

Educating National Security Lawyers for the Twenty-first Century: The Intersection of National Security Law and International Affairs

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The field of national security law has grown enormously over the last decade. U.S. activities devoted to countering terrorism, particularly after 9/11, the wars in Iraq and Afghanistan, the continuing shadow wars against al Qaeda and its affiliates, the Arab Spring and its repercussions, and sharply increased attention to cyber war and cybersecurity have contributed to a complex legal, strategic, and policy maze that challenges our abilities to advise our clients and teach our students. Our generation must try to bring coherence and structure to this emerging discipline. Throughout its fifty-year history, the American Bar Association (ABA) Standing Committee on Law and National Security (SCOLANS) has strived to address the most important national security law issues and advance understanding among members of the bar and the public. In recent years, SCOLANS has recognized the importance of educating the next generation of lawyers to advise clients concerning national security law, including tensions between security and liberty, and anticipate problems on the horizon. The *Journal of National Security Law & Policy* (founded with support from SCOLANS) aims to advance the conversation on national security law and policy education and is launching a series that will focus on national security teaching and curricula. This article and the one by Laura K. Donohue in this collection open this discussion.¹

In September 2012, SCOLANS and the Institute for National Security and Counterterrorism (INSCT) of the College of Law and Maxwell School of Citizenship & Public Affairs at Syracuse University co-hosted the third annual National Security Law Teaching Conference, *Educating the Next Generation of Decision Makers: The Intersection of National Security Law and International Affairs*.² The conference engaged national security law and international affairs experts from academia, government, and private practice in thoughtful discussions about translating legal advice into policy in civilian and military settings. It identified interdisciplinary lessons and methods to improve education for

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1. Laura K. Donohue, *National Security Law Pedagogy and The Role of Simulations*, 6 J. NAT'L SECURITY L. & POL'Y (2013).

2. For conference information and materials, see <http://teaching-national-security-law.insct.org> and http://insct.syr.edu/insct_events/teaching-law-national-security/.

students of national security law and policy.

The organizers' founding premise was that in modern foreign affairs and national and international security governance, policy and subject area experts and lawyers attend the same meetings, hash out common policy positions, and worry about how to implement their prescriptions. This approach has become the hallmark of the "whole of government" policy process. Yet international affairs experts and national security lawyers are educated in parallel, not together. They speak different professional languages, and their analytic reference points and methods are normally divergent, if not at times conflicting. In short, a good deal of energy and time in governance is spent finding common ground between lawyers and policy experts. The conference explored ways to enrich education in related and complementary disciplines by exposing both sides to new methods and ways of approaching problems.

Panel discussions were led by distinguished experts from academia, private practice, and government, and included several who had served in multiple capacities. *Translating Legal Advice into Policy – How It Actually Happens* was led by Elizabeth Rindskopf-Parker, Mary DeRosa, Joel Brenner, and Richard Falkenrath.³ Panelists emphasized how lawyers applying national security law must be able to present a wide array of ideas and lead policy makers to make educated decisions within legal constraints. Lawyers advising government policy makers must offer a variety of options and outline a plausible way for policy makers to accomplish their stated policy goals.

In discussion, panelists agreed that while policy makers can feel constrained by their legal counsel's advice, a good attorney tries to understand not only what the client is asking, but also what the client ultimately wants to achieve. The national security lawyer needs to be constructive, providing policy makers with options for what they can do, not just what is prohibited. Unequivocal "yes" or "no" answers are rare in national security law. Lawyers must also clarify the difference between their legal and policy advice, and ensure that their client participates in the process.

Panelists opined that executive and legislative branch lawyers have different priorities and often do not work well together or trust each other since each approaches tasks with deep institutional equities. Furthermore, their interactions may raise separation of powers issues and create tactical problems, particularly during times of war, when each branch asserts its respective Article I or II powers.

3. Elizabeth Rindskopf Parker, Professor and former Dean, Pacific McGeorge School of Law, General Counsel, CIA (1990–1995) and NSA (1984–1989), Principal Deputy Legal Adviser, U.S. Department of State (1989–1990); Mary B. DeRosa, Professor, and former Deputy Assistant and Deputy Counsel to the President, National Security Council Legal Adviser, Chief Counsel for National Security, Senate Judiciary Committee; Joel Brenner, practicing lawyer and former Inspector General at NSA and Counterintelligence Executive at ODNI; and Richard Falkenrath, Chertoff Group Principal and former Deputy Commissioner for Counterterrorism for New York City.

Panelists pointed out that legal scholars can contribute to the development of national security law by presenting government attorneys with research concerning emerging issues that government attorneys may not have the time to explore. Law schools' core function should be to graduate students who have multi-disciplinary analytical and pragmatic skills.

The second panel, *Teaching our Law and International Affairs Students: Learning from Each Other*, was chaired by law professors, Steve Vladeck and Laura Donohue, and international affairs professors, Cindy Williams and Michael Glennon.⁴ They discussed national security pedagogy and the importance of simulations or "gaming," arguing that law schools do not adequately prepare students for situations they will face after graduation. For instance, law students should learn how to interject law into policy discussions, be the "+1" in the room. Students should learn to accommodate uncertainties that pervade national security law and communicate advice effectively and succinctly. The panel also decried students' inadequate knowledge of history and agreed that national security courses should teach the historical context of modern national security problems. Teaching the historical foundation will give our students an important perspective during crisis situations.

The third panel, led by David E. Graham, Charles J. Dunlap, Jr., Geoffrey S. Corn, and Harvey Rishikof, examined the intersection of national security legal advice and policy from the perspective of the military and service branch educators.⁵ The panel explored changes in how the military seeks legal advice and criticism that lawyers play too large a role in military decisionmaking and even establish policy. Specifically, panelists considered whether the role of military lawyers should be to advise only on the law or whether they should also address the policy ramifications of their legal advice. Panelists agreed that in most situations it is important to know who the final decision maker is and what the process is, and to know whether you, the lawyer, have a seat at the table when the final decision is being made. Dunlap introduced the notion of the "strategic corporal" to illustrate that decisions are not always made at the top and pushed down, but that a decision made at a checkpoint by a corporal, informed by good legal advice, for example, can have strategic national security consequences.

The panel also discussed the importance of moral courage in national security law and being able to say "no" to your client. Panelists stressed the need to know *who* your client is and build a relationship with the client. Clients will

4. Stephen I. Vladeck, Professor and Associate Dean for Scholarship, American University Washington College of Law; Laura K. Donohue, Associate Professor, Georgetown Law; Cindy Williams, Principal Research Scientist, Security Studies, Massachusetts Institute of Technology; and Michael J. Glennon, Professor of International Law, Fletcher School of Law and Diplomacy, Tufts University.

5. David E. Graham, Executive Director of the Army JAG Legal Center and School, former Director of the Center for Law and Military Operations; Charles J. Dunlap, Jr., Executive Director of the Center on Law, Ethics and National Security, Duke Law School, and former Deputy TJAG, U.S. Air Force; Geoffrey S. Corn, Professor, South Texas College of Law, and former Army JAG; and Harvey Rishikof.

look to lawyers for judgment on issues beyond the law, and this additional advice can regard life and death situations. A panelist remarked that one of the greatest qualities of a good lawyer is to understand what you do not know. A military lawyer must know how to inform a captain without telling him how to steer his ship. Increasingly, military JAG officers are being asked to work with civilian counterparts from the Department of Justice or the Department of State on missions of whole of government in the field. A sound grounding in international law and theory will prove invaluable to the next generation of JAGs.

The final panel, *Problem Solving in the Real World of National Security: Interdisciplinary Approaches and Lessons*, was chaired by Kathleen Clark, Cynthia R. Ryan, Laurie R. Blank, and W. George Jameson.⁶ Clark framed the discussion by noting that problem solving in national security law is necessarily interdisciplinary because the essential facts pertinent to a problem may spring from any source, and non-lawyers are as likely as lawyers to be central to coming to thoughtful policy and law recommendations. Jameson described national security law problems as presenting “dawn and dusk alternatives,” not night and day options. Decisions are often based on shades of gray and require judgment grounded in pragmatic considerations.

Cynthia Ryan emphasized that the agency lawyer must know her client’s business, which in Ryan’s case is imagery analysis. The National Geospatial-Intelligence Agency is a technologically sophisticated agency that moves fast, and lawyers have to keep up. She instructs agency attorneys to read and understand the agency’s mission strategy because the strategy reflects the priorities of the client. At an intelligence briefing, she learned about an agency plan to use aggregate data from Twitter to identify potential hotspots around the globe. Without prompting from the Director, the Office of General Counsel (OGC) identified the use of Twitter as an emerging legal issue that its lawyers wanted to address proactively. The office created a guide designed for non-lawyers about using social media information. The guide was disseminated from the director through the agency to operations, and OGC followed up with training for NGA staff.

Laurie Blank directs an international humanitarian law clinic that pairs students with clients, including NGOs, the International Committee of the Red Cross, and international tribunals. She noted that law students are taught research and writing, but receive less instruction on how to give advice. Students must learn about their clients and their clients’ interests using whatever sources they can find, and then communicate with the client by phone and

6. Kathleen Clark, Professor, Washington University School of Law, and former Chair, National Security Law Section, Association of American Law Schools; Cynthia R. Ryan, General Counsel, National Geospatial-Intelligence Agency; Laurie R. Blank, Professor and Director of International Humanitarian Law Clinic, Emory University School of Law; and W. George Jameson, Principal, Jameson Consulting, and formerly, Director, Office of Policy and Corporate Coordination (2006–2009) and attorney, Office of General Counsel, CIA.

email, rather than traditional legal memorandum. They learn to present information to their clients in a way that generates more client requests so the student can better address the client's core problem.

In their respective plenary speeches, Harold Hongju Koh,⁷ State Department Legal Adviser, and James B. Steinberg,⁸ Dean, Maxwell School, Syracuse University, illuminated the conference's core themes. Koh reviewed several Obama administration national security actions to illustrate the dynamic relationship between national security law and policy and the unyielding need to shape baseline legal principles to new and unanticipated circumstances. Koh reminded his audience that the law matters, even in the face of asymmetric attacks by those who use our fidelity to law as a weapon. Yet the law is inevitably playing from behind in our high-stakes and always changing national security environment. Koh reviewed the Cuban Missile Crisis to illustrate how lawyers were able to expand the choice of options through shrewd international law interpretations. In his remarks, Steinberg highlighted the importance of good lawyers in a national security policy environment. Lawyers as skillful as Harold Koh say what the law is, map out options that fall within available authorities, and stitch the policy imperatives together with legal guidance in a coherent package. Steinberg, an attorney, noted the advantage of legal training to enhance the role of national security lawyers in the policy process.

In sum, the conference underscored the need for cross-training lawyers and international policy specialists in each other's disciplines. Emerging national security issues do not fit into departmental silos. Senior national security leaders are often lawyers who have later taken on policy positions. Conversely, international relations experts selected for senior policy positions increasingly find themselves locked into windowless rooms with senior attorneys. A curriculum that teaches law and policy skills and challenges students with the interdisciplinary conundrums often faced by policy makers will better prepare our next generation of leaders. The conference initiated dialogue about how to create such a curriculum, and we hope that other institutions, following the lead of Syracuse's INSCT and the ABA's SCOLANS, will continue this discussion.

7. Harold Hongju Koh, Legal Adviser, State Department (2009-2013), and Professor and former Dean, Yale Law School.

8. James B. Steinberg, Dean, Maxwell School, Syracuse University, and formerly Deputy Secretary of State, Deputy National Security Adviser to President William J. Clinton, and Dean, Lyndon B. Johnson School of Public Affairs.