

INTRODUCTION

IN 1962, WHAT IS NOW THE ABA STANDING COMMITTEE ON LAW AND NATIONAL SECURITY (Committee) was first established as the Committee on Education about Communism. Its founders had a vision to identify ways to assess and analyze key national security law issues in a nonpartisan manner. While this initially involved specific issues surrounding the Cold War, the field and emerging law has since grown to include topics such as intelligence, technology, terrorism, and privacy as well. The forefathers of the Committee could never have anticipated the growth of the field and yet, their goals and vision facilitated this organically.

A review of these past fifty years is inviting not only for the development of the legal arena, but also the growth of the Committee, its contributions to the field and its people. This book attempts to capture both sides of this paradigm, the legal transformation and also the individuals behind it.

The first section is dedicated to perspectives from the current and some of the past Chairs of the Committee. Their work, including programs they led, testimony given to Congress, articles written, and discussions held directly impacted legal doctrine and the practice of National Security Law.

The second section reviews the development of National Security Law during the past fifty years highlighting eight topical areas and perspectives. The section is divided into two parts. The first contains three broadly focused articles: A Brief History of the Field of National Security Law; U.S. National Security Law and International Law: Links and Implications; and The Law of Armed Conflict cross cut the themes of those that follow. The second part presents five articles: The Development of Intelligence Law; National Security and Civil Liberties; Military Justice; Due Process and Terrorism; and The Impact of Technology on National Security Law provide a more in-depth analysis of these specific topics.

Topics were chosen to highlight the breadth and depth of the field over the last fifty years. Each author was asked to review the field to assess the most pertinent developments and related writing during the past half-century. They have

done a masterful job of selecting the items that have been touchstones for development of these areas. The resulting section is filled with articles describing the evolution of the law with a series of key reference documents cited at the end.

As one reads the documents in this section, some themes emerge. First, the professionalization of the field is a key theme. Over the last fifty years, the field of “national security law” has emerged as at least one course in law schools, with many schools offering courses in various specializations within the field. Although the authoritative definition of the field still remains to be written, the fact it is a field, like contracts or federal jurisdiction, is a true accomplishment and development to be celebrated. The Committee’s role in reaching out to the academia and engaging some of the brightest practitioner minds to shape and help structure the dialogue on the field is a lasting institutional legacy.

Next, the evolution of the concept of national security law appears throughout the essays. Early in the history of the Committee, many in the ABA viewed the Committee as “intelligence community” dominated. In one sense this was true; the early membership of the Committee was often drawn from the intelligence community and focused on intelligence matters. This was not so surprising, given that Lewis Powell had been an intelligence officer in World War II, the Cold War featured many aspects of intelligence and there was a sense by the Committee Founders that this approach was what the ABA needed for balance. But over time the tie between national security and intelligence began to expand as events undermined how the national state understood the concept of security. Statutes defined separate arenas of intelligence, military and criminal matters—Title 50, Title 10, Title 18—or domestic versus international spheres. The end of the Cold War and 9/11 shattered this paradigm and, as the chapters reflect, we have been in the process of how to respond to these “shattered boundaries.”

Third, the theme of how to implement due process in this new era is reflected in part under international law in the guise of the Law of Armed Conflict, military law, and the Geneva Conventions. International issues have had domestic implications that U.S. legal institutions are currently incorporating and integrating. This integration is being conducted under an emerging framework of appropriate due process and the protection of civil liberties. The chapters in this anthology reflect the debate—for instance that over the questions of detention and prosecution. These are hotly contested areas and the verdict is still out on whether the institutions being crafted will succeed; the goal to provide a recognized rule of law, which has been the driver on these reforms. It is clear that there is disagreement on whether success will ever be achieved, but the essays and readings are included to encourage more reasoned debate.

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In addition, the theme of how to balance legitimate secrecy with transparency and openness remains a challenge the Committee has visited numerous times and is reflected in the essays. There is no easy answer to this riddle but where we have been and where we are heading is an important contribution of this volume.

Finally, the theme of technology is addressed in a separate chapter but cuts across a number of areas of national security. Several authors mention cybersecurity—the information revolution will continue to have critical implications for our field for decades. Recently our Committee has been asked to head up a national task force on cyber by the incoming ABA president. This confidence in the Committee is the latest confirmation of the vision of our Founders. As we begin the next fifty years, the Committee remains at the center of national security and the law.

Readers will note that many different names are used to describe the American Bar Association Standing Committee on Law and National Security. Often it is referred to as the ABA Standing Committee, the Standing Committee, the Committee or the SCOLANS. All of these references should be viewed as the same.

Also, for the first time, the Committee is presenting this project both in print and as an ebook. Those who have the print version will have access to the electronic version with direct links to most of the reference materials therein. Those who have the ebook should have direct access to the reference materials immediately. As more articles are written that merit such attention we will be able to update the selection.¹

It is our hope that this anthology will become one frequented regularly by those studying and practicing in the field and that it brings insight into how debates from the past may influence our future. While it concludes with a section about technology, one can imagine that the next fifty years will push that debate even further to the fore. In the meantime, the legal developments and changes discussed throughout this edition continue to impact our work and our lives.

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¹ While the ABA Standing Committee has attempted to link each reference to an open source document, there are some that were either not available or were available only through paid sources. We have noted those available through paid sources with an *** throughout the anthology.