



National Security Law Report

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National Security Law in a Changed World: The Twelfth Annual Review of the Field

Edited by Matthew Foley

On November 21-22, 2002, the Standing Committee on Law and National Security of the American Bar Association; the Center for National Security Law of the University of the Virginia School of Law; and the Center on Law, Ethics and National Security of the Duke University School of Law; cosponsored the twelfth annual conference devoted to the review of developments in the field of national security law. This conference summary is our best attempt to summarize the conference proceedings without confirming the remarks with each speaker. This document is only a summary. This year also marked the 40th anniversary of the Standing Committee. One of the founding members of the Standing Committee is R. Daniel McMichael. Although his schedule prevented him from being with us, he sent a letter on the occasion of the Standing Committee's anniversary. In it, he described "the imperative upon which the Committee was based: the absolute necessity of building consensus among people of varying political and intellectual hues as to how our nation is to preserve its liberty under law in the face of those forces (and they never seem to go away) that would have it otherwise." In closing, Mr. McMichael noted that "there is no single site upon which to erect a monument commemorating the founding of the Committee, yet a monument does exist. It is the Committee, itself, its members and what they do. The monument still stands unblemished - and long may it be so."

I would extend the "monument" to include all of you who participate in the activities of the Committee through attendance at our conferences, panels, breakfasts, and other programs, or just by reading this newsletter. Your commitment to examining the important issues at the intersection of law and national security validates and sustains the vision of the Committee's founders. It is with these thoughts in mind that we continue the tradition of hosting the annual review of the field of national security law. -Suzanne E. Spaulding, Chair

Opening Remarks

Suzanne Spaulding, Chair, ABA Standing Committee on Law and National Security

Suzanne Spaulding welcomed everyone to this conference marking the 40th Anniversary of the establishment of the Standing Committee on Law and National Security. She noted that the nation is still grappling with the implications of the changes highlighted by the attacks of September 11, 2001. At the Annual Review Conference that year, participants sought to define the relatively new term "homeland security." Yet, less than a year later, the decision was made to establish an entirely new Department for Homeland Security in what many have characterized as the greatest government restructuring since 1947. Similarly, for years the Annual Review conferences have included discussions on the relationship between law enforcement and intelligence. Shortly before the 2002 conference, the Foreign Intelligence Surveillance Court of Review determined that the "wall" that had been erected between these two communities within the FBI was never constitutionally required. The Court upheld a plan to bring the two communities closer together. Yet, at the same time, the National Security Advisor had convened a meeting to discuss growing calls for pulling domestic intelligence out of FBI altogether and establishing a sepa-

rate agency. Another area in which changes are outpacing the normally measured step of legal evolution is in the domestic missions of the military. The 2001 Review of the Field conference discussed this topic in terms of the application of the Posse Comitatus Act and other issues related to military support to civil authorities. However, we now realize that the war on terrorism is not just a rhetorical war and the battlefield is not easily defined. Thus, domestic military activity that may once have been assumed to be law enforcement may now be characterized as military operations to defend the homeland, for which rules of engagement and the Law of Armed Conflict may be more applicable than Posse Comitatus. We find ourselves today trying to apply to the fight against terrorists the rules of international law that were developed to manage relations between nation-states. As national security lawyers wrestle with these issues, the ABA can play a key role in fostering the kind of informed public discussion and debate that will help to develop the collective wisdom needed to meet these challenges. It was with this in mind that, in 1962, a group of lawyers that included Lewis Powell, Morris Leibman, Dan McMichael, Jack Marsh, Frank Barnett, and Admiral William Mott first talked about establishing the Standing Committee on Law and National Security. And it is this tradition that the Standing Committee and the ABA carry on today.

A.P. Carlton, ABA President

Judge Robinson Everett, Counselor to the Standing Committee, introduced ABA President A.P. Carlton, who praised the Standing Committee for its prescience and hard work. Carlton stressed the bond between the armed services and the activities of the ABA, with regard to the dedicated attorneys serving in the armed forces, the department of defense, and the efforts of the private bar to those providing pro bono legal services to military families affected by the events in the Middle East and elsewhere. Moreover, given the challenges of today's world, Carlton noted that the ABA is likely to focus increasingly on international issues.

Carlton congratulated the Standing Committee on its fortieth anniversary. The Standing Committee has sponsored conferences on terrorism as far back as 1985, and its May 2001 conference called for an office of domestic security in the executive branch, Carlton noted.

Today, the country is engaged in a debate about the balance between national security and personal liberty. There is particular discussion of whether the Justice Department might have the right to listen in on lawyer-client discussions in the absence of a warrant, the rights of US citizens who are alleged to be enemy combatants, and the possibility of detaining such people without charges or access to a lawyer. Carlton said that these kinds of issues will likely be before us for many years to come.

Carlton closed by calling ABA relationships with the administration "open and productive," and stating, "it is a great time to be an American lawyer. The American legal education system is the best in the world."

The ABA National Security Law Report

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Panel 1: Executive Branch Roundtable

Moderator - Judith Miller, Williams & Connolly, LLP

James Thessin, Legal Advisor of the State Department

Thessin addressed developments in 2 key areas: distinction between national law enforcement and use of force internationally, and the efforts to establish international norms to combat terrorism. He argued that international law must continue to adapt to new circumstances.

International law is a way to control violence between and among states. Except for crimes against humanity, war crimes, and genocide, national law is used for the prosecution of individuals. Terrorist groups have blurred the lines between networks, individuals, and states. Thessin said that this has led national law enforcement and international efforts also to blur. These acts are violations of domestic criminal laws. At the same time, al Qaeda is an international network, and military force may be required to deal with it.

Thessin explained why the administration does not believe that al Qaeda members are lawful combatants as defined under the Geneva Convention. They target civilians, lack a uniform, and have a diffuse command structure not intended to ensure compliance with the laws of armed conflict.

New institutional approaches are not always unwelcome, but they may undermine existing bodies' contributions, Thessin argued. He set forth the view that the establishment of the permanent tribunal of the International Criminal Court will complicate the work of the Security Council and of individual states. The Security Council, which aims to control violence, may be undermined by the ICC's lack of political constraints. The ICC may also interfere with domestic solutions, such as the Truth and Reconciliation Commission in South Africa, and with political negotiations. The prosecutors and judges may have political views themselves. Also, the extension of jurisdiction over nonparty states may deter states from participating in peacekeeping missions.

UN resolutions post-September 11 stressed the ability of states to defend themselves, and required states to assist in fighting the movement of terrorist funds and individuals. Other conventions obligate states to criminalize terrorist activities and their support, and to cooperate on prosecution and extradition of offenders.

Resolution 1441 in November 2002 gave Iraq one last chance to cease its material breach of its obligations, Thessin said. Iraqi noncompliance will result in a reconvening of the Security Council. Iraq is on notice that it faces "serious consequences."

Kenneth Wainstein, General Counsel of FBI

Wainstein addressed the day-to-day activities of administration lawyers in fighting terrorism. The FISA Court of Review's recent decision will enhance the ability to protect the US, Wainstein argued. The Justice Department's work on the case was of benefit throughout the administration.

FISA was passed in 1978, after hearings about intelligence activity. It set up a procedure for secret review of government requests for electronic surveillance, and eventually was amended to include physical searches as well. FISA also detailed the evidence that the government had to show to obtain the right to do surveillance. It required a finding that foreign intelligence information will be obtained. Wainstein explained the "unclear application" regarding the requirement on "the purpose" of the surveillance. The concern was that the government could be tempted to use the FISA Act to circumvent the requirements for a criminal wiretap under Title III of the Omnibus Crime Control and Safe Streets Act of 1968.

A complicated and confusing regime emerged in the 1980s, Wainstein said. The FISA court looked at the nature and makeup of investigations, particularly regarding the personnel involved in an application for permission. This produced the “primary purpose test” that the primary purpose of the surveillance had to be to collect for intelligence.

The government adopted procedures to allow intelligence investigators to provide some information to criminal investigators. However, criminal agents could not advise intelligence agents because that would imply that the primary purpose had shifted from intelligence to criminal prosecution. A wall separated criminal investigations from intelligence investigations. This “wall” hindered terrorism and espionage investigations, Wainstein argued.

The USA Patriot Act, drawn up largely by Justice Department attorneys, gave a number of useful new tools to investigators. It helped to bring down the wall between intelligence and criminal investigations, making the FISA restriction “a significant purpose.” In March 2002, the Attorney General issued guidelines on carrying out these new laws. The FISA Court of Review allowed these guidelines to stand.

Wainstein assessed the consequences of the ruling as allowing prosecutors and criminal agents to be involved in formulating strategy that might result in a FISA request, and clearer rules for investigations.

John Rizzo, Senior Deputy General Counsel of the CIA

Rizzo offered his perception of changes in the legal landscape, issues on the horizon, and an assessment of risk in days and years ahead. The scope and aggressiveness of intelligence activity authorized in the past year is unprecedented. Congressional overseers have consistently approved operations that were once considered too risky, or off limits for valid policy reasons. There will be a long-term effect of these changes in the law, such as access by intelligence community to grand jury information and other law enforcement information.

Specific legal issues that the CIA is currently working with include the agency’s role in apprehension and questioning of unlawful combatants, the conduct of information operations regarding computers, and the meaning of international agreements such as the Geneva Convention.

The atmosphere has changed, Rizzo noted. Before, when Congress wanted to talk to the CIA, it was about fears of violating human rights or other suspected unethical actions. Now, it is more likely to be criticized for not being aggressive enough, as in restrictions on how to recruit informants with questionable histories. Most fundamentally, Rizzo argued, September 11 has caused the CIA and other agencies to reconsider and reassess legal policy and principles. The CIA and FBI are reassessing how they relate to each other and share information. There is a questioning of the premise that international law enforcement efforts are the best way to counter terrorists, rather than military action.

Rizzo detailed the legal issues that may arise in the near future. There is the question of policy toward Iraq. CIA and DOD will engage in a dialogue over the rigorous statutory requirements for each agency. This discussion last took place during the Gulf War. The CIA also has to manage the new flood of information coming from law enforcement in the wake of Patriot Act mandates. There may be a need for a new paradigm governing assessment of what information may be important, and how to turn it over. The worsening threat of proliferation of weapons of mass destruction is also a matter of CIA legal concern. The trend toward universal jurisdiction in the ICC may entail greater legal risks for CIA activities. The CIA has never dealt with state and local US officials before, but now there will be a relationship, likely mediated by the new Department of Homeland Security.

The CIA has to be careful what they wish for, Rizzo noted. It now has authorities it had requested; what

will it do if these activities go awry? The pendulum will swing back, and today's era of political consensus for increased intelligence authority will come to an end at some time in the future. It'll be good for the country when the threat is perceived to be less, Rizzo argued, but it could be bad for the CIA in the sense of diminished authorities.

Whit Cobb, Deputy General Legal Counsel of the Department of Defense

Cobb discussed the legal underpinnings of the DOD war on terrorism. US actions are in the context of war, not criminal law. Cobb assured that the war on terrorism is being conducted in accordance with the rule of law.

Cobb started from the perspective that we're at a new kind of war. It's not a metaphorical war. Al Qaeda attacked the US on September 11, and perhaps in Somalia in 1993. Even though the adversary is not a nation-state, the US is currently at war.

Cobb addressed the legal authorities for the war. The Constitution gives the President the authority to defend the US. Congress passed a law on September 18, 2001, authorizing the President to use all necessary force. Given these facts, Cobb argued, the US and its partners have ample authority to detain enemy combatants, and those who are members, associates, or accomplices of al Qaeda or any other terrorist group.

During World War II, courts upheld the government's right to detain adversaries for the duration of the conflict. Cobb predicted that the habeas corpus petitions filed on behalf of various detainees would not succeed, saying that the government has issued ample facts in support of its position. With regard to military commissions, Cobb noted that they go back as far as George Washington. They were used to try thousands in the European and Pacific theaters during World War II.

The legal goals of the prosecution of suspected terrorists, Cobb argued, are to advance the war effort and the cause of justice while protecting intelligence activities.

Capt. Jane Dalton, Legal Advisor to the Chairman of the Joint Chiefs of Staff

Dalton reviewed the successful campaign in Afghanistan and a measure of success in the war on terrorism. The US achieved a relatively rapid victory against the host country of the main terrorist bases, and averted the predicted humanitarian disaster in Afghanistan. The war on terrorism has since been expanded to the Philippines, the Mediterranean, and South America. The war in Afghanistan produced the fewest casualties and collateral damage of any major war.

Next steps in the war on terrorism include setting up new procedures and programs, examination of violations of the law of armed conflict, and review of the existing rules of engagement. In an environment like Afghanistan, where the soldiers did not wear uniforms, traditional rules may not be appropriate. Targeting in Iraq would be very different, Dalton noted, because it has more infrastructure than did Afghanistan.

Dalton argued that the US attack in Yemen killing an al Qaeda operative and his associates was an act of war, not an extrajudicial killing. Al Qaeda declared war on us, Dalton said, and we're fighting back.

When asked whether the Yemen strike was a covert action, Dalton noted that covert action does not include traditional military activities or the activities of a commander in preparation to undertake military activities.

Dalton argued that there is no need to change the Posse Comitatus Act, because there is sufficient flexibili-

ty under existing law for the military to play a supporting role domestically, as it did in the 2002 Winter Olympics in Salt Lake City. The Department of Homeland Security legislation reaffirms this position. The new Northern Command is intended to defend US and nearby areas, Dalton said. Its second major mission is to provide assistance to civil authorities, as the military has following natural disasters.

Panel 2: Capitol Hill Roundtable

Moderator - Paul Schott Stevens, Dechert

Richard Hertling, Minority Staff Director of the Senate Committee on Governmental Affairs

Establishment of the Homeland Security Department indicates that the country is rethinking the notion of national security, Hertling said. The department is the first step in that process. Usually when people on the Hill discuss national security they think of the Armed Services Committees and Intelligence Committees. But September 11 brought home the fact that the threats faced by the US have changed dramatically over the past several years. Congress usually follows, Hertling said. Typically democracies are responsive rather than proactive. Senate committees were aware of asymmetric threats from nonstate actors against the country before September 11, but nothing forced Congress to act in a new way.

In response to the new situation, Congress passed the USA Patriot Act. The next step, Hertling said, was to contemplate the recommendations of the Hart-Rudman Commission to reorganize the government. There was disagreement over whether a broad reorganization would be successful - perhaps an office to coordinate activities would be sufficient. The President became convinced over time that there was a need for a broader reorganization. A new organization illustrates that we're reconceptualizing what national security means. Now the Customs Service is a part of national security. Hertling identified the goal of the Homeland Security Department as pulling agencies together and refocusing some of their efforts. This refocusing will help morale, Hertling argued, by helping people recognize the importance of what they do to safeguard the country. The Department is an amalgam of various agencies that touch on national security issues.

Hertling sees a need to be consistently conscious of the impact of government structure and the new kinds of threats we face on our civil liberties. He praised the department's institutional protections of a privacy officer and an officer for civil rights and civil liberties.

Congress too must examine its organizational structure. The Hart-Rudman report and the Bush administration have important suggestions, Hertling said. Currently, 88 committees and subcommittees of Congress touch on the responsibilities of the Homeland Security Department. Congress must sort out its responsibilities in overseeing the Department. This may call for a new committee, or a pooling of the various committees in the House and Senate. Hertling warned that a large number of committees overseeing the department could result in unfortunate time demands on the new Department's staff.

Vicki Divoll, General Counsel, Senate Committee on Intelligence

Divoll discussed the two primary functions of the Committee: legislation and oversight in relation to the USA Patriot Act. Following 9/11, Senator Graham convened a task force of senators to review current procedures and propose changes. Several of the proposals became part of Attorney General Ashcroft's list of recommendations and were included in the USA Patriot Act. Divoll commented on the quick process of passing the USA Patriot Act. She discussed two provisions of particular importance regarding intelligence sharing, Sections 901 and 905.

Section 901 recommends that the Director of Central Intelligence, as the head of the intelligence community, should be responsible for setting the requirements and priorities of how FISA is to be used. In the past the FBI has directed the use of FISA. When the FBI found an interesting target, they implemented FISA. However, FISA is a powerful domestic intelligence collection tool and it was thought that it should be utilized in a more organized fashion. Therefore, since the DCI determines how intelligence resources should be used, Section 901 includes FISA as part of this process. The FBI remains in control of selecting the FISA targets. However, once the intelligence information is collected, the DCI becomes involved again in the dissemination of the intelligence information. Currently, the Committee is focusing on oversight of the implementation of this Section.

Divoll commented positively on the new dissemination processes taking shape. The FBI, which used to be restrictive of the intelligence information it received, is now regularly disseminating this information to the intelligence community.

Next, Divoll discussed the changes in Section 905 that made it mandatory for any foreign intelligence information collected in a criminal case either through grand jury, title 3 warrants, or an interview to be passed to the intelligence community. Under previous statutes this provision was optional. Divoll praised the administration's willingness to change its position on this provision after September 11 and commented on how quickly the administration implemented Section 905 having regulations in place. Additionally, Divoll stated that Section 908 requires field prosecutors be trained in recognizing foreign intelligence information so they can effectively comply with Section 905.

Regarding FISA, Divoll stated that according to the Review Court, the Justice Department could have more power after the USA Patriot Act provision sunsets than they have with the USA Patriot Act. She also agreed with the Court's limiting the use of FISA to foreign intelligence-related crimes instead of allowing the Justice Department to call any criminal prosecution foreign intelligence-related. Furthermore, while criminal prosecutions could be the primary purpose for seeking FISA, it need not be the exclusive purpose.

Michael Sheehy, Democratic Counsel, House Permanent Select Committee on Intelligence

Sheehy discussed the December 2002 Intelligence Authorization bill, and issues the House Intelligence Committee will address in the new Congress. The bill's main impact, he said, was a great increase in resources, mostly to support the war on terrorism. There were also provisions for homeland security activities. Personnel strength and training, especially language training, were both increased. The bill also moved to modernize certain intelligence capabilities, especially at NSA and NRO. It also established a commission to examine the September 11 attacks.

Sheehy reviewed the impact of the November 18 FISA Review Court decision on the USA Patriot Act. Some argue that it is an expansion of FISA authorities, others that it is an interpretation of authorities provided in the Patriot Act. Regardless, Sheehy said the decision is a substantial victory for the attorney general and the Department of Justice. There may be a congressional response to this decision, Sheehy noted, but issues regarding the Homeland Security Department will likely preoccupy the Committee in the months ahead.

The House Committee examined the need to improve intelligence sharing within and between agencies, Sheehy reported. He discussed the Undersecretary of Defense for Intelligence, a newly created position. The unresolved issues of the new position are the role the undersecretary will have in budget formation, and whether he has to negotiate with the DCI on funding.

Sheehy expects the September 11 review commission to do very important work. There is a need for a comprehensive look across the government and make recommendations on specific improvements. Staffing

and review of documents and materials will be necessary, and only 18 months are given. There may be difficult negotiations with the administration on declassification of documents, Sheehy said.

In the new session, Sheehy saw two general areas of focus for his committee. It will review implementation of USA Patriot Act, particularly the FISA amendments, which sunset in December 2005. Sheehy saw a need for the establishment of criteria to evaluate the success of the new procedures. In addition, the Committee will consider the implications of surveillance techniques and review the charter for operation of military tribunals, secret detentions and detention without charges, and the employment of high technology means to disseminate data-so-called data-mining.

The Committee also is likely to consider intelligence community structural changes, Sheehy said, such as whether the US needs domestic intelligence gathering community like Britain's MI5. There is the question of what remains of the separation between enforcement and intelligence, and whether it should move in either direction. The committee may also review whether analysts need better access to raw intelligence. The FBI has enjoyed a fair degree of success in counterterrorism operations, particularly at the turn of the millennium, Sheehy noted, but some still call for broader reform of structures and procedures.

Scott Stucky, Principal Republican Counsel, Senate Committee on Armed Services

Stucky reviewed the broad jurisdiction and activities of the Armed Services Committee in matters affecting the common defense. It authorizes appropriations for DOD and defense aspects of the Energy Department. It also contends with thousands of nominations each year in DOD and the Energy Department, including promotions within the armed forces. Committee size varies from year to year, from 18 to 25 in recent years.

The FY03 authorization bill was a "Democratic" bill, Stucky said, as Senator Levin had chaired the committee throughout the year. The bill authorizes \$393 billion for FY 2003. The most important new aspect of the bill was to allow retired pay and VA disability compensation for the same period of service. The White House, concerned with the \$58 billion over ten-year price tag of the provision, was opposed to it. Restrictions on the amount originally proposed brought the cost down to \$200 million in the first year rather than \$5 billion. This does not represent the last word on the situation, Stucky said.

Regarding Defense Base Closure and Realignment Commission (BRAC), Stucky explained that a House provision that would have required a unanimous vote to add any installation to the Secretary of Defense's list was dropped at the request of DOD.

The requirement that DOD give a significant preference to products bought from federal prison labor was significantly cut back at the request of Sen. Levin, who believes it to be a way to save money.

The missile defense project carries a number of reporting requirements, Stucky said. Up to \$814 million can be spent on this, or on the war on terrorism. The Crusader, the Army's premier artillery program, was killed by the DOD, and the committees went along.

In the new sessions, Stucky saw a focus on posse comitatus; military transformation, especially of the Army; Navy shipbuilding; and force structure, especially regarding the stress on Reserves and the Guard.

Panel 3: Use of Force Against Rogue States: Constitutional and International Law Perspectives

Moderator - Duke Law Professor Scott Silliman

Silliman opened the panel by relating that the Bush administration may choose to lead a “coalition of the willing” without specific Security Council authorization in the event of a further material breach of Resolution 1441 by Iraq or a showing of a linkage between al-Qaeda and that country. He asked whether this would be in furtherance of the newly articulated doctrine of preemptive self-defense in our National Security Strategy document, and how that doctrine is viewed with regard to existing international law.

Michael Byers, Professor, Duke Law School

Byers analyzed the administration’s position on international law. Almost any president would have made the policy decision to intervene in Afghanistan as President Bush did, Byers said. There were four possible legal justifications for taking down the Taliban regime: 1) intervention by invitation, from the Northern Alliance, but the administration chose not to invoke this; 2) UN Security Council authorization, which would have been likely, even from the French, but the administration chose not to ask; 3) unilateral humanitarian intervention, given the threat of millions starving to death; and (4) using self-defense as its justification. The administration chose the fourth option, in part because of its desire to establish this claim as accepted international law. George Schultz argued in 1986 that international law did not forbid attacks on terrorists abroad. but this concept did not receive widespread support. But after the attacks of 9/11, the world was almost universally sympathetic to the US-and fearful of its wrath-and the US moved to establish the Schultz doctrine as accepted international law, Byers said. There is a similar debate now over the asserted right to preemptive self-defense. Article 51 of the UN Charter seems to indicate that there is no such right, but President Bush has argued to the contrary that the US must act before threats are even fully formed. Administration lawyers are involved in this policy decision. They have opted to adapt the concept of “imminent threat” to today’s adversaries, rather than referring to the UN Charter. Such justification means that the US is not articulating an entirely new claim. Ambiguity in the law allows the powerful to twist arms and gain advantages that aren’t available to others, Byers concluded. The Bush doctrine got a lukewarm response from Germany, Jordan, Saudi Arabia, and other important countries; and faced with this resistance, and wanting to build a coalition, the State Department pushed to move to the UN Security Council. “The successful adoption of [Resolution] 1441 has got to be the highlight of US diplomacy in the last ten or twenty years. It’s an amazing document,” Byers said. It gives potential US allies a legal justification to go to war on the side of the US without needing to embrace the Bush doctrine. War triggered by material breach is now international law. Byers expressed the view that it would not have happened without the Bush administration’s willingness to use force-and excellent lawyering. Byers offered a cautionary last word. Some people in the Bush administration continue to push for self-defense as a justification for the use of force, but the invitation of other states such as Yemen to intervene in their countries would be sufficient. The problem with self-defense is that it could then be open to other states, such as China, Russia, and Iraq, to use as well.

Ruth Wedgwood, Professor, SAIS

Wedgwood presented a different reading of the UN Charter. The UN wasn’t intended to be a pacifist organization in the face of offenses against human rights, she argued. Elihu Root, who worked for improved international law in the interwar period, still believed in a somewhat expansive, preemptive right of self-defense. It’s uncertain if Article 51 of the UN Charter is exhaustive. Frank Kellogg, interwar Secretary of State, who hoped to abolish aggression, still thought that countries retained a right of self-defense, defined by the countries themselves. The Bush doctrine is a political doctrine, and not meant to be a law review article,

Wedgwood explained. The US is the leader of the free world, and Europe has underinvested in its military and is only capable of a supporting role. The Bush doctrine contains intentional ambiguity. Chapter 7 of the UN Charter uses the term “breach of the peace.” This indicates a broader right for preemptive action. Throughout the history of the UN, there have been occasions when the text simply doesn’t suffice. Wedgwood argued that consensus must be sought. Today, we have nonstate actors who have no interest in joining the world community, who prefer to target civilians, and who clearly do not fall within the Charter. This means that we must turn to the principles underlying the Charter to determine what it would have us do, Wedgwood argued.

Wedgwood called Iraq “legally unique.” Resolution 687 prohibits it from having chemical, biological, or nuclear weapons, or missiles ranging over 250 kilometers. Iraq’s disregard for the cease-fire agreement it entered into following the Gulf War leaves it open to further enforcement action. In Afghanistan, the US acted with support from much of the world, and the UN resolutions following September 11 left states no room to support terrorism. Given the uniqueness of the threats we currently face, Wedgwood argued that we do ourselves harm if we insist on being syntactical and finding perfect analogies. Regional organizations acted in West Africa, Liberia and Sierra Leone to defuse crises. This changed Article 53 forever, Wedgwood said, by opening the possibility of ex post facto approval of intervention. Regional organizations acted as agents of the Council, in the absence of explicit authorization. Political and diplomatic history and knowledge of how conflicts play themselves out is required in the study of international law—it cannot be viewed as a simple game of classification. If there’s too much artifice, people will see through it. Wedgwood closed by praising Oliver Wendell Holmes’ observation that law must adapt itself to the needs of different societies and systems.

David Ackerman, Legislative Attorney, Congressional Research Service

Ackerman reviewed the domestic legal framework governing the use of force. Congress has declared war 11 times. At other times, it has authorized the use of force. On numerous other occasions, some say more than 200, the president has used force without either. Ackerman reviewed the Constitution’s provisions regarding war powers and the intent of the framers. Article I, Section 8 confers on Congress the power to declare war and contains numerous other provisions. Article II says, less specifically, that the president shall be the commander in chief. Incomplete records of the debate at the Constitutional Convention indicate that the delegates were reluctant to give too much power to the president, and that the commander in chief clause was accepted with little dissent.

The Constitution’s allocation of war powers differed greatly from that of the Articles of Confederation, Ackerman said. The central government gained powers formerly belonging to states, such as the power to raise an army. The title of commander in chief was removed from the province of the Congress and given to the executive. The British monarch had power to declare war, and regulation and government of the army and navy, as opposed to the Constitution, which gives these powers to Congress. The Constitution impliedly vested the authority to repel attacks with the president, but not the power to start a war. This scheme of joint action was how the power to make war was understood in the early years of the country, including in actions against the Indians, the quasi war with France in 1798-1800, the Barbary pirates, and the War of 1812. Also, Ackerman noted, the Supreme Court understood this to be the case. The 1973 War Powers Resolution (WPR), passed over President Nixon’s veto, was intended to return the balancing of war powers to the Framers’ intent, Ackerman said. It required the president to report to Congress within 48 hours of introducing troops into hostilities, and terminate any such use of armed forces within 60 or 90 days unless Congress has declared war, extended the time limit, or is unable to meet. Ackerman said that the resolution illustrated how much the balancing of war powers had changed. “But the WPR failed to achieve what it set out to do,” Ackerman argued. The end result, he said, was a “sixty- to ninety-day blank check” for the executive. Still, he concluded that “the WPR has done some good.” Presidents have usually complied with its requirements for allowing debate and information to flow to Congress and the public and with its 60-day time limit. It did not, however, restore Congress to a position of primacy, or even equality. Congress has not chosen to repeal or

greatly amend the WPR. The Constitution intended Congress and the president to act together in the use of force. The WPR “has muddied that mandate” by allowing the president to initiate the use of force without Congressional authorization for up to 60 days. Ackerman argued that the wisdom of the division of the warmaking power was reflected in the consultation between the legislative and executive branches and the public debate leading up to the congressional authorizations of the war on terrorism and of the use of force against Iraq. Fuller public understanding and support and an improved policy resulted, Ackerman maintained.

Maj. Gen. John Altenberg, USA (Ret.), former deputy JAG of the US Army

General Altenberg argued that the executive clearly has power to use force to protect US citizens and borders. In some cases, when time is short, the president, as commander in chief, is the only one who can act, as in the evacuation of Saigon, and the rescue mission for the Iranian hostages. The president’s powers are not enumerated, unlike Congress’ powers. Rather, Altenberg said, they are vested collectively in the president. Article IV Section 4 guarantees states a republican government and physical protection. This is the inherent power in the executive to defend the country. “The reason all those people got together in July and August of 1787 in Philadelphia was to provide for the common defense,” Altenberg said. The president is the commander in chief, and has primary responsibility to defend the country, especially when time is of the essence. The War Powers Resolution reinforces this idea, that the president has inherent authority to use force. Altenberg presented the rationale for this interpretation. The president is the person best situated to make judgments when they need to be made quickly. He has access to all the information, and does not need to deliberate. The judiciary recognized the president’s inherent authority in the Prize cases during the Civil War. The Steel Seizure case reflects the limits on the president’s domestic power. In the conduct of foreign affairs, however, the president has greater authority, Altenberg argued, as noted in the Curtiss-Wright case. With regard to the current situation, Iraq has invaded Iran and Kuwait, developed weapons of mass destruction (WMD), failed to adhere to UN resolutions, attacked allied aircraft carrying out UN resolutions, targeted a former US president for assassination, ordered the execution of all those between 15 and 17 in certain areas in Iraq, and gassed Iranians and Iraqis. The efforts of the past 10 years to constrain Hussein have failed. This, Altenberg explained, is why Iraq is an imminent threat, which triggers the president’s authority to act alone. The strength of WMD was beyond the capacity of the framers to appreciate. Our appreciation for which kinds of threats are “imminent” has changed since September 11th. Sometimes there isn’t time to go to Congress, Altenberg said. The president has the authority to use force anywhere in the world to defend the country. The kinds of threats that we face now are completely unpredictable.

Panel 4: Leaks - Dealing with Unauthorized Disclosure of Classified Information

Moderator - John Norton Moore, Director of the Center for National Security Law, University of Virginia School of Law

Dr. James Bruce, Vice Chairman of the Director of Central Intelligence’s Foreign Denial and Deception Committee in the National Intelligence Council

Bruce stressed that he, like the other participants, was presenting his own views, not those of his organization. These views emerge from his experience as an intelligence officer studying how US adversaries learn about US intelligence and develop countermeasures. Bruce has concluded that the US press is “among the most important” sources of such information. George Tenet has also advanced this view. Bruce said that advocates of new protection of information are constrained from presenting the empirical evidence that would justify such reforms.

Bruce presented four propositions: 1) problem of unauthorized disclosure is severe enough that action from Congress, along with the executive branch, is warranted; 2) important reasons for the seriousness of the problem are poor laws and poor law enforcement; 3) the necessary remedies are not drastic; 4) consequences of legal inaction are high. These regard classified intelligence information, not all classified information.

Bruce stressed that leaks do a great deal of serious, significant, and continuing harm, sometimes permanent and irreversible. A recent classified study on leaks in the press and damage to intelligence programs found a very strong relationship. The US press is a major source of information for adversaries. Identifying who provided the information to the press is a very difficult issue. Referring to the comments of former Soviet intelligence operatives, who regularly found sensitive information in the US press, Bruce argued that classified intelligence disclosed in the press is the effective equivalent of intelligence gathered through foreign espionage. Leaks have damaged US ability to listen to conversations of members of the Soviet Politburo; monitor weapons inspections in Iraq, and intercept phone conversations of Osama bin Laden. Bruce argued that this is just the tip of the iceberg.

Lax law enforcement allows more leaks to the press, Bruce claimed. Government officials and the press believe that they will not be prosecuted for many leaks. There are laws on the books, but they are aging and erratically enforced. There is a legacy of failed approaches. Bad laws are hard to enforce, Bruce said. He recommended new laws, amendments of old laws, and enforcement of existing laws.

Bruce argued that journalists should have a legal responsibility regarding the publishing of classified information, and called for a new statute reinforcing this. He acknowledged that there are First Amendment issues, but expressed the belief that the consequences of leaks are so severe that such actions are necessary.

Doyle McManus, Washington Bureau Chief of the Los Angeles Times

McManus stated that he and James Bruce have more common ground than some might think, but have diverse opinions regarding solutions. He noted that Justice Black's opinion from the Pentagon Papers case in 1971 stated that the media's role is to disclose the government's secrets to the people and uncover deception. McManus framed the issue for journalists as an effort to reconcile the journalist's need to disclose secrets with the citizen's duty to protect national security. These two duties can be reconciled most of the time, though not in all cases, with a great deal of effort. McManus called for a new compact between government and the press to avert unintended and gratuitous harm to national security.

One part of the problem is that leaks are not an occasional occurrence, but rather part of Washington's lifeblood. Leaks come from government officials with varying motivations. Some leaks have been damaging, such as the fact that the US was listening in on bin Laden's phone conversations after September 11. This leak came from a US senator speaking on the record in front of cameras. A recent story on government monitoring of Iraqis was leaked to respond to critics in Congress who thought the administration was not doing enough. Bob Woodward's work on the response to September 11, which presented the president as a "masterful wartime strategist," relied on classified notes. A government spokesman confronted by angry rival reporters acknowledged, "we did work with Mr. Woodward on this project." Leaks of classified information are sometimes authorized. Officials are likely to leak at will when it suits their interests.

Journalists are, however, sensitive to the argument that they need to protect national security. The media readily agreed not to publish reports on the president's location and schedule after September 11 in response to an administration request. McManus expressed the view that most journalists would have agreed not to publish the report on monitoring of bin Laden's cell phone conversations. However, there is a lack of procedures or of mutually agreed-upon ground rules for the disclosure of such information.

McManus saw three problems in this enterprise. The media is using a set of late Cold War, post-Vietnam ground rules that may or may not be appropriate. Journalists withhold information that may endanger lives, information about troop movements and prospective actions, and often withhold information about intelligence sources and methods. Many reporters are too inexperienced or uneducated even in these few broad guidelines.

McManus argued that the government must be willing to engage in a robust dialogue with the media on these issues. A new law criminalizing leaks of information would be ineffective, McManus argued. Such laws already exist, but are rarely invoked due to their unwieldy nature. Hundreds of thousands of documents are classified each year. Executive branch officials assert that they need to be able to disclose some such information to communicate effectively with the media. As a practical matter, such after-the-fact punishment would have little deterrent effect on the publication of classified information.

W. George Jameson, Counsel, Office of the Deputy Director of Central Intelligence

Jameson indicated that his views are not necessarily those of the CIA.

Jameson started from the perspective that these issues are very complicated, and there is great room for disagreement. The balance is between public interest in protection and the public interest in disclosure. With the efforts toward homeland security, there is new disclosure of information to state and local authorities. The intelligence community regularly shares information about threats without detailing sources or methods. Often these efforts are compromised by officials who leak detailed information.

The attorney general's office has produced a report on the damage caused by leaks. It does not call for new legislation, but does acknowledge that some problems could be ameliorated by legislation. Jameson argued for a comprehensive approach to improve government response, through increased training, policies for dealing with the media, and better tracking of information.

Jameson called for legislation as part of a broad plan to improve security of information. Carefully drafted legislation targeting leakers would provide more ability to investigate, prosecute, and identify leakers. Critics say that the government classifies too much information; Jameson argued that this is an insufficient defense for those who betray the public trust. To enable the government to curtail and investigate leaks more effectively, Jameson called for an exploration of the effects of new legislation. He favors laws authorizing civil or criminal punishment of government officials who show a gross or reckless disregard for damages to sources and methods by their disclosure. Such a law targeting the press would have to be very narrow, and may require the demonstration of actual damage. Government agencies should have administrative subpoena authority for their employees and the media, perhaps with the caveat that no information gathered from the media could be used against the media person or company targeted.

Part of the problem is that the executive branch has been ineffective in making the case that leaking classified information is a crime that should be punished. Any laws passed to resolve the problem must be narrowly targeted.

Robert O'Neil, Founding Director of the Jefferson Center for Protection of Freedom of Expression, and former President of the University of Virginia

O'Neil agreed with the attorney general's conclusion that additional laws are not needed to address the issue of leaks. First Amendment principles demand that access to information is a creature of government policy. The scope of any First Amendment guarantees to government information is quite narrow, O'Neil said. Sanctions that might be applied with respect to leaks are different for those who leak it and those who use it, typically through publication, O'Neil said. The Supreme Court unanimously held a former CIA worker to the nondisclosure requirement of his contract. Even regarding those who use or publish information, there remains a difference regarding gag orders before the fact and punishment after the fact.

An overlooked part of the Pentagon Papers decision is that post-publication sanctions could have been imposed on those who published the information. The decision only forbids prior restraint, O'Neil said. Today there are a few additional questions regarding the significance of material that was illegally obtained, as long as the illegal act was not committed by the publisher. Only Justice Black said "never" could prior restraint be per-

mitted. Justice Brennan wrote that the Court would entertain such a law regarding troop movements in time of war. There were injunctions issued against CNN from playing a tape of a discussion between Gen. Noriega and his lawyer, and against Progressive Magazine from publishing the recipe for hydrogen bombmaking.

“The form of government intervention makes a big difference,” O’Neil said. When National Security Advisor Condoleezza Rice requested that media outlets not publish unedited messages from Osama bin Laden, almost all complied.

There are unclear parameters if the government needs or wishes to find out the source of a leak, O’Neil said. In the 1960s, the Supreme Court declined to recognize any First Amendment privilege to refuse to answer the questions of a grand jury. However, in the meantime, many lower courts had declined to issue such requirements on varying grounds.

O’Neil summarized the debate over the contextuality of First Amendment rights. Some argue that in times of war, there may be a new understanding of these rights, while others claim that these principles may transcend changed circumstances, such as those in which we now find ourselves.

Timothy R. Sample, Staff Director, House Permanent Select Committee on Intelligence

Sample argued that either/or solutions will not be effective in this case. There is no one law that Congress could pass that would fully solve the problem. If part of the problem is a breakdown in the government’s own security regime, Sample said, it is much easier to blame other people than to solve the problem. One aspect of that breakdown, Sample said, is that we’re moving to “need not to know” rather than “need to know.” Long lists of people know about any detail of classified information, making it difficult to find the source of a leak. Second, Sample argued, we need to revamp classification procedures.

Sample agreed with Bruce that there is not a general appreciation of the damage caused by leaks, not just to individual programs, but also to the overall ability to conduct intelligence. “Too many in the world today know how we go about our business, mainly through unauthorized disclosure.” Even leaks that seem justified individually add up to a good picture of what intelligence does.

There is a lack of enforcement, and a lack of consequences to those who leak. There are many retirees who see other officials leaking information, who then decide that they should be able to tell their story. During operations in Afghanistan, the media reported a great deal of classified information. Rumsfeld said the leaks upset him, but he was too busy to be able to deal with them at that moment. Sample called for political will to fight leaks.

Sample acknowledged that the leak about Osama bin Laden’s cell phone conversations came from the Hill. Congress, too, is evaluating the way it balances the need for security with the need for disclosure. He took exception to the idea that a journalist’s duty is to uncover secrets. He argued that a divide has emerged between the public’s right to know and the media’s right to know. Scooping others can take priority over looking at what the public wants and needs to know. There is “an unbelievable lack of understanding” between the media and intelligence community, Sample said.

Sample called for a reevaluation of existing laws, which he said that the attorney general suggested in his report may be necessary. He argued that if this activity takes place now, there will be ample debate. However, if we wait, then such a reexamination would likely be a reaction to a new terrorist act, and would be more likely to threaten civil liberties.

Patrick D. Murray, Associate Deputy Attorney General, and Chairman of Attorney General's Task Force on Unauthorized Disclosure of Classified Information

James Madison noted in the Federalist Papers that security against foreign dangers is one of the primary objects of civil society. The Constitution confers on the president the responsibility to defend the country. This includes the ability to protect some information from misuse and withheld from public discourse. Disclosure of some information would jeopardize American security, government, and freedom.

Since 1876, the Supreme Court has acknowledged this compelling interest of the government. Congress, too, has acknowledged this ability of the executive in a series of statutes. There are areas into which the public's right to know does not extend.

The media recognizes the need to refrain from publishing details about troop movements, but there is ambivalence about protection of sources and methods. Not all government secrets are government deceptions, Murray argued. Former Representative Pat Schroeder, a champion of whistleblowers, acknowledged that some intelligence leaks serve no public purpose.

The First Amendment's guarantee of a free press reflects the belief that a vigorous press serves the marketplace of ideas. "A free press is the foundation of an informed electorate and a free society," Murray stated. The Constitution gives the president the right to withhold information, and preserves a free press. This produces a beneficial natural tension that extends to the matter of the disclosure of classified information.

Classified information is essential to the advancement of foreign policy and the safety of those in harm's way for US security. Leaks of classified information damage these interests.

Due to a lack of prosecutions, there is a perception among government workers that there is no penalty for the unauthorized disclosure of information. Following up on work of the Clinton administration, Attorney General John Ashcroft set up a task force to determine the extent of the problem of disclosure and possible remedies for the problem. The problem, as the task force saw it, was not the media, but employees of the federal government who leak information. The media has nothing to write about if government employees "just say no" to leaks, Murray said.

There are six criminal provisions that address some aspects of unauthorized disclosure, Murray reported. There could be some benefits to unifying these laws in a single new statute, including sending a message that the government is serious about fighting such criminal activity. However, the task force decided not to recommend passing a bill for symbolic reasons. Instead, it called for the government "to enforce the laws that are on the books." Along with criminal violations, leaks are violations of a nondisclosure contract that government employees sign. There are specific protections of six categories of leaks, extending across anything that the media may have an interest in publishing. There is no silver bullet to solve the problem. "Sustained, comprehensive, and coordinated" efforts are required.

Panel 5: Detention and Prosecution of Terrorists

Moderator - Capt. Rodney Bullard, USAF

David Cole, Professor of Law, Georgetown University Law Center

After Sept 11, there is a new focus on preventive measures to fight terrorism, rather than merely punishing those who are guilty. While prevention of crime is always a goal of prosecution, in these times of fear it has received new emphasis. However, there are temptations to circumvent the criminal process when the government moves to prioritize preventive efforts. The requirements of a fair hearing for suspects and the assumption that people are innocent until proven guilty can be perceived as cumbersome in the effort to prevent crime.

This has happened before, Cole argued. In 1919, there were a number of small bombings in the US. Americans feared this terrorism and the radicalism of the Russian Revolution, and wanted to prevent such crimes. The government responded not by finding and prosecuting the bombers, but by looking for an alternative route outside the criminal process. In the Palmer Raids, the government used immigration laws to round up between 4000 and 10,000 immigrants who were suspected of being involved in disfavored political movements and organizations. A government official who resisted the Attorney General's actions called the targeting of immigrants "the course of least resistance." Cole suggested that the Palmer Raids were the only precursor in this country to what has happened since September 11. After September 11th, Attorney General Ashcroft vowed to use any means available to lock up terrorists. Throughout the course of the preventive detention campaign, some 2000 people have been detained, although the government will not disclose the exact number. Not a single detainee has been charged with activities relating to September 11th, and only four have been charged with any terrorism-related crime, according to Cole. The remaining 1996 or so detainees have been affirmatively cleared by FBI investigations of any terrorist or other criminal conduct. Many had committed visa violations, but these had nothing to do with terrorism. This record of four out of 2000 raises serious questions about what criteria the government was using when it swept up all these people, Cole argued. Many were held without any charges for weeks, while many were held in detention without probable cause for months after they admitted to visa violations and agreed to leave the country. Overstaying a visa allows the INS to deport immigrants, Cole said, but not to detain them indefinitely, especially not after they have agreed to leave the country. These immigration cases have been shrouded in secrecy from their detentions to their hearings. There is no information available about some detainees; they have simply "disappeared". This secrecy applies to all cases, regardless of whether there was any sensitive information presented at the hearing or about the actual threat posed by the detainee.

Some immigration judges ordered detainees released on bond, pending determination of immigration status, because they posed no threat. In response, Cole said, Attorney General Ashcroft changed the rules of immigration law. INS officials can now effectively overrule judges in such determinations simply by filing an appeal, which can last up to a year. These restrictions can only apply to immigrants-citizens have more rights.

Cole acknowledged that we are in a new environment and that there is a need for new actions to ensure that more terrorist attacks do not take place; but he cautioned against "short-circuiting the very processes that are designed to distinguish the innocent from the guilty," such as public trials, decisions by judges rather than prosecutors, and avoiding the disappearance of people in the hands of the government. The Bill of Rights, he argued, extends to persons other than just citizens; since in modern times, these are commonly held to be human rights. In addition, Cole maintained that locking up people who are not terrorists does not make us safer, and it only discourages cooperation by Arabs with our government. Working cooperatively with the Arab and Muslim community within the US and abroad is more likely to turn up the al Qaeda "needles in the haystack." Finally, Cole argued that it is delusional for citizens to accept restrictions upon immigrants that

they do not accept upon themselves, because the government eventually asserts similar powers over citizens. For example, the government originally only contemplated the detention of noncitizen suspected terrorists without trial or access to a lawyer, but now claims the ability to treat citizens in the same manner. Cole counseled against taking shortcuts around criminal processes when human liberty is at stake.

Victoria Toensing; Partner, diGenova and Toensing; and Former Deputy Assistant Attorney General, Criminal Division, Department of Justice

Today, there are more protections for defendants than there were 25 years ago. That is generally a good thing, but not in the case of the war currently being waged against Americans. There is a need for preventive action. Toensing addressed three areas: acquisition of evidence, detention, and prosecution. In referring to actions under the Foreign Intelligence Surveillance Act (FISA), she noted how TWA flight 847, with American passengers onboard, was hijacked in 1985 and taken to Beirut, Lebanon. The effort to wiretap conversations among the terrorists was stopped because the FISA court held that the crime committed was not a matter for FISA concern—a matter relating to foreign intelligence. The erroneous interpretation of what FISA actually required prevented intelligence and law enforcement from talking to each other, and unnecessarily led to difficulties in finding and prosecuting the terrorists responsible for September 11th.

With reference to David Cole's previous comments, Toensing argued that the reason that the government stopped disclosing the number of people detained in the post-September 11 investigations was the difficulty in defining the word "detention," rather than the reasons David put forward. The correct number of detainees is closer to 1,200, she said, than the 2,000 number which David and the ACLU tend to cite. The reason that the hearings should not be made public is because of the "mosaic theory" such that if the names of detainees are all made public, our enemies would be better able to figure out what the government is actually doing. Also, she argued, given that we are in a war against terrorism, it is appropriate to transfer some authority to the political branches of government.

We are learning how best to prosecute terrorists, said Toensing. The US captured a US citizen, Hamdi, on the battlefield in Afghanistan, and the Fourth Circuit has acknowledged in its opinion in his case that the judiciary should not interfere excessively with the President's conduct of the war against terrorism. She argued that the reason it is important to restrict a terrorist's to an attorney is that the government must be able to get as much information as possible, and access to attorneys may impede this process. In another major case, that of Zacarias Moussaoui, who is not a US citizen, his lawyers are trying to gain access to other detained suspected terrorists, and that will delay his trial and thwart the government's efforts. Toensing argued that when a US citizen is arrested on US soil for acts that were not on the battlefield, such as in the case of Jose Padilla, military tribunals may be appropriate. There is a need for a process to determine if he should be treated like someone actually captured on the battlefield.

Paul Virtue, Hogan & Hartson; and Former General Counsel, INS

The INS is a law enforcement agency which employs the Border Patrol, 2,000 special agents, and immigration inspectors at airports and seaports. Just as important to the INS, according to Virtue, is its role of facilitating the admission of people and the flow of commerce to the US and protecting refugees. There will be a necessary balancing of these roles with relation to the new Office of Homeland Security. It is important to prevent people who are suspected of engaging in or planning terrorist activity from entering the US, yet this will be a challenge since the INS admits several hundred thousand foreign nationals annually, some of whom make multiple entries. There is a shared database planned for INS inspectors and the Department of State, and visa interviews are going to be stepped up. There are now full background checks for people coming in from countries the State Department has not identified, but are understood to include Middle Eastern countries such as the ones in which the September 11 hijackers had roots. This is slowing down processing, but it is

an important aspect of the program. The default rule is that the visa is denied if the consular officer has any doubt about an immigrant's intentions. The INS is authorizing a shorter period of visitation to the US, normally 30 days, so that the information given to a consular officer will not become old. People from certain countries will have to be fingerprinted as they enter the US and report to the INS periodically. Because students are a "captive audience" for radicals, there are special requirements for the INS to monitor students. Finally, and least effective and efficient, is trying to identify people in the US who are suspected of aiding terrorists, especially when you consider that there are 6-8 million people unlawfully in this country. People can be detained for up to 72 hours without immigration charges being filed under the USA Patriot Act, and the reason for detention can then be converted to Material Witness warrants.

Virtue expressed concern about the effort to identify as many people as possible who may have had information about September 11th. It was a round-up scenario, and Virtue doesn't know how many were detained. It might not have been the best of all possible approaches, but the government does need tools to find such people. There needs to be more information taken in on people before they're taken into custody to the extent that it's possible, Virtue said, because that takes pressure off the process. The detention authority is tied to removal from the US; and there are limited reasons why people can be detained, otherwise they are entitled to a hearing from a judge who can order their release. Classified information can't be used in an ordinary hearing as a means to deport someone, but it can be used to inform the court with respect to discretionary issues and custody. Virtue explained that voluntary departure is only available when we are dealing with a person of good moral character, and their departure is discretionary; as against where the INS has a sound reason for seeking a deportation order which keeps people out of the US for at least five years.

Judge Walter T. Cox, Former Chief Judge of the US Court of Appeals for the Armed Forces and currently a visiting professor at Duke University School of Law

Cox posed the question of what we should do with those we have captured in the war against terrorism. He reviewed the President's military order of November 13, 2001, empowering military commissions to deal with al Qaeda and other terrorists; and addressed, in general, the philosophy supporting use of those commissions. Arguably, there is an international "common law" regarding military commissions, Cox said, but it need not concern us because Congress authorized such commissions in Article 21 of Uniform Code of Military Justice (UCMJ). The military forces have the inherent right to use commissions to try those who have committed violations of the law of war. In *Ex parte Milligan*, after the Civil War, the Supreme Court set aside a conviction by a military commission, saying that when civilian courts are open and functioning in this country, American citizens cannot be tried by such commissions. A little known footnote to that case, said Cox, is that involving Dr. Mudd, who set John Wilkes Booth's broken leg, following the assassination of President Lincoln. Mudd was tried by a military commission and his petition to the Supreme Court for a writ of habeas corpus was denied without comment, though there is a possibility that this was only for procedural reasons.

There were 16 million Americans in arms in World War II, two million court-martialed, and 150 soldiers were executed without any judicial review, Cox said. This was one of the key reasons for Congress creating the UCMJ in 1950 which, among other things, established a system for civilian court review for courts-martial, a system which, since 1984, now extends to the United States Supreme Court. American citizens with no connection to the military are not subject to military trials, Cox said. Further, the Supreme Court said in *O'Callahan v. Parker* that a military court didn't have jurisdiction even over soldiers unless there was some nexus between the crime alleged and their military status.

The subject matter jurisdiction of military commissions would be comprised of violations of the law of war, as well as of Articles 104 and 106 of the UCMJ, these two articles pertaining to spying and aiding the enemy. The personal jurisdiction of military tribunals remains unsettled, Cox said, but no commission has yet been ordered into being, although there are likely to be some soon.

A concern of the legal community is the level of due process in the original order for and the rules of procedure to be used by commissions. Cox expressed his “bias” that the military justice system (courts-martial), a highly ethical and professional form of justice eminently capable of providing a fair and impartial hearing, should be followed. However, although the March 21, 2002, procedural rules for commissions replicate the military justice system closely, there are still significant differences, notably in the review process. That remains a great concern.

Panel 6: The Prevention of Terrorism

Moderator - Suzanne Spaulding, Chair

This panel discussed issues related to detecting international terrorists inside the US.

Discussion Panel Members:

- L. Britt Snider, Former Inspector General, CIA
- Kate Martin, Director of the Center for National Security Studies
- Richard Shiffrin, Deputy Counsel of Intelligence, Office of the General Counsel, Department of Defense
- Spike Bowman, Deputy General Counsel for National Security Law, FBI
- Stewart Baker, Steptoe & Johnson, former General Counsel, National Security Agency

Retrospective on USA PATRIOT Act, one year later

Asked about the impact of the USA PATRIOT Act, Spike Bowman said that the crux of the Act is its recognition that information is essential to preventing terrorism. It allows greater use of information from various sources to track down individuals linked to terrorism and prevent attacks. Kate Martin said it is difficult to fully evaluate the impact of the Act on civil liberties because we do not have the information to tell what has happened. The collection of information is done in secret, and we don't know how many people have had their medical records or other information collected by the government. People who are subjected to FISA surveillance are not given a sufficient opportunity to challenge this information later on in court, she argued. Others stressed the importance of oversight to prevent abuses.

An American MI5?

Participants discussed proposals for a domestic intelligence collection agency. The Gilmore Commission on domestic preparedness to address WMD terrorism, for example, has recommended a separate agency for intelligence collection inside the US because they do not believe FBI can quickly enough change from a focus on prosecutions and building a criminal case to the mindset required for more open-ended intelligence. Moreover, they felt it would enhance civil liberties protections to not have intelligence collection undertaken by those with law enforcement powers. Snider said that he opposed a US version of MI5 because the FBI does this now and there's no need to set up a new infrastructure and reinvent the wheel. However, he would maintain a separation between the two functions of law enforcement and intelligence with the Bureau. Martin also expressed concerns about the proposals for a domestic intelligence agency, explaining that they do not address longstanding problems related to stove-piping in intelligence. She noted that there are still problems in the “hand-off” from CIA to FBI when a suspected terrorist comes from abroad into the US; some argue that a new entity or a new part of the FBI devoted to antiterrorism operating here and overseas, but within the law enforcement framework, might be the best response to this problem. Bowman said that the FBI has long been concerned with prevention, despite frequent assertions to the contrary, and that there are problems with MI5 in England right now. Others argued that the FBI has problems sharing information, and that it may be easier to establish a new entity than to try to dra-

matically change a deep-seated culture. Some panelists said that the oft-noted need to “connect the dots” might effectively be addressed by proposals for a fusion center that would combine, or at least co-locate, the counterterrorism analysts from FBI, CIA, and members of other agencies to foster real time cooperation.

Data mining programs

The main challenge facing both law enforcement and intelligence, argued some of the panelists, is getting timely access to, and understanding the significance of, information the government is already authorized to obtain. There is a lot of available information, much of it in the private sector. The best way to identify terrorists is through looking at transactional information. Some argued that if the government had been able to access the information about who was getting tickets, and who was living at which address, and which frequent flyer numbers they were using, it could have identified 11 of the September 11 hijackers. DARPA (Defense Advanced Research Projects Agency) is trying to develop technology to mine potentially vast amounts of information to assist in finding terrorists. Shiffrin emphasized that this is still very much in the development stage and has not yet been implemented. Thus, there is time to build in the necessary safeguards-technological as well as procedural-to protect privacy.

Several panelists argued that the government needs to use all the information it can lawfully access in order to prevent another attack. They noted that technology is outstripping the laws that were passed about information management a few decades ago. Some made the case that it was absurd that the government had been forbidden from doing things like tracking electronic clips about people, which any child can now do using common search engines. However, it was pointed out that if the government wants to collect information from private companies, it will need to protect those companies from potential liability. Some argued that the Privacy Act regulations forbidding sharing of information by companies with the government should be changed. In addition, foreign laws, such as the data protection laws of the European Union, could significantly complicate these data mining efforts if they involve information from EU databases or about European citizens.

Panelists noted that stringent safeguards, including the ability to know who is mining the data for what purposes, would be vitally important. Even then, however, it was noted that some might legitimately question whether the government should have the ability to compile so much information about individuals not suspected of crime.

Revisiting intelligence restrictions on operating in the US

The panelists discussed the use of national technical means inside the US, as well as the impact of restrictions on other kinds of collection in the US, or about US persons, in light of changes in technology and in the nature of the threat. Shiffrin talked about the use of intelligence assets in the hunt for the snipers in the metropolitan area last year. He suggested that Americans might question why technology purchased with their tax dollars could not be used to keep them safe here at home. On the other hand, decisions like that in the Kilo case restricting the use of thermal imaging to detect illegal drug production in someone’s home, reveal some of the potential 4th Amendment concerns. Moreover, it was noted that we might want to refrain from doing things that may be legal but that raise issues about the kind of society in which we want to live. Others wondered whether we ought to change some of the restrictions on NSA, such as the prohibition on collecting electronic communications that reside for a brief period of time in the US (in an ISP, for example) but begin and end outside the US. Similarly, some questioned whether we should revisit the blanket prohibition on CIA having any internal security functions. ABA

Thursday Lunch Speaker

Ambassador Francis Taylor - Assistant Secretary of State for Diplomatic Security, U.S. Department of State

Taylor offered his perspective on the global war on terrorism and how it is being fought. There is a worldwide, persistent, and lethal threat from terrorism, Taylor said. President Bush, Secretary Powell, and State Department diplomats worked tirelessly to gather political support and military support for the US war on terrorism. The soldiers used 21st century technology and 19th century military techniques, integrating people on horseback with people in jets.

The US attacks helped to liberate the people of Afghanistan from the oppressive rule of the Taliban. While work there is not done, Taylor said, the US is making efforts to prevent any slipping back into poor governance. Military efforts are important, but often not the most important part of the fight against terrorism. Diplomacy and law enforcement are of equal importance. Success will not come in one dramatic strike, Taylor said. Rather, it will come through the patient accumulation of successes throughout the world.

Countries and multilateral organizations invoked treaties to support the US after September 11. Support from countries as varied as Pakistan, Russia, South Africa, China, and the Philippines has been the backbone of our coalition and our fight against terrorism. The US also assists other countries in their fight, from seminars in drawing up laws to specialized law enforcement programs. Taylor vowed that the US will also continue to work to fight poverty and terrorism, which, while not the causes of terrorism, breed grievances that extremists can exploit.

The Department of State has sought to counter negative images of the US, and counter ideas that the US is targeting any specific ethnic group in the war on terrorism. It also works to advance the notion that suicide attackers are not martyrs but cowards and simple criminals. Cooperation throughout the world has rounded up al Qaeda cells worldwide, increasing our safety and that of other countries. Suspected terrorist cells have been uncovered in Portland and Buffalo. Terrorist money worldwide has been blocked.

UN Security Council Resolution 1373 calls for all nations to keep their systems free from terrorist funds, and to report on their efforts. This is a global campaign, Taylor said, and UN efforts to attack the problem have an enormous impact. Terrorist organizations and those who raise money for them have been uncovered.

“Good human rights policy is good terrorism policy,” Taylor said. When there are political and human rights issues that need to be addressed, simple law enforcement does not constitute a solution.

Despite these successes, Taylor does not see a victory on the horizon. There is a need for sustained international will and a continued coalition. It’s a daily task to remind people of the threat. The US must also bolster the capacity of states to fight terrorism. The US cannot find and prosecute every terrorist or fight the proliferation of WMD without international assistance. “We will prevail when the laws of the world are such that terrorism is no longer sanctioned in any part of the world and we have effective law enforcement and legislative systems” to prosecute and convict terrorists, Taylor said. The State Department recently hosted a conference intended to offer suggestions and guidelines for other countries from various regions in the world. Speakers came from the US, UK, EU, and other countries.

Taylor concluded by stressing that the war will go on “as long as it takes.” There is a serious threat to US, our friends, and our interests. Tracking complex financial transactions can have a greater impact than an artillery barrage. Diligent and persistent sharing of information can produce results as far-reaching as a major intelligence operation. **ABA**



Francis X. Taylor

Friday Lunch Speaker

John Bellinger III - Senior Associate Counsel to the President and Legal Adviser to the National Security Council.

Bellinger commended the Standing Committee for its efforts to bring together administration and government officials with national security lawyers. Administration officials “get a lot out of this conference, that’s why many of us are in attendance,” he said.

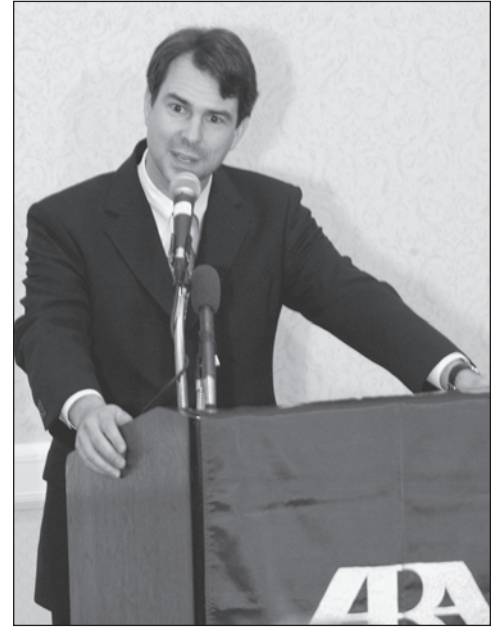
Bellinger noted that last year’s conference discussed the president’s executive order authorizing military tribunals and the Patriot Act giving additional authorities to the administration to investigate terrorist activities. There were many major legal developments in 2002. As the administration addressed new threats, Bellinger said, it reexamined old rules, such as the “application of the Geneva Convention to our war on terrorism and the obsolescence of the ABM treaty.” He focused his remarks on the National Security Strategy and actions taken on Iraq’s decade of defying international obligations.

In September 2002, President Bush issued his first National Security Strategy. Bellinger said that the document was edited by the president, intended as a single comprehensive statement of American national security challenges and goals. Bellinger laid out the three main pillars of the National Security Strategy: to defend peace through actions against terrorists and outlaw regimes, to preserve peace by fostering good relations with other great powers, and to extend peace by seeking to extend the benefits of freedom and prosperity around the globe.

Defending the security of the US is the fundamental goal of the federal government at any time. President Bush has made clear that we will use every diplomatic, financial, law enforcement, intelligence, and military effort to root out al Qaeda and others who attacked on September 11 and others who threaten now, Bellinger said. In some cases, he argued, we must be prepared to take action before threats have fully materialized. We must be prepared to preempt possible attacks against the US.

Bellinger attempted to “clear up several fallacies about our policy on preemption.” He believed that the policy has been mischaracterized as a major change in US policy and international law. Preemption does not only involve use of force. Diplomatic action, financial action to dry up terrorist fundraising, interdiction of weapons, and intelligence activities are part of preemption. He added that the concept of preemptive use of force is not new. The right of preemptory self-defense is long recognized in international law.

Grotius and Vattel hundreds of years ago recognized the use of force as justified not only after an armed attack, but before one occurs, Bellinger argued. The criteria that Daniel Webster laid down in the famous Caroline case in 1837 have long been cited as the international law standard for anticipatory self-defense. In that case, a British-Canadian militia crossed into the US near Buffalo to blow up the US steam ship Caroline, which had served as a launching point for Americans providing help to insurgents in British Canada. The British argued that their actions were justified as anticipatory self-defense against additional attacks. The US rejected that claim, and Secretary of State Daniel Webster laid out the principles that have become the standard for the last two hundred years. There must be an imminent threat, the exhaustion of peaceful means to respond, a necessary action, and proportionate response.



John Bellinger III

Bellinger expressed the view of the administration that “the Caroline factors should continue to be applied today, except that they have to be modernized to adapt to the reality of modern warfare,” with the potential for catastrophic weapons of mass destruction attacks and suicidal attacks by terrorists. Old rules must be adapted to reflect modern threats.

In the 21st century, Bellinger argued, the Caroline factors must be expanded to address a fifth factor: the magnitude of the potential threat. The magnitude of the harm becomes a coefficient by which the imminence criterion must be measured. In the 18th century, one could wait until an army had massed on the border or a warship had steamed to the edge of our harbors before one used force in self-defense. You couldn’t simply use force under international law because another country had the capability. But in the 21st century, he maintained, it would be too late to wait until a terrorist group has developed nuclear, chemical, or biological weapons that they might try to slip into an American city. The old imminence standard must be treated flexibly to reflect the new threats.

Finally, Bellinger stressed that as a policy matter, any preemptive use of force would not be our first choice. The number of cases where preemptive use of force might be justified is very small. Preemption is not a green light for other countries to act first without exhausting other peaceful means, he said. We would only use force preemptively at the end of a long chain of efforts, when the risks are grave, and when other means have been tried and have failed or would clearly be futile.

One threat that the Bush administration is committed to confronting comes from Iraq, Bellinger said. The combination of Saddam Hussein’s violent ambitions, his development of weapons of mass destruction, his support for terrorism, and defiance of the world community is a “witches’ brew that we cannot ignore,” he argued.

While some maintain that the US is acting lawlessly, Bellinger presented a series of facts and arguments to explain why it is Iraq that “through a decade of defiance and deception has flouted its international obligations and numerous international legal norms.”

“For more than a decade, Saddam Hussein has deceived and defied the will and binding resolutions of the UN,” Bellinger argued. Hussein had “continuously violated at least 16 UN Security Council resolutions, continued to develop chemical, nuclear, and biological weapons and prohibited long range missiles, refused to allow unconditional access to UN weapons inspectors, brutalized the Iraqi people including through committing torture and gross human rights violations rivaling the Nazis, supported international terrorism, refused to account for prisoners of war and missing individuals following the Gulf War, refused to return stolen Kuwaiti property including Kuwaiti archives, and circumvented UN economic sanctions,” Bellinger reported.

Bellinger listed the UN Security Council resolutions that the US believes Hussein has violated: 686, 687, 688, 707, 715, 949, 1051, 1060, 1115, 1134, 1137, 1154, 1194, 1205, and 1284.

Since 1991, the UN Security Council repeatedly condemned and deplored Iraq’s noncompliance, and has found Iraq in violation of its international obligations, Bellinger argued. It has repeatedly told Iraq that it will face “serious consequences” for failure to observe its obligations. Bellinger expressed the belief that “these violations and defiance should be of grave concern to the ABA and this committee of lawyers committed to upholding the rule of law.” An international legal system cannot work if rules are established and then not enforced, he argued. In September, President Bush told the UN Security Council that the world faced a test, and the UN faced a difficult and defining moment. Bellinger posed the questions, “Will Security Council resolution 1441 be honored and enforced or put aside without consequences? Will the UN serve the purposes of its founding, or will it be irrelevant?”

In going to the UN, Bellinger pointed out, President Bush has pursued a multilateral strategy, through international institutions and pursuant to the UN charter to force Iraq to comply with its obligations. He did so because he wanted to emphasize to Iraq that the world community condemned Iraq's behavior, Bellinger explained, not because the US needed additional authority from the UN to use force against Iraq. The US believes it already had the authority under international law under UN Security Council resolutions 678 and 687 to use force against Iraq to enforce compliance with applicable UN resolutions.

Bellinger explained that resolution 678 from 1991 authorized member states to use "all necessary means" to uphold resolution 660, the applicable resolution at the time, and all subsequent resolutions and to restore international peace and security to the area. This was the legal authority for Operation Desert Storm. After the war, resolution 687 reaffirmed the authorization in resolution 678 and declared a formal cease-fire between coalition forces and Iraq, "provided that Iraq accepted the conditions laid out in resolution 687," Bellinger said. Iraq accepted the terms in resolution 687 but "has subsequently breached almost all of these obligations, as the Security Council has explicitly recognized." Iraq did not destroy its WMD, did not comply with the inspections regime laid out in resolution 687, did not cease support for terrorism, and did not return Kuwaiti property or account for the missing. Because Iraq is in material breach of the terms of resolution 687, the cease fire is legally no longer in effect, and resolution 678's earlier authorization to member states to use all necessary means has been re-triggered, Bellinger argued. This authorization to use force continues until Iraq complies with its obligations under resolution 687. This international law component is in addition to Congress's reaffirming the president's authority under domestic law to use force to defend the US against the threat posed by Iraq, and to enforce all relevant UN Security Council resolutions on Iraq.

The UN passed a strong and unanimous statement condemning Iraq for its defiance. Even Syria joined the vote, Bellinger noted. Resolution 1441 is a carefully crafted resolution that builds on the previous decade of UN statements. The preamble's 18 paragraphs recognize that Iraq's noncompliance with the Council's resolutions and its proliferation of WMD pose a threat to international peace and security, and they deplore Iraq's refusal to submit complete declaration of its WMD programs, its obstruction of weapons inspectors, and failure to comply with other resolutions.

The resolution's 14 operative paragraphs reaffirm that Iraq has been and still is in material breach of its obligations. The Security Council decides to give Iraq a final opportunity to comply. They require Iraq to submit a complete declaration of its WMD programs within 30 days. And it establishes an enhanced inspections program requiring immediate, unimpeded, and unconditional access to all sites in Iraq, including presidential palaces and that require Iraq to comply with all private interviews with Iraqi scientists and others outside the country and finally require Iraq to cease hostile acts against UN personnel or member states seeking to uphold UN resolutions.

Paragraph 4 states that any misstatement, omission, or failure to comply will constitute further material breach. Under paragraph 11, UN inspectors are required to report immediately any Iraqi interference or any failure to comply with the resolution. Paragraph 4 also permits member states individually to report violations. If Iraq violates resolution 1441, the resolution does not require a second resolution to authorize use of force by member states. Instead, the resolution requires that if a violation is reported, the Security Council must meet immediately to assess the situation and to be mindful when it is meeting that it has repeatedly warned Iraq that it would face serious consequences as a result of its violations.

We already have authority under previous resolutions to use force to compel Iraq to comply with its obligations. If Iraq does not comply, we would certainly expect that the Security Council would grant further authority to use force, but the president is prepared to act if it does not. Resolution 1441 is designed not only to put in place a more aggressive weapons inspections, but equally important, to test whether Hussein, after a decade of defiance, will begin to cooperate with the UN. Unfortunately, his reaction so far doesn't indicate a

cooperative disposition. Iraq's written response is filled with conditions and ambiguous language. Hussein has continued to fire on US and UK planes many dozen times. These actions already violate paragraph 8, which prohibits hostile acts against member states upholding UN resolutions, and are material breaches of paragraph 4 of the resolution.

Although we have the options of referring these violations to the UN for assessment, we plan to continue to have our pilots take routine military actions to defend themselves. Iraq's continuing to fire poses a significant risk to our pilots and UN personnel.

We would hope that Iraq has finally gotten the message that the world community is serious about making it comply with its international obligations and to disarm. President Bush has made clear that he is not looking for an armed conflict with Iraq. But Iraq must not be permitted to continue to defy the UN or to threaten US national security. As lawyers and as people interested in international rules, we should all agree that there must be some consequences for Iraq's failure to comply, and not just more empty threats of serious consequences. At President Bush's request, the international community has sent a strong message to Saddam Hussein that he has one final opportunity to comply with his international obligations. Bellinger concluded, "the UN has said to Iraq, you have mail. Let us hope that the mail is read and received."

Bellinger then responded to questions. One questioner advanced the view that the no fly zones may be illegal under international law. Bellinger responded that the longstanding basis for the US enforcement of the no fly zones has not been challenged. International authority comes from resolutions 648 and 949, he said, which allow action to be taken to prevent Hussein from repressing his people and prevent him from taking action against his neighbors. Even if Hussein did not agree with our legal theory, Bellinger said, we hoped that in a spirit of cooperation, he would refrain from shooting at our pilots.

Another questioner pointed out that many UN resolutions, including some cited by Bellinger, call for the entire Middle East to be free of WMD. He asked if the US would press Israel to eliminate its nuclear weapons to help US "credibility" in the region. Bellinger responded that while many resolutions that the US has signed on to call for a nuclear-free Middle East, resolution 1441 focuses on Iraq.

Responding to a question about the recent decision of the FISA court, Bellinger said that he finds frustrating the way the FISA is discussed as a secret court in the media. No court that issues a Title III wiretap in a criminal investigation operates publicly, he pointed out. The FISA court is composed of federal district court judges who are chosen by the chief justice. He called them "regular judges fulfilling a special purpose." He said that the administration was very pleased with the decision, especially the need for closer cooperation between law enforcement and intelligence and between intelligence and prosecution. The decision allows intelligence information at earlier stages to be provided to prosecutors. This is consistent with the administration's goal that different parts of the government work together. ABA

OUTER SPACE LAW AND POLICY & NATIONAL SECURITY CONCERNS IN THE 21st CENTURY: A CANTIGNY CONFERENCE EXECUTIVE SUMMARY

By Angeline G. Chen

FOREWARD

The future of the human use of space is at an uncertain point. New debates have been sparked by the tragedy of the space shuttle Columbia. The treatment of national security in space will have significant impact on societies and economies on Earth, and serve as the linchpin for further development in space. The United States will play a lead role in these debates and decisions. It is imperative that the decisions made be comprehensive, informed and educated.

On June 26-28, 2002, the McCormick Tribune Foundation and the Standing Committee on Law and National Security of the American Bar Association co-sponsored a conference addressing issues relating to the intersection of outer space law and policy and U.S. national security concerns. The conference, part of the McCormick-Tribune Foundation's Cantigny Conference Series, was attended by experts from multiple disciplines connected to the field of outer space and/or national security.

The objective of the conference was to help begin and shape a comprehensive dialogue. The conference was non-attribution, with the opinions expressed being those of the speakers and not of the organizations with which they are affiliated.

EXECUTIVE SUMMARY

New technologies and globalization have far-reaching implications. Our use and exploitation of outer space plays an integral and key role in assuring America's national security and the continuity of critical activities in the military, commercial, civil, defense and research sectors. The U.S. is more dependent on space than any other country. Creation and implementation of space laws and policies must be informed, deliberate, and closely coordinated with all stakeholders.

U.S. National Interests in Outer Space

The Department of Defense's 2001 Quadrennial Defense Review states, "because many activities conducted in space are critical to America's national security and economic well-being, the ability of the United States to access and use space is a vital national interest." Conference attendees agreed that a clear definition beyond the rhetorical level of U.S. interests in space is currently lacking, and supported the establishment of clear objectives based on those interests. Attendees also supported a determination as to whether U.S. investment in space capability is being effectively mobilized in the pursuit of broader national interests. Part of the task in defining our national interests in space involves consideration of whether space is that much different from air, land, or sea, which do not invoke the same emotional responses as space. Is it time to alter our cultural perception of space as a separate and different arena for human activity? Would such a perception shift in how we view space change how we approach our use and exploitation of it?

Participants expressed a number of views on the interests in space that the U.S. needs to defend. We have an interest in being able to use space rapidly and precisely. We require assured access to space. We have an interest in denying adversaries from gaining access to either our space-based assets or space capabilities. Our ability to deny the use of others, under appropriate circumstances, to access and use space is equally as vital as our own ability to use it. We need to define threats, assess their probability, then plan accordingly. We need to protect our interests in space in a fashion that least negatively impacts other countries. We must thus think in multilateral terms regarding space.

Technology was recognized as playing a key role with regard to any discussion about space. The integration and interdependency of the space sector with America's critical infrastructure and emerging technologies is undisputed. Satellites are critical in facilitating military and civilian communications. Broadcast television, radio, earth sensing, exploration, global positioning, military uses and verification of arms control agreements are enhanced by space-based assets. The U.S. government's commitment to assured access to space, along with the need to support access to space for commercial uses, likewise underscores the importance of sustaining U.S. launch capabilities.

With our increased dependency and reliance upon technology, however, comes a proportional increase in our vulnerability. While technology itself is neutral, all technologies have the potential to facilitate undesirable outcomes. Our economic and security space systems are potentially vulnerable to interference. The following questions were posed: How can that vulnerability be reduced? What are the appropriate policies and technical decisions that must be executed? Beyond establishing law and policy, whose responsibility is it for implementation?

It was generally agreed that use of diplomacy and international agreements had proven relatively successful to date with regard to treatment of space. Attendees noted, however, that this might have been due to the small number of nations engaged in accessing space. As that number increases, and as states recognize the potency of outer space for offensive purposes, the debate regarding treatment of space from an offensive perspective has become heated. Arguments against space-based weapons include the positions that: (1) they are likely to be ineffective; (2) they are probably easily circumvented by various technological developments; (3) space-based assets are probably too fragile to protect with weapons; and (4) putting weapons in space to any major degree would be unpopular with our allies.

Before actions are taken to change our activities or define our national security interests in space, threats should be identified, conference attendees argued. Maintaining space-based assets for use by the U.S. military for purposes of precision, lethality and timeliness involves one set of threats. Few entities are currently technologically capable of materially impairing U.S. capability in this regard. A terrorist with a credit card and the ability to use commercial assets presents a different set of threats.

Space Management and Organization by the United States

The U.S. Commission to Assess United States National Security Space Management and Organization (the "Commission"), established by Congress to examine organization and management issues relating to U.S. security in space, released its report in January 2002. The Commission's members were unanimous in affirming space interests as a vital U.S. security interest. The Commission made a number of key recommendations, including: (1) the need for presidential leadership; (2) encouraging the relationship between the defense and intelligence communities; (3) the need to examine space as a likely theater of conflict; and (4) investing in science, technology and personnel. Conference attendees expressed agreement with the Commission's findings.

Conference attendees agreed on the necessity of defining responsibilities of various players in space. Clear delineations will ease resource allocation. Participants mentioned identification of sectors, focus areas falling under each or several of those sectors, decision-making authority, and labor pool and professional development as chief concerns. Participants identified four distinct but converging sectors in space: military, intelligence, commercial, and civil.

In terms of focus areas of national security space, four were identified: (a) force enhancement, (e.g., intelligence functions, navigation functions and communications); (b) the infrastructure required for conducting space activities; (c) space control through development and maintenance of space capabilities; and (d) force application.

Centralization of decision-making authority for all aspects of space was also identified as a critical need. Some participants expressed the view that fragmentation has thwarted achievement. Ensuring clear accountability and authority lines will likewise be crucial.

Finally, conference attendees were in consensus that significant effort must be placed in professional development of a space-savvy and skilled labor pool in all segments of the space community.

Prioritizing and Achieving U.S. Space Policy and National Security Objectives

Once interests and organization/management strategies have been identified, priorities must be established among the various objectives for space and how best to pursue them. Prioritization of objectives is essential. Participants noted that determination of those priorities is a dynamic process. A number of these trends will affect calculations over time: globalization, technology convergence, a reversal in expectations for commercial space, and a degrading of the existing space ground infrastructure which was built during the Cold War.

Participants posed a number of questions, including: should existing international agreements be revised? Should options be provided for such issues as private property rights, or a greater role of the private sector in space? What are some of the options for establishing a mechanism for improvement in the shaping and implementation of U.S. space-related objectives?

Some conference attendees posited that more focus was required on budget allocation for research and development in exploration and basic science research technology. It was noted that some of the most productive areas of cooperation across all sectors fall within the area of basic research, which often can contribute to national security.

Dual-use technologies highlight tensions between the public and private sectors. Participants identified a number of separate issues related to this topic, including licensing of remote sensing systems, missile proliferation, export controls, and spectrum allocation. A participant explained these debates as conflicts between different perceptions of the national good. There was agreement that the U.S. needs to be directly involved in discussions of the global regulatory environments governing outer space.

Other areas seen as requiring more attention and resources included: technological investment; education and outreach; the creation of a nurturing social and cultural environment for space-related activity; a long-term view towards development and sustaining of space capabilities; international interests and cooperation; and interoperability requirements.

Balancing Interests of the Commercial Sector and National Security

The 1996 National Space Policy notes the need for the U.S. to have a strong, stable and balanced national space program that serves our goals in national security, foreign policy, economic growth, environmental stewardship, and scientific and technological excellence. A Defense Science Board study on space superiority also notes our need for the integrated and effective use of our civil, commercial, and national security space, as well as a strong industrial base to support our activities.

It was recognized that there is interplay of the commercial sector's interests with other requirements and foreign policy efforts (such as the government's interoperability or operational cooperation requirements with other countries and export controls). Conference attendees noted the need to consider the commercial sector's critical role in achieving U.S. security space objectives and proactively supporting that role in an appropriate manner.

Recommendations were made that the U.S. continue to fight for legitimate overseas business opportunities for U.S. space firms and enact appropriate trade and foreign policy regulations to support those efforts. In addition, as a consumer, it was noted that the government should look for all possible opportunities to use commercial assets, products, services and goods where feasible. Likewise, given the international interest and efforts with regard to space (including new entrants to the field) it was felt that the government should likewise look for greater opportunities for industrial consolidation and alliance with countries that share some of our common security concerns.

The blurring of distinctions as to responsibilities and requirements between various sectors and capabilities led to a significant number of questions, e.g., what are the responsibilities of U.S. companies in terms of the services they provide on an international basis? For example, what is a U.S. corporation's obligation, if any, if a terrorist group uses the company's system in ways that threaten U.S. national interests? What are the implications of further consolidation in the U.S. space sector? What does it mean for U.S. procurement activities or for our competitiveness? What are the implications of potential international consolidation?

It was noted that a balance with regard to export controls especially needs to be struck between the commercial interest, which is to sell equipment and services to as many users as the law will allow, and the national security concern, which is to control access to military-critical capabilities for force protection purposes. Regulations can often become a burden or a tax on U.S. entities.

A significant number of commercial entities that provide space services or products have a multinational character. Defining the U.S. commercial interest becomes more complex in these venues. Foreign investment can present a complicated scenario with multiple, sometimes competing, variables for consideration. International joint ventures in the launch services sector that were able to successfully achieve government requirements and national security objectives while remaining commercially viable, was discussed as a case study in how this balance could be achieved.

Participants noted that the government should recognize that certain industries, such as satellite manufacturing and launch services, constitute assets that the U.S. needs to maintain as part of the U.S. critical national security infrastructure. The decision has to be made as to whether or not to try to keep these types of industries available either completely or almost exclusively domestically. Some market sectors are so critical that they need government support. Markets such as the launch services sector are significantly distorted by non-market factors. Countries pursue goals for national prestige, strategic linkages in the case of launch vehicles with missile capability, and political leverage. The government's standard approach has been to allow market forces to work first, and then see if government intervention is required. Some participants argued that for some sectors, competition is inefficient for reaching the prime or most important objectives.

With the advance of commercially available technology, other countries and people will have access to similar capabilities to the ones that we have. And their requirements may not align with ours. Our doctrine focuses on precision and yet today we are up against adversaries that may have a much narrower requirement set that does not pay heed to minimizing collateral damage. How should we accommodate these differences in force application with regard to commercially available capabilities? Some participants expressed the view that rather than focus on control, the U.S. might think more proactively about how this new transparency relates more broadly to all of our national security missions and how we deal with it.

Partnerships and International Cooperation in Space

Participants agreed that international interaction, cooperation, and partnerships in space clearly influence national security concerns of the United States and may, in turn, affect policy and the law of outer space on both the national and international levels.

In the area of commercial satellite systems, both the International Telecommunications Satellite Organization (INTELSAT) and the International Maritime Satellite Organization (INMARSAT), were discussed. Both organizations were formed decades ago at a time when access to space by a single nation was not economically feasible. The two organizations were thus created pursuant to international agreements to meet basic needs of the international community. Since then, continued development of the satellite operators market and commercial competitors have led to the privatization of international consortiums such as INTELSAT and INMARSAT. The continuing multinational character of these organizations and the services they provide, however, continue to require international cooperation and understandings with regard to those systems.

Our dependency on these multinational, now commercial, entities was also recognized. Participants acknowledged that the U.S. must work with other space-faring nations to enact and implement reason-

able and consistent legislation and protections similar to those of our own to maintain consistency and avoid conflicts with our partners. Our ability to maintain a competitive commercial sector depends on our ability to do so effectively and efficiently. Policy failures in the area of encryption provide an illustration of the perils of failure to cooperate. The debate over encryption was similar in that the key concerns were in achieving a balance between the promotion of U.S. dominance from a commercial standpoint versus the protection of national security through restricting access to technology. The government's failure to identify a clear and dominant objective aligned with market realities and a unified strategy resulted in confusion and a rapid ascendancy of foreign markets for encryption over which the U.S. had no control.

In addition, participants expressed the view that international interdependencies in the commercial sector for key components and manufacturing capability will increase over time, bringing a decrease in our nation's ability to control or even influence such capabilities. Each existing satellite system incorporates significant international dimensions, from investment to components to distribution partners. Therefore, full-scope consideration must be given to what in fact the U.S. position should be with regard to reliance on so-called "U.S. systems" versus "foreign systems." Participants cited the Anti-Deficiency Act as a well-intentioned regulation in need of review. The Anti-Deficiency Act mandates that no U.S. agency may enter into a contract that commits it to pay more funds than have been appropriated to pay those commitments. This restriction often hinders the government's ability to react commercially to market realities. This example underscored the necessity for the review of existing U.S. legislation to ensure their efficacy and appropriateness.

Organizations such as the World Trade Organization and regional consortia that carry enforcement and policy-shaping powers also will affect national security positioning.

With regard to the existing legal and regulatory framework, it was noted that the existing treaties relating to outer space have served their purpose well to date. Many believe that the Outer Space Treaty's provisions are as relevant and important today as they were at the inception of space exploration. Under the existing legal regime, space exploration and use by nations, international organizations, and now private entities has flourished. Some participants expressed the view that existing agreements should be renegotiated. Others argued that opening those treaties for re-negotiation could prove detrimental to our national security interests, since a number of nations would be sure to press for significant limitations on our military activities in space, which do not exist under the current regime.

Participants also noted that the current legal regime has encouraged joint efforts such as the International Space Station, the International Telecommunications Union and various international joint ventures in the launch services industry. Because space is legally accessible to all, the need for continued international cooperation and coordination in this area will remain. Some participants argued that U.S. activities in this theater must seek an accord with international opinion.

Legal Implications of National Security Operations in Space

The final session of the conference sought to explore the legal implications of U.S. national security operations in space. Because the existing legal regime permits military use of space, attendees focused on the proposed changes for the future with regard to potential weaponization of space and the identified focus areas for space (i.e., force enhancement, infrastructure requirements, space control and force application). U.S. organizational and national security decisions will affect this debate.

Some participants argued that existing space treaties are regarded as constituting customary international law, and that the U.S. should adhere to those agreements' principles such as the freedom for all

nations to explore and use outer space and the restriction of using outer space for peaceful purposes. Participants debated whether or not the existing regime completely prohibited placement of weapons in space. The Outer Space Treaty specifically prohibits the placement of nuclear weapons or weapons of mass destruction either in space or on celestial bodies. Certain types of activities supporting national security are permissible, such as surveillance for arms control and peacekeeping purposes. One key question in this area is what interpretations of existing treaties are reasonable within the context of intended military-supported or national security-focused activities are intended.

Some participants argued for the U.S. to adopt a more long-term perspective. Many agreed that outer space will become a focus of the military. Space may become the next theater of conflict or force dominance, or at a minimum, an increased area for military operations. Today the military utilizes outer space for force enhancement, and some predicted that the future will bring an expansion in space control activities. Others anticipated that there would be a groundswell of support for policies and laws encouraging technology development with less focus on definitive end-use or application.

Participants noted in their final observations that those involved in the ongoing discussion should recognize that with our increasing dependency on space is the concurrent increase in the potential for interference and vulnerability. The threats and opportunities to which U.S. policy and strategy responds will continue to evolve and transform. The law, which many participants conceded often lags behind technology, cannot hope to prevent or deter the entire spectrum of those threats. It can, however, provide the appropriate legal and regulatory framework and clear rules of engagement and operational conduct that will allow the U.S. government to achieve its defined national security objectives with regard to outer space. ABA

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