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John D. Becker

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NATIONAL SECURITY LAW IN THE POST-9-11 WORLD:

A SURVEY OF RECENT LEGAL MATERIALS

REVIEWED BY JOHN D. BECKER*

PHILIP BOBBITT, *THE SHIELD OF ACHILLES: WAR, PEACE AND THE COURSE OF HISTORY*, Alfred A. Knopf, New York (2002).

STEPHEN DYCUS, ARTHUR L. BERNEY, WILLIAM C. BANKS, AND PETER RAVEN-HANSEN, *NATIONAL SECURITY LAW*, (3rd ed. 2002), Aspen Law & Business, New York, (2002).

THOMAS M. FRANCK AND MICHAEL J. GLENNON, *FOREIGN RELATIONS AND NATIONAL SECURITY LAW: CASES MATERIALS, AND SIMULATIONS*, (2nd ed. 2002), New York (2002).

It has become something of a cliché to say that the events of September 11, 2001 changed the world, at least in terms of how Americans view the world. One of the more notable areas of change has been in law, particularly in national security law. Changes occur almost weekly in this area of the law as U.S. courts consider issues ranging from the status of tort claims by survivors and relatives of victims of the World Trade Center and Pentagon bombings to claims about the legal status of Afghan war detainees in Guantanamo Bay, Cuba to the striking down of legal barriers between domestics and foreign intelligence collection means in the recording of terrorist communications.

Even changes in the law, however, do not occur in a vacuum. They occur in a specific context. And in this case, the context is broader than the events of 9-11. The broad context is inclusive of elements such as international relations, strategy, and law.

One good survey of this broader context is found in the new, well-received work by Philip Bobbitt, entitled *The Shield of Achilles: War, Peace, and the Course of History*. Bobbitt's work in broad strokes is about the modern state—

* John D. Becker is a third-year law student at the University of Denver, where he is also pursuing a Ph.D. from the Graduate School of International Studies. A retired Army officer, he has served on the faculties of the U.S. Military Academy and the U.S. Air Force Academy. Mr. Becker also serves as an adjunct faculty member for the University of Phoenix Online and for the MBA program at Regis University.

how it came into being, how it was developed, and in what directions can it be expected to change. Bobbitt's position includes looking at recent changes in the state through the lenses of both military strategy and constitutional law. His conclusion is that the relationship between strategy and the legal order has shaped and transformed the modern state and the society composed of states, resulting in the emergence of a new state— the market state.

Bobbitt's text is broken into two books – Book One titled “State of War” which focuses on history and the future of war and Book Two is called “States of Peace,” which discusses history and the future of international society. In turn, each book is broken into three parts; each part with a general thesis is set forth as an overture to the narrative argument that is then provided. The argument can be set forth as follows:

Book I— Part I: “The Long War of the Nation-State,” argues that the (global) war that began in 1914 (with the beginning of World War I) did not end until 1990 (with the demise of the Cold War).¹ Rather than a traditional war, it was an epochal war not unlike the Greek Peloponnesian War.² Epochal wars put the constitutional basis of the participants into play and do not truly end until the underlying constitutional questions are resolved. Thus, the Long War was fought to determine which alternative—communism, fascism, or parliamentarianism— would replace the imperial constitutional orders of the nineteenth century.

Book I—Part II: “A Brief History of the Modern State and the Constitutional Order, “asserts that epochal wars have brought about profound changes in the constitutional order of states through a process of innovation and mimicry.³ In order to survive, some states are innovative in their constitutional reforms while other states copy those innovations when they prove decisive in resolving the epochal conflict of an era.

Book I—Part III: “The Historic Consequences of the Long War” argues that the Long War of the twentieth century was another such epochal war and that it has brought about the emergence of another form of the state, the market-state. Focusing on one of the first market-states, the United States, Bobbitt looks at possible changes—both constitutionally and strategically – as the new constitutional order comes to maturity.⁴

Book II—Part I: “The Society of Nations,” deals with the states in which we currently live. It traces the origins of this society to the abortive peace following World War I and the American attempt to superimpose the U.S. Constitution model on the society of states.⁵ The argument continues by bringing the plan forward to the collapse of Bosnia in the 1990's and concludes that the society of

1. See PHILLIP BOBBITT, *THE SHIELD OF ACHILLES: WAR, PEACE, AND THE COURSE OF HISTORY* xxviii Alfred A. Knopf 2002.

2. *Id.* at 19. Epochal wars can be marked by several conflicts that might be considered separate wars and periods of apparent peace and often do not maintain the same lineup of enemies and allies throughout the epoch.

3. *See id.* at 67.

4. *See id.* at 211.

5. *Id.* at 365.

nation-states is rapidly collapsing.⁶ The difference between Bobbitt's claims and other similar claims⁷ lies in his conclusion that the dying and regeneration of constitutional orders are a periodic part of the history of the modern state.

Book II—Part II: "A Brief History of the Society of States and the International Order," examines the historic conflicts that have shaped the modern state (and also looked at in Book I, Part II). The focus, however, is on the peace agreements following those conflicts. The claim is made that the society of modern states has had a series of constitutional reforms which are the result of the peace congresses that ended epochal wars, from the Treaty of Augsburg (1555) to the Peace of Paris (1990).⁸

Book II – Part III: "The Society of Market-States" discusses the future of the society of states by hypothesizing various possible worlds. The various possibilities are adapted by methods pioneered by Royal Dutch Shell Corporation.⁹

Book II closes with the conclusion that by varying the degrees of sovereignty retained by the people, different societies develop different forms of the market state. These include the mercantile state, the entrepreneurial state, and the managerial state. Bobbitt sees the challenge of the future to lie in developing rules for cooperation between these different forms of market states, less conflict develop which could threaten the survival of some states.¹⁰

Bobbitt's text is insightful in a number of ways. First, he recognizes that the process of shaping states is a function of the fusing of the inner and outer dominions of authority: law and strategy. In this way, he is following the Roman-Machiavellian tradition.¹¹ He also acknowledges the sometimes forgotten point that war is a product as well as a shaper of culture.¹²

Second, he identifies modern developments that can call into doubt the basis for the existing international orders of states. These developments include the universal recognition of human rights as a norm that requires legal adherence, regardless of internal laws or customs; the widespread deployment of weapons of mass destruction; the proliferation of global and transnational threats, such as environmental pollution, migration, population growth, disease and famine; the growth of a world economic regime that can ignore borders in the movement of capital investment, effectively curtailing state management of their economic affairs; and the creation of a global communication network that penetrates borders

6. See Bobbitt's charts of international orders at 346, which include the princely state, the kingly state, territorial state, state-nation, and the nation-state.

7. For example, Francis Fukuyama in *The End of Man and the Last Man* and Paul Kennedy's *The Rise and Fall of Great Powers*.

8. See BOBBITT at 479.

9. See *id.* at 718-19.

10. See *id.* at xxx.

11. Arms and laws were the strengths of ancient Romans, both in the Republic and the Empire, later recognized in the writings of Niccolo Machiavelli. Few texts draw across disciplines for this type of analysis, which is why Bobbitt's is unique.

12. See BOBBITT at xxxi. War has often been recognized as having cultural aspects, most often in the role it has in shaping cultures, including by Michael Howard and John Keegan.

electronically and threatens languages, customs, and cultures.

Finally, he acknowledges that futures are functions of choices that are made by peoples and their leaders, not simply the result of the forces of history, technology, or time. These possible worlds are even now being shaped by the choices we are now making and will make in the future.

If *The Shield of Achilles* suffers any shortcomings it may be the lack of cross-cultural comparisons and models. At the end, Bobbitt argues the text is not-Eurocentric for it is only in Europe (and the West) that we see the state as a political idea and the nation-state as an idea in particular. And yet, in his own analysis of the types of market-states, he draws upon cultural aspects, including for defining the mercantile state.¹³ Clearly, cultural factors play a key role in the development of the changes in states and systems that Bobbitt discusses at length. And if conflict is as much a matter of cultural clashes as inner and outer authority, then it should be acknowledged accordingly.¹⁴

With this broader framework as background, the two law texts can better be put into perspective. *National Security Law (3rd Edition)*, by Stephen Dycus, Arthur Berney, William Banks, and Peter Raven-Hansen, starts by noting that the horrific attacks on the World Trade Center and the Pentagon on September 11, 2001, did not “change everything” in this area of the law.¹⁵ Issues like electronic surveillance of suspected terrorists, the role of the military after an attack, the use of secret evidence in trials, extraterritorial jurisdiction and the arrest of terrorist suspects, and the legality of assassination as a counterterrorist tool had been considered previously.

Instead, what the aftermath of September 11th did change is the way we look at national security law; the white lights of the plane crash explosions highlighted overlooked aspects of the law and also revealed connections that were once overlooked.¹⁶ And in much the same way as the federal government has been reorganized to coordinate a national homeland defense, the text has been rearranged to facilitate the teaching of national security law through the lenses of counterterrorism laws. Fortunately, however, it has not been changed too much. Dycus *et al.* recognize that at the heart of national security law lays an understanding and appreciation for both the law—domestic and international—and for war—general, imperfect, and other forms of war.¹⁷

13. Japan is an illustrative example, given its literature and educated people, restrictive immigration, trade, and currency laws and policies, and the desire to put the greater communal good before all else. See *Id.* at 284-85.

14. See for example, Samuel Huntington's *Clash of Civilizations and Culture Matters* for a discussion of the role of culture in civilizations and societies. My own stronger claim is that culture shapes worldviews, patterns of thought, communication, and courses of actions.

15. Certainly an allusion to the general claims made after 9-11 about many areas of life and society. See DYCUS ET. AL at xxix.

16. In other words, the importance of different areas of national security shifted in view of new and different attacks by previously unimportant groups and tactics. *Id.*

17. Given the connections between the 9-11 attacks and the war on Afghanistan, a possible war (at least as of this writing) with Iraq, and a broader war on terrorism, an appreciation of this area of the law cannot be underestimated.

National security law is acknowledged here to be complex and difficult, given that the political and legal issues are perennially contentious and there are few settled answers. And yet, not many other topics are as current and provocative.¹⁸

Dycus *et al.* organize their text into four major parts. These include: 1) The Framework of Separate Branches with Shared National Security Powers, 2) Maintaining National Security Abroad, 3) Fighting Terrorists and International Criminals, and 4) Protecting National Security Information in a Democratic Society.

Part One presents the relevant cases of sources of authority for national security law. Starting with the U.S. Constitution and key cases, like *Youngstown Sheet and Tube Co. v. Sawyer*, *United States v. Curtis-Wright Export Corp.*, up cases like *Dellums v. Bush*, the authors wade through the issue of separations of national security powers. At the heart of this issue is the delicate balance between liberty and security.¹⁹ They also look at the specific Article One and Article Two powers for the President and the Congress, the role the judiciary has taken, and the domestic effect of international law. Overall, it establishes a legal and political framework for national security subjects later in the text.²⁰

Part Two address the important questions of U.S. military involvement abroad, in both functional and categorical terms. First, it looks at general or “high-intensity”²¹ war through the lenses of recent wars, specifically Korea, Vietnam, and the Persian Gulf War. Issues include the legality and legitimacy of wars, limits on the scope of wars, and ending wars. Additional consideration is given to both authority of the War Powers Resolution and the Charter of the United Nations. Second, imperfect wars of limited or low-intensity conflicts are considered. Cases include U.S. operations in Iran, Grenada, Panama, Somalia, and the NATO intervention in Kosovo, including hostage rescue missions, peacekeeping missions, and humanitarian interventions.²² Final consideration is given to intelligence operations, including the covert use of force in cases like Iran-Contra.

Part Three is the major revision in the text, coming as it does after September 11th. It starts with an overview of terrorism—causes and types and responses. Following is an examination of the laws concerning terrorism, including constitutional, statutory, and regulatory frameworks for domestic and international investigations, and the tough, thorny issues of profiling and preventative

18. See DYCUS ET AL. at xxx.

19. *Id.* at 1. The connection between domestic and international issues is drawn clearly by that phrase.

20. *Id.* at 4. Dycus is very much like Franck and Glennon in this regard, but the two texts differ in their respective emphasis on selected cases.

21. Of course, the intensity of war very much depends on where you sit. To a soldier or Marine being shot at, all wars are high-intensity ones.

22. Recent interventions by the United States have covered what I have called a continuum of national security in previous articles, suggesting actions from localized terrorist acts up to and including global thermal nuclear warfare. See for example, *Warfare, Strategies and Tactics*, in *The Encyclopedia of Applied Ethics, Volume 4*, Academic Press, San Diego, CA, 507.

detention.²³ Subsequent consideration is given to "consequence management," with roles and responsibilities of government agencies and issues of related civil liberties. Attention is also paid to the special problems of trying international terrorists, including territorial jurisdiction, extradition, and rendition, ranging from removal proceedings to military tribunals and international courts.²⁴ At the end of this part, some treatment is paid to special threats to civil liberties in a crisis, in cases like *Korematsu v. U.S.* and *Ex parte Milligan*.

Finally, Part Four addresses the question of access to national security materials by citizens, the media, and Congress. In turn, it looks at what government restraints can be imposed on that access by various means, including classification, statute, and court action. In a democratic society, and in one that strives to be so, this question is significant, relevant, and important.²⁵

The materials drawn up in the text are very traditional ones, including case studies, primary legal materials (such as judicial opinions, executive orders, statutes, and legislative histories), and descriptive texts. The authors also suggest the reader supplement the text with regular perusal of a national newspaper, something vital due to the constant judicial opinions coming out now in national security law.²⁶

Overall, Dycus *et al.* is helpful for establishing a solid grounding in national security law. They have introduced both simulations and exercises to help develop the reality of applying the law to particular patterns of facts in this important area. Of course, the primary purpose of any legal text is to present the law and Dycus *et al.* do that in a professional, relatively unbiased manner.

Similarly, *Foreign Relations and National Security Law (2nd Edition)*, by Thomas Franck and Michael Glennon, provides a thorough treatment of the law of foreign relations (or national security law).²⁷ In the introduction, Franck and Glennon note that this area of law stands at the intersection of constitutional, criminal, and international law. Specifically, the text looks at the interaction between the conduct of United States foreign relations and the constitutional distribution of powers, prerogatives, and rights within the nation.²⁸

That distribution is overlapping to a large degree, between the President (and the executive branch), the Congress, the states, and the people.²⁹ Constitutional entitlements – repositories of rights and duties – are another way to understand these distributions. They have been acknowledged and mitigated, in practice, by

23. DYCUS ET AL. at 561-62. This section is called "crisis management" by the authors, which may or may not be apt.

24. What is interesting is to compare the legal and political treatment of terrorists with that of war criminals – how we deal with a Milosevic as opposed to a Bin Laden.

25. This clearly appears to be a key consideration, in light of legislation like the Patriot's Act.

26. Not to mention national security issues in general.

27. Franck's and Glennon's text was written in 1993, prior to 9-11, and thus uses the older phrase, law of foreign relations inside but national security on the outside cover.

28. See FRANCK & GLENNON, at v.

29. Interestingly, they leave out the courts as a key player here, but later recognize that the courts role here includes inventing rules of adjustment or adjudication in cases.

the conduct of parties to actual disputes. In short, the actual practice has reduced the problems of unclear assignments of constitutional entitlements.

Foreign relations law has been accorded special status in the political and judicial arenas because of the recognition that all else depends upon the survival of the Republic. One connected issue then becomes whether the system of checks and balances found in domestic law would necessarily apply in the foreign relations arena, which as might be expected has been subject to a great deal of debate.³⁰

Franck's and Glennon's text is organized into eight chapters, with at least one simulation allocated per chapter. The chapter headings include: Foreign Relations and the Separation of Powers Doctrine, The Law of Nations as Incorporated Into United States Law, Treaties and Other International Agreements, The War Power, The Power Over the Purse, Federalism, Justiciability of Foreign Relations Issues, and National Security and Freedom of Expression.

In many ways, this covers much the same ground that Dycus *et al.* does and certainly the case law is the same (i.e., *Youngstown Sheet, Curtis-Wright, Korematsu*, and *Chada*).³¹ Likewise, other relevant references, like treatises, the Restatement, and clarifying notes are found in both texts. But the application of the materials to simulations does change the equation a bit in Franck and Glennon, at least it would appear to do so in the classroom environment.³²

For example, one simulation has the United States having a cultural exchange with Mexico. One of the proposed exchange groups involves a theater group with a politically charged production, which has been denied visas by virtue of Presidential order. The entertainment group representing the theater group in the United States brings suit, seeking to have the Presidential order voided. Students are to play the roles of District Court judge and counsel for both sides and consider listed materials, including the International Covenant on Civil and Political Rights.³³ Simulations appear to be the strength of the text.

One major shortcoming of the text is that no revision has been put forth in the past decade and given all the significant events which have happened in national security, including September 11th, that is troublesome.

In sum, surveying these three texts reveals that national security law is of continuing relevance and importance in today's increasingly connected world. With the advent of non-state players, like terrorist networks like Al-Qaida, and the continuing transformation of state players into market-states and other significant factors like technology, migration, and culture, the international arena is in flux. As a result, national security issues will remain on the front pages—hard copy and digital—of newspapers and national security law will remain at the forefront of our

30. See FRANCK & GLENNON, at vi. Do we bend the rules to save them or not? In national security law, the answer seems to be, it depends.

31. The biggest distinction is the editing of cases. In Dycus *et al.*, *Curtis-Wright* is given in total, with additional clarifying whereas Franck and Glennon similar case is heavily edited.

32. In my own teaching experiences, simulations can be helpful but sometimes fall flat.

33. See generally FRANCK & GLENNON, at 108

legal system. And accordingly, texts like Bobbitt's, Dycus *et al.*, and even Franck's and Thomas's will remain relevant and significant for both legal students and international lawyers.