

National Security Law

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John Norton Moore

Robert F. Turner

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Preface

It is “obvious and unarguable” that no governmental interest is more compelling than the security of the Nation.

—U.S. Supreme Court in *Haig v. Agee*

Nearly a quarter-of-a-century has passed since the two of us co-founded the Center for National Security Law (CNSL) at the University of Virginia School of Law as a nonpartisan, nonprofit research institute to promote interdisciplinary advanced scholarship and education about legal issues affecting the national security of the United States. Our first project was to design and publish a casebook so that other schools could more easily teach in this new field.

When the first edition of *National Security Law* was published fifteen years ago it was described as addressing “a new field in American law and legal education.” Today the field of national security law is firmly established. Courses in national security law are taught at the nation’s top law schools and practitioners abound throughout the government. A parallel discipline called “operational law” has developed simultaneously within the military. Indeed, the United States military leads the world in incorporation of law into military operations. Government attorneys from all over the world now routinely come to the CNSL National Security Law Institutes, and copies of the casebook and its documentary supplement appear in government libraries from Argentina and Australia to Ethiopia and Russia. The American Bar Association Standing Committee on Law and National Security has become one of the most prestigious and active committees of its kind. In 1994, we assisted colleagues at Duke Law School establish their very excellent Center on Law, Ethics, and National Security, with which CNSL and the ABA Standing Committee annually co-sponsor a major national conference in Washington, DC. Three years ago, one of our favorite former students and a valued colleague retired after a distinguished career in the Army JAG Corps and established a Center for Terrorism Law at St. Mary’s Law School in San Antonio. In a post-9/11 world this rapid development of the field seems destined to continue.

While there are now other casebooks titled *National Security Law*, we respectfully suggest that this is the only one that truly defines the field. The other books, while of generally high quality, tend to focus on more limited areas, particularly domestic legal issues such as war powers and First and Fourth Amendment freedoms. In contrast, this volume seeks a full synergy of international law, international relations, and national law and policy related to the security of the nation and the problem of unauthorized violence in the world.

This second edition is not merely a modest revision of the original. Several chapters that were of greater relevance in a Cold War setting have been deleted, other chapters have been substantially redesigned or updated, and important new chapters

have been added. We are particularly excited about Chapter 2, “Newer Theories in Understanding War: From the Democratic Peace to Incentive Theory,” which provides a state-of-the-art review of our present understanding of the origins of war and an exposition of an important new foreign policy paradigm developed by one of our editors. Other completely new chapters address “Operational Law,” “Drugs as a National Security Issue,” “Outer Space Law,” “Domestic Terrorism,” “Information Warfare,” and “Homeland Security.” And a review of the brief biographies of contributors will reveal that we have assembled some of the leading authorities on their topics in the world and produced a volume of tremendous relevance to the post-9/11 national security challenges facing this country.

The field of national security law is largely the result of a synergy between the international law of conflict management and emerging areas of national law concerned with security matters, such as the law of intelligence and arms transfers. Although the international law of conflict management is frequently presented in introductory international law courses, typically it is dealt with in cursory fashion. It is the editors’ experience that few graduates of such courses, and even surprisingly few teachers of international law, have a sophisticated knowledge and appreciation of the complexities of the international law of conflict management in all its dimensions—from initial determination of the lawfulness of coercion to efforts at arms control. Moreover, national security matters are increasingly surrounded with a range of important national law issues as evidenced by the War Powers Resolution and congressional constraints on intelligence operations and arms transfers.

One of the most dramatic trends of the past quarter-century in national security affairs has been the increase in congressional efforts to influence the decision-making process by the enactment of hundreds of new laws and statutory restrictions on the discretion of the Executive Branch. An illustration of the magnitude of this post-Vietnam legislative activism can be seen in the growth of the congressional publication *Legislation on Foreign Relations* from one 658-page volume twenty five years ago to three volumes averaging in excess of 1,500 pages each today. Some observers view this enhanced congressional role as a positive response to the tragedy of Vietnam and the abuses generically categorized as “Watergate,” while others with equal sincerity contend that Congress has exceeded its constitutional authority and in the process endangered the security of the nation. Whatever view one takes in this heated debate, the plethora of new legislation in this area has made the study of national security law essential for anyone who wishes to understand the American national security process as the U.S. government enters the new millennium.

This book brings together teaching materials addressing a broad spectrum of important national security legal issues. It seeks to place such legal issues in historical and strategic context, and to acquaint the student with a wide range of recurring national security problems. It is a carefully designed product integrating the expertise of some of the foremost authorities in each area with the editors’ overall structure of the new field of national security law. It is designed for use in law schools, graduate programs in international relations and national security, and the nation’s war colleges and service academies—as well as to serve as a handy desk reference for professionals and practitioners in the field.

In recent years there has been an explosion of litigation on national security issues. Issues once almost never raised in court are now increasingly the subject of litigation.

During our professional lifetimes the legal staff at the Central Intelligence Agency has grown from one or two lawyers to more than 120—expanding more than ten-fold since the end of the Vietnam War. The State Department's Office of Legal Adviser has grown even larger, and since the terrorist attacks of 9/11 the FBI national security law legal team has increased more than five-fold. Two decades ago there was a lawyer on the National Security Council staff who focused primarily on Freedom of Information (FOIA) requests and an occasional personnel matter. Today there is not only a full-time NSC Legal Adviser focused heavily upon policy issues, but three other lawyers as well as well. And today's military commander understands that his or her Staff Judge Advocate is among the most valuable resources available when planning operations during periods of armed conflict.

The choice of *national security* as a focus for this book reflects the priority and deference generally given to this phrase in contemporary policy, and the resulting need for lawyers, social scientists, policy-makers—indeed, all citizens—to analyze and evaluate national security issues on a critical and continuing basis. We believe strongly that this effort will be enhanced by a comprehensive examination of the many ways in which law and national security interact.

The chapters of this book highlight the diversity of values and assumptions that underlie current conceptions of national security. They explore the contemporary policy dilemmas and political tensions which such diversity can generate, as well as some of the traditional resolutions, tentative accommodations, and continuing contradictions embodied in the law applicable to each area.

As a principal outcome of past political accommodations, *law* is both a starting point and an end product of each new struggle by the institutions of government to balance the frequently imprecise demands of national security with the often equally vague advancement of other values and objectives. Broadly conceived as it must be, the legal process is in practice frequently the battleground on which the struggle to define and prioritize national security objectives occurs. Such struggles are seldom won or lost permanently; each generation typically feels compelled to reexamine and challenge the decisions and accommodations of earlier times as perceptions and priorities change, international realities shift, and circumstances require. We recognize, therefore, that the terrain will be a changing one in many of the areas covered in this book. Yet it is also likely that the issues posed in each area, the trade-offs that they present, and the approaches suggested for dealing with them will also be characterized by a remarkable continuity over the years. In any event, we hope that the chapters that follow will provide a framework for policy analysis and decision as well as a snapshot of the legal landscape.

The book does not propose a single grand theory or formula to assure rational choice or sound law in the realm of national security. The novelty of the book is rather in the scope of the material covered, the identification of an overall new and important field of national security law, and in the effort to present for broad scrutiny and comparison a large number of important security issues. The subjects addressed include not only some of the central public preoccupations of our time—military force, arms control, free speech, terrorism—but also a number of more esoteric corners of the law relating to national security that are often ignored in public debate until, from time to time, some unexpected crisis thrusts them into the limelight and points up the need for wider discussion and understandings.

Periods of crisis can be the worst of times to consider the priorities and trade-offs that govern decisions about the making and application of law in matters of national security. As passions mount, positions tend to polarize around extremes. On the one hand, uncritical invocations of “national security” can become all-purpose justifications for disregarding or overriding values that the security of the country is in fact meant to ensure. On the other hand, skeptics of security considerations may underestimate the dangers inherent in a world that is all too frequently inhospitable to those same values. In balancing these competing considerations it is easy either to focus on the real constraints of national security or to neglect the realities of a world that is too frequently harsh in preoccupation with immediate preservation of equally real competing values. Only through an honest understanding of the realities of national security threats and competing interests can optimal and informed judgments be made about national security law. It should perhaps be remembered in this connection that democracies, for all their greatness, can all too easily misperceive serious totalitarian challenges and turn inward toward a more familiar and compatible world. While comforting in the short run, such approaches not only fail to change the underlying reality but may even embolden aggressive conduct and undermine deterrence—thus increasing the risk of war.

During the last quarter-century, whether for good or for bad, the law has taken on a dramatically increased importance in the national security process. Policymakers, political scientists, historians, and citizens who seek to be informed voters all have a need to understand these changes. Members of the legal profession, in particular, have a special responsibility to understand these developments—not only because the past decade has seen an explosion in the demand for lawyers trained in this field, but also because of the traditional role played by our profession in shaping informed public opinion about important public policy issues. We have produced this second edition with the hope that it will facilitate an interdisciplinary understanding of what we believe to be one of the most important public policy developments now facing the nation; and if it contributes in even a small way to that end our efforts—and those of the many scholars and practitioners who helped make this work possible—will have been justified.

In a work of this kind there will inevitably be errors. Every reasonable effort has been made to keep these to a minimum, but the breadth and dynamic nature of the subject—combined with the interactions of numerous contributors—virtually guarantee that there will be mistakes. The editors accept full responsibility for any errors, and invite readers to bring them to our attention so that future editions may be corrected.

Many of the substantive topics addressed in the volume are highly controversial and subject to legitimate differences in points of view. We believe that one of the book’s strengths is the diversity of viewpoints represented by the distinguished authors who have contributed individual chapters. Each contributor is of course responsible for any value judgments reflected in his or her chapter, and readers are reminded to keep in mind that many of the subjects addressed in the pages which follow involve newly developing fields of law which are not without controversy. As the brief biographical sketches of our contributors reveal, several of our chapters have been written by individuals currently employed by the federal government. It should be emphasized that the views expressed herein and responsibility for the accuracy of facts stated are those of the

contributors and should not be attributed to any department or agency of the government or any other entity with which they currently or in the past have been affiliated. Many of the chapters include lists of additional readings that will provide other insights on the subjects.

John Norton Moore & Robert F. Turner
Charlottesville, VA, November 2004

Acknowledgments

It is particularly fitting that the academic field of “national security law” began at the University of Virginia School of Law more than three decades ago, when one of the editors (Professor John Norton Moore) offered the first American law school course in the field. The University of Virginia, after all, was founded by one of history’s greatest champions of the rule of law, Thomas Jefferson, whose personal interest in the interplay between law and national security issues while serving as U.S. Minister to France, America’s first Secretary of State, and two terms as our third president, is well known.¹ The university Jefferson founded has a proud history of extraordinary scholarship and teaching in related fields and is associated with such luminaries as Permanent Court of International Justice Judge John Bassett Moore, American Political Science Association and American Society of International Law President Quincy Wright, and International Court of Justice Judge Hardy C. Dillard—who served for many years as our Law School’s Dean. It is not by coincidence that the U.S. Army Judge Advocate General’s School has since its inception been located here at the University of Virginia.

Known initially as “International Law II: Law and National Security,” then as “Law and National Security,” and finally as “National Security Law,” the original course was supplemented over the years by more specialized seminars focusing on the separation of national security powers, foreign policy goals, intelligence, arms control, foreign trade, and other areas. To promote the teaching of national security law across the nation, in 1981 the editors co-founded the Center for Law and National Security (later renamed Center for National Security Law [CNSL]) at the University of Virginia School of Law and began work on the first edition of this casebook. In the past two decades the number of American law schools offering at least one course or seminar in this area has grown from four to more than 100—encompassing more than half of the nations accredited schools of law.

Over the decades, we have benefited greatly from the scholarship and experience of some of the top experts in the world on various issues related to national security law. They have traveled to Charlottesville to guest lecture in our classes or to take part in CNSL conferences, we have encountered them in our work with the American Bar Association Standing Committee on Law and National Security (to which one of us gave its current name and each of us chaired for at least three terms during the 1980s and 1990s), they have lectured in our annual National Security Law Institutes, or we have met them in other venues. Some have first come to us as students and then gone on to achieve distinction in their chosen fields.

1. See, e.g., Jefferson’s *Opinion on the Treaties with France*, April 28, 1793, in 25 PAPERS OF THOMAS JEFFERSON 608 (John Catanzariti, ed. 1992) (“Compacts...between nation and nation are obligatory on them by the same moral law which obliges individuals to observe their compacts.... Of these, it is true, that nations are to be judges for themselves, since no one nation has a right to sit in judgment over another. But the tribunal of our consciences remains, and that also of the opinion of the world. These will revise the sentence we pass in our own case, and as we respect these, we must see that in judging ourselves we have honestly done the part of impartial and rigorous judges.”)

With great sadness we note that, since the first edition of this work was published, some of the preeminent scholars and practitioners in this new field have passed from the scene. Myres S. McDougal, Sterling Professor of International Law at Yale Law School and perhaps the most able international lawyer in the world during the second half of the twentieth century, died in 1998. Thus far in this century we have lost former Yale Law School Dean Eugene V. Rostow, former State Department Legal Adviser Monroe Leigh, and other cherished scholars, practitioners, and dear friends. Each of them deserves to be recognized for their great contributions to the field of national security law, and we are both influenced greatly by their scholarship, friendship, and wise counsel.

Rather than attempting to cover every aspect of the topic ourselves, we decided in 1981 to solicit contributions from those individuals we thought to be the leading experts in the nation—in some cases, in the world—on the specific issue being addressed by each chapter. We were pleased with the result, and when we decided to do a major revision of the casebook four years ago we again sought out the leading experts in each field. This necessitated some unavoidable delays, as several of our contributors are actively involved in government service; and as a result of the terrorist attacks of September 11, 2001, even those of us in the academic sector have found the demands on our time to have increased almost exponentially. We are, of course, deeply indebted to each of men and women who have contributed to this edition.

Transforming chapters into a finished product required many hundreds of hours of painstaking copy editing, cite checking, and other administrative efforts for which we are tremendously grateful to Linda A. Skove. Linda worked with contributors to meet tight deadlines, doing the necessary copy editing and coordinating the efforts of student assistants in checking citations, locating documents, and all of the other countless details that are necessary to produce a first-quality casebook. We are also greatly indebted to her predecessor as project manager of the casebook, our former in-house editor Joanna C. Murdick. Both Joanna and Linda blended a remarkable professional competence with a personal charm that made working with them a delight for all involved. Without their exemplary efforts, the second edition would not have reached fruition as quickly as it did. We are also indebted to our newest employee and current staff editor Elyse H. Hunter.

We are grateful as well to Center Administrator Donna D. Ganoe, whose valuable talents have contributed measurably to the success of both editions of the casebook and countless other Center programs as well for more than two decades, and to the excellent support provided as well by Kay W. Wood and Kathy H. Wood of the Center's staff.

Much of the tedious business of checking citations and tracking down legal documents for the casebook has been performed by a group of very able student assistants who have worked for the Center in recent years. Particularly noteworthy have been the contributions of: Karl Trunk, Matthew Quatrara, Meagan Conklin, Clinton McHugh, Jessica Myers, and Kris Cheney. We are much in their debt and wish them continued success as they move from law school into the professional world.

The publication of the first edition of National Security Law marked our first association with Carolina Academic Press. The experience was so positive that since then we have turned to them for virtually all of our publishing needs, and with each new volume our respect and appreciation for their professionalism has risen even more. We would thus be remiss if we did not acknowledge our grateful appreciation to Dr. Keith Sipe, the President of Carolina Academic Press. Keith has been strongly supportive of our work in this field, and working with him, Linda Lacy, Bob Conrow, Tim Colton,

and their colleagues at CAP has made the preparation and publication of this edition all the more enjoyable.

Both this project and virtually everything else our Center has done over the past twenty-four years has been made possible by the generous support of a number of philanthropic foundations and donors, to whom we owe a debt of gratitude that words cannot easily express. Without such support, this work would not be possible.

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