitarian law, and numerous domestic statutes. In its current form, it therefore serves as a fitting complement to many of the core courses offered in law schools today.

Why Teach (or Study) National Security Law?

One of the principal reasons I retired from the United States Air Force after 25 years of service as a judge advocate was the tremendous excitement and lure of being able to teach national security law at Duke Law School. I wanted to engage my students on issues of great national importance. That excitement has not waned throughout the years I have been teaching,

3. *Id.* at 1.

4. *See, e.g.*, *Orlando v. Laird*, 443 F.2d 1039 (2nd Cir.), *cert. denied*, 404 U.S. 869 (1971); *DaCosta v. Laird*, 448 F.2d 1368 (2nd Cir. 1971); *DaCosta v. Laird*, 471 F.2d 1146 (2nd Cir. 1973).

5. 50 U.S.C. §§1541-1548 (2000).

6. *See, e.g.*, *Campbell v. Clinton*, 203 F.3d 19 (D.C. Cir. 2000).

7. Remarks by the President in Photo Opportunity with the National Security Team (Sept. 12, 2001), *available at* <http://www.whitehouse.gov/news/releases/2001/09/20010912-4.html>.

8. National Security Strategy of the United States (Sept. 2002), at 13-16, *available at* <http://www.whitehouse.gov/nsc/nss.pdf>.

and student interest in the course material is as strong as ever.

In the very first class of each semester, I ask each student why he or she is taking the class, and the answers are illuminating. Some are drawn to national security law because they want to plumb the limits of presidential power in times of crisis, notably the ongoing war on terrorism. Others, reflecting back on the terrorist attacks of 9/11, feel compelled to practice law in one of the governmental agencies because of a desire to do something for their country. Still others simply want to study an area of law that is as timely as the morning's headlines. Although reasons for enrolling in the course differ, the fact that it is always oversubscribed at my school attests to its continuing popularity.

From the perspective of one who teaches, conducts research, and writes in the field of national security law, there is the unique opportunity not only to deal in "cutting edge" legal concepts but also to influence the formulation of governmental policy in a way few other areas of the law afford. Many of us have testified before House and Senate committees on the balance to be struck between national security and civil liberties. Others have been asked to be consultants to executive branch agencies. Many have helped to inform public debate on the war on terrorism through interviews with radio, television, and print media. I have invited local television stations here in North Carolina to tape class discussions of particularly newsworthy issues, such as the Abu Ghraib prison scandal, the "torture memos," and possible criminal sanctions against DOD contractors and CIA personnel operating as interrogators in Iraq and Afghanistan. The students have thoroughly enjoyed the experience (and their new "celebrity" status), and the stations have benefitted from the expert commentary on their evening news programs.

Perhaps the greatest satisfaction for me as a teacher of national security law is to follow my former students as they pursue careers prompted by their having taken the course. Many apply for federal court clerkships in the District of Columbia Circuit, which has an unusually heavy docket of cases involving national security issues, and a few are accepted each year. Others apply to federal agencies where they can become directly involved in the practice of national security law. Still others seek out law firms that have an established national security litigation practice. I cannot think of more important positions for young attorneys in these perilous times.

Structuring the Course

A course in national security law can be structured as a three semester-credit offering (roughly 45 classroom hours) and taught either in three one-hour sessions per week or in some variant of that model. My own preference is for two-hour sessions, with two class meetings every other week, so that classroom discussions can be more robust and not prematurely interrupted at the end of an hour.

A course in national security law is, from my perspective, best taught as a small seminar rather than a large "lecture" class. The course material lends itself to a close interaction between professor and students. The number of students wanting to take national security law in recent years, however, even when it is taught both semesters, has made it difficult to limit enrollment. Still, a "seminar" of up to 30 students may yet preserve the more intimate classroom dynamic. The greater the size of the class, of course, the greater the challenge for the professor to ensure that all students actively participate in classroom discussions.

Basic Teaching Materials

Although more texts for teaching national security law will undoubtedly reach the market in the future as the subject continues to gain prominence, four currently in print are readily adaptable for classroom use in a course that surveys the field broadly, while two others provide more specialized coverage.

The first is *National Security Law*, a casebook coauthored by Stephen Dycus, Arthur L. Berney, William C. Banks, and Peter Raven-Hansen, and published by Aspen. It is now in its third edition (2002) and is the one that best suits my particular needs. Its broad scope of coverage includes, among other things, presidential and congressional national security powers, the role of the judiciary in issues of national security, the domestic effect of international law, general war as differentiated from lesser forms of conflict, intelligence operations, consequence management after a terrorist attack, investigating terrorism and prosecuting international terrorists, public access to national security information, and restraining leaks of that information. A comprehensive teacher's manual is available to adopters.

Another text, perhaps more in the style of an anthology, is also entitled *National Security Law* and was coauthored by John Norton Moore, Frederick S. Tipson, and Robert F. Turner. The first edition was published by Carolina Academic Press in 1990. A substantially revised second edition under the authorship of Moore and Turner is due out soon. Besides containing all the principal court opinions in the area, it provides the student with an abundance of relevant articles and excerpts from respected treatises that serve to complement the cases. The third text is *Foreign Relations and National Security Law* by Thomas M. Franck and Michael J. Glennon. Its second edition was published by West in 1993. It is similar in style to the Dycus, Berney, Banks & Raven-Hansen text and includes simulations. The fourth book, which gives greater coverage of international law, is *Foreign Relations Law* by Curtis A. Bradley and Jack L. Goldsmith. It was published by Aspen in 2002. All four of these books more than adequately cover the pivotal cases and materials in national security law, so any one of them would be suitable for use as a principal text.

Two recent books focus on specific parts of the wider field. *Anti-Terrorism and Criminal Enforcement* by Norman Abrams was published by West in 2003. *Law and Bioterrorism* by Victoria Sutton appeared in the same year from Carolina Academic Press.

Developments in the field have come at such a rapid clip that I have had to copy and distribute new judicial decisions, statutes, executive orders, U.N. Security Council resolutions, and the like to my students almost every term. Recent examples include the USA PATRIOT Act in the fall of 2001,⁹ a decision by the Foreign Intelligence Surveillance Court of Review in

9. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272.

2002,¹⁰ new FBI investigative guidelines in 2003,¹¹ and the Fourth Circuit's decision in *United States v. Moussaoui* in 2004.¹² The casebook I use has included excerpts of materials like these in annual supplements.¹³

In addition to the basic texts and handouts, many supplemental books, monographs, and law review articles on specific national security law issues may be put on reserve in the law library. These can be assigned as optional readings or can allow students to research particular topics in greater depth.

Because national security law is currently so topical and fluid, many of us now teaching it open each class by discussing national and international events of the past several days, emphasizing how those events are informed by and illustrate principles covered in the course. This "teaching from the headlines" has become, for me, one of the most pertinent and thought-provoking parts of each class and, for the students, what they often look forward to most. It goes without saying that students should be encouraged to watch, listen to, or read some reputable news source on a daily basis so they can stay abreast of what is happening in the world. Most are able to do so easily using on-line media services.

Any course can be enhanced by bringing in guest speakers who have extensive experience working in a particular field relevant to national security law and policy. In my courses at Duke, I normally invite a total of five outside lecturers to address the students at various times during the semester. Among recent invitees is Professor Richard Kohn, a well-respected military historian at the University of North Carolina, who has spoken about the constitutional principle of civilian control of the military and its application throughout the last two centuries. Judge Walter Cox, a former Chief Judge of the United States Court of Appeals for the Armed Forces, has lectured on the history and practice of military justice under the Uniform Code of Military Justice,¹⁴ distinguishing it from other federal and state criminal jurisprudence. He has also engaged students in a discussion of authority for and use of military commissions, a topic of great current significance with the prosecutions underway at the Guantánamo Bay Naval Base. Gene Matthews, for many years the General Counsel for the Centers for Disease Control and Prevention in Atlanta, has discussed the issue of bioterrorism, addressing both the extent of the threat we face and our ability to cope with a bioterrorist attack. L. Britt Snider, who has extensive experience in intelligence oversight, has spoken about the Central Intelligence Agency and the crucial role of the two congressional oversight

10. *In re: Sealed Case*, 310 F.3d 717 (Foreign Intelligence Surveillance Court of Review 2002).

11. Department of Justice, Attorney General's Guidelines for FBI National Security Investigations and Foreign Intelligence Collection (Oct. 2003).

12. *United States v. Moussaoui*, 365 F.3d 292 (4th Cir. 2004).

13. The most recent is *DYCUS, ET AL.*, 2004-2005 SUPPLEMENT TO NATIONAL SECURITY LAW (2004).

14. 10 U.S.C. §§801-940 (2000).

committees.¹⁵ With the recent release of the 9-11 Commission Report on intelligence collection and analysis, Snider's comments are extremely topical. Finally, as a supplement to my course materials on the use of force in international relations, Air Force Brigadier General Charles Dunlap, currently the Staff Judge Advocate (senior counsel) at Headquarters Air Combat Command at Langley Air Force Base, Virginia, has addressed laws regulating the use of force and the role of military lawyers in armed conflict. This subject is of special relevance now in light of the allegations of prisoner abuse at military detention facilities in Iraq and Afghanistan.

Conducting the Class

The texts suitable for use in the classroom all contain the acknowledged principal cases that serve to highlight basic tenets in national security law. For example, most contain the Supreme Court opinions in the *Steel Seizure* case¹⁶ and *Curtiss-Wright*,¹⁷ considered by virtually all to be the two preeminent cases in national security law. In covering the cases, the traditional approach, and one that I favor, is to require a student to prepare and present to the class an oral brief on the particular opinion being studied.

In some instances, several students can be assigned to assume the roles of individual justices in a single case and to brief their respective justices' opinions as if they were their own, regardless of whether they agree or disagree with the justices. The rest of the class is invited to ask the student "justices" questions about the opinions briefed, then each of the student "justices" is allowed to comment, giving his or her view of the soundness of the opinion. The *Steel Seizure* case and the *Pentagon Papers* case¹⁸ are ideally suited for this type of treatment because of the distinct differences expressed in the myriad opinions written by the participating justices. Although the requirement to brief cases may be considered "old school" by some, students at Duke have reacted quite favorably to it and applauded it in their course critiques.

As already mentioned, a course in national security law is ideally suited for a small to mid-size seminar. That demands a dynamic, personal, and interactive teaching style. Simply put, the better and more comfortable the faculty/student relationship is in class, the easier it is to facilitate a productive and thought-provoking dialogue on the issues.

But prudence dictates caution in one respect. Many of the seminal issues in national security arise when a President claims the right to act under his Article II executive or commander-in-chief authority, either in the absence of congressional action or perhaps even in the face of implied or expressed congressional intent to the contrary. Thus, there tends to be a very definite political dimension to the issues. This is especially true since the terrorist attacks in New York and Washington three years ago, as courts on the whole have yet to provide

15. The Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence.

16. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

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

18. *New York Times Co. v. United States*, 403 U.S. 713 (1971).

definitive guidance regarding constraints on presidential power in the war on terrorism.

Because consideration of these issues in class can quickly become politically charged, a carefully balanced and strictly non-political approach must be used to guide the discussion. One recent example is reliance on the doctrine of preemption to justify the use of military force to remove the regime of Saddam Hussein. Another is the use of military commissions to prosecute persons whom the President has declared to be “unlawful enemy combatants.” The prudent approach would be merely to delineate the applicable constitutional and statutory provisions, as well as the principles of international law, then allow the students to reach their own conclusions. Students should be reminded that with issues like these, as with so many in national security law, there may be no clearly defined “right” or “wrong” answer until a court speaks with certainty and finality, and that this seldom happens.

Evaluating the Students

Although some law school subjects lend themselves well to mid-course or end-of-course testing, national security law, in my opinion, is not one of them. Because of the fluid nature of the subject matter and the relative paucity of definitive court opinions, I do not favor testing as the best way to evaluate students.

In lieu of testing, students in my courses are required to write a 20-30 page, double-spaced research paper, due at the end of the semester. In conjunction with class participation, the papers determine final grades for the course. Each student is allowed to choose a research topic, which can be anything under the broad rubric of national security law, as long as it is approved by me. Some have chosen an historical review of topics like the Posse Comitatus Act¹⁹ or President Lincoln’s suspension of the Writ of Habeas Corpus during the Civil War. Others have taken a more analytical approach, dealing with such current issues as the difference between preemption and prevention under international law, presidential authority to create military commissions without congressional legislation, or congressional oversight of intelligence operations, including covert ones.

Students schedule appointments with me for a mid-course review of their work. This ensures that they are proceeding along the right research paths and adhering to their previously approved outlines. One of the last class sessions is devoted to each student’s sharing his research, findings, conclusions, and, in some cases, recommendations, with the rest of the class.

My experience has been that students thoroughly enjoy and enthusiastically pursue this individual research. In many cases, papers written for the course are later published in one of our law journals.

Conferences

Although it is difficult to require students to attend outside events, I encourage mine to participate in national and regional conferences on national security law and policy. One of the oldest and best known is the “Annual Review of the Field” held each fall in Washington, D.C. It is sponsored principally by the ABA’s Standing Committee on Law and National Security, but in

19. 18 U.S.C. §1384 (2000).

recent years it has been co-sponsored by the Center for National Security Law at the University of Virginia and the Center on Law, Ethics, and National Security at Duke University. It includes speakers from the defense and intelligence communities, as well as from congressional staffs, along with experts on selected topics of special interest. This conference thus exposes law students to professionals in the field who either make or significantly shape national policy. In recent years the American Bar Association has waived the registration fee for students.

The Center on Law, Ethics, and National Security at Duke University has for a number of years hosted a conference each spring on a national security topic. It has been attended by law students from throughout the region. Recent conferences have addressed U.S.-Canadian security relations, legal and policy considerations in the Iraq war, humanitarian intervention, and the International Criminal Court.

Other local or regional conferences on national security issues are hosted by law schools and various non-academic organizations. Many would benefit the student of national security law.

Conclusion

As the debate continues on the appropriate responses to the tragic events of September 11, 2001, it is vitally important that the lawyers of tomorrow – those who will find employment in executive branch agencies or on Capitol Hill, become judges or policy-makers, or perhaps even find themselves as private practitioners representing persons accused of terrorist acts – become familiar with the dynamic field of national security law. To that end, there can be no better time than now to take or to teach so important a course.