

Why a Journal of National Security Law & Policy?

*Elizabeth Rindskopf Parker**

New periodicals and law journals, if not commonplace, are still far from unknown. The arrival of this inaugural issue of the *Journal of National Security Law & Policy* is particularly noteworthy, however, because of the circumstances that have produced it and the need it seeks to address: bringing national security practitioners, lawyers, and scholars into conversation about the evolving relationship between law and national security. It is worth reflecting on the circumstances that make the arrival of this new journal so timely and important.

There is no more dangerous time than when great empires fall. Historians have long commented on the disorder and resulting insecurity such events produce. In retrospect, it has become clear that the fall of the Berlin Wall in 1989, marking the end of the Cold War, initiated such a period. Yet it took the 9/11 attacks more than a decade later to begin the process of awakening a fuller understanding of the implications of this event for our new century.

With the benefit of hindsight, we can now discern a chain of events leading to 9/11, beginning with the Soviet invasion of Afghanistan and the fierce resistance to it conducted by the mujahedin with support from the United States and Pakistan. Together, these events precipitated the fall of a declining Soviet Union, which in turn removed a source of control and order in large parts of the world. Initially, the demise of the Soviet empire and the resulting freedoms for large populations in both the U.S.S.R. and its client states were cause for celebration among Western nations. Naïvely, we assumed that we were witnessing the dawn of a “new world order” based on democratic principles of government as practiced in the United States and western Europe. Gradually, however, it became clear that the post-Soviet world was poorly prepared for government under the rule of law. Without alternative legal systems for maintaining order, the Soviet empire’s sudden collapse of authority produced a dangerous chaos for the whole world, unleashing both good and bad forces onto the world stage. Among the latter were long-disaffected populations and poorly guarded storehouses containing the ingredients for weapons of mass destruction – nuclear, chemical, and biological. Finally, the borderless world created by modern technologies and facilitated by the fall of the “Iron Curtain” allowed these forces to move easily to any nation in the world. Thus, a new threat to the fundamental security of all nations was born, one of unthinkably destructive potential, posed by individuals and groups against whom traditional military and diplomatic national security systems were of little use.

* Dean, University of the Pacific, McGeorge School of Law.

The challenge that these developments pose to the traditional model of international law based on the Westphalian system of state-ordered security and the sanctity of state sovereignty is obvious. That system is poorly designed for controlling the new threat. Yet the fact that international law and individual states are not prepared to deal with such an existential force does not mean that they are irrelevant. The challenge now is to create new approaches to security based on an evolving view of international law. What is needed is a new system that not only operates effectively across national borders and involves all states, but that also uses domestic law to involve sub-state actors, including non-governmental organizations, private corporations, and citizen groups.

Here in the United States traditional notions of “national security” have also been dramatically challenged as a result of the 9/11 attacks. We have been awakened to the fact that our security is no longer threatened solely by events outside our national borders. A paradigm shift is occurring in the way we understand the role of our government in ensuring national security, both outside our borders and within. National security has become a primary domestic concern and no longer a matter for the federal government alone. Domestic actors, both governmental and private, have been drawn into national security roles. With them have come the legal structures that define and regulate our system of government.

In the rush to repair our perceived loss of national security at home, we have sometimes acted to protect our physical safety while regarding the law and our constitutional system only as afterthoughts. We have addressed legal issues after the fact, when problems arose, rather than carefully considering them from the beginning. At other times we have proceeded on the assumption that we must choose between national security and individual rights and liberties. In reality, nothing could be farther from the truth. Yet it is unarguably true that a troubling tension has developed since 9/11 between security measures and our liberties.

The explanation for this tension lies in two facts, both central to the creation of the *Journal of National Security Law & Policy*. First, our domestic legal community – bench, bar, and academia – and the legal system they interpret and protect have been poorly prepared for the perilous times in which we live. Within this community there has been only limited appreciation of the practical demands of national security, as well as a lack of understanding of the legal structures that historically have guided our nation’s security activities. In short, the domestic legal community has seen national security policy and law as beyond its purview. It has failed to recognize its ability to contribute to orderly solutions in a newly-disordered world. Second, members of our community of national security experts have seldom been students of our constitutional and legal structures and systems. They sometimes possessed only a layperson’s appreciation of the often subtle and always complicated features of the law. Thus, they have not been well prepared to identify and implement national security solutions that give appropriate weight either to international law or to constitutional and domestic legal

considerations.

If we are to preserve the constitutional system we hold dear from both external threats and internal erosion, law and national security must go hand in hand. Our legal community must have a fundamental role in designing new national security doctrine and structures that will operate at home and abroad within constitutional limitations, and that will yet be pragmatic and effective. To do this, it must act in partnership with those who are experts in the practical aspects of national security. The two groups must work in concert to identify creative ways to address national security threats without ignoring our rights and liberties.

None of this will be easy, nor will it happen quickly. This much is obvious from the national debate about responses to the 9/11 attacks. From personal experience of more than two decades, I am familiar with the need for discussion and debate, first to understand the national security problems our nation confronts, and then to identify solutions to these issues that are true to the spirit of the legal system we cherish.

The mission of the new *Journal of National Security Law & Policy* is to facilitate this interaction. The *Journal* seeks to provide a forum for the exchange of views between academics and practitioners as they search for the best ways to achieve the two values fundamental to our system of government and to the world's future, law and security.

While the role of the *Journal* as a forum for discussion may be unique in the current universe of law journals, inspiration for it and the need it seeks to fill have important antecedents that should be acknowledged. For many years the American Bar Association's Standing Committee on Law and National Security has worked diligently to bring attention to current issues of national security and law. Many individuals have contributed to the Committee's efforts, and it is a particular honor both to receive the Committee's financial support for this first issue and to be its intellectual descendent. So, too, the now-defunct *Journal of National Security Law* provided early leadership for the direction the new *Journal of National Security Law & Policy* seeks to take. To both, to co-editors John Cary Sims and Stephen Dycus, and to all those who have assisted in the new *Journal's* birth – or who will contribute to its work in the future – thank you. And to our readers, welcome to an enterprise that seeks to engage issues that are among the most important and timely our nation has ever confronted.

* * *