



National Security Law Report

THIRTEENTH ANNUAL MORRIS I. LEIBMAN REVIEW OF THE FIELD OF NATIONAL SECURITY LAW CONFERENCE

Conference summary edited by Pamela J. Parizek and Matthew Foley, with assistance from Daniel Monaco, Jen Jaskel, Tom Lyons, and Jennifer Stahlschmidt of Catholic University of America Columbus School of Law. All photos by Robert Turner.



ABA President Dennis Archer opened the conference on Thursday and expressed his appreciation for the tireless efforts made by our military personnel and to the Standing Committee, who has been "on the forefront of the issues that concern our service members for the past 40 years."

The ABA Standing Committee on Law and National Security's Thirteenth Annual Review of the Field Conference addressed recent developments and ongoing issues in national security law. Held on November 20 and 21, 2003, at the Crystal City Marriott in Arlington, Virginia, the conference drew a distinguished group of national security law experts from the government, academia and the private sector as presenters and attendees. Topics ranged from changes in the law over the course of the year to debates over the proper course to take in reforming the Department of Defense, prosecuting terrorists, and other issues. Conference participants spoke in their private capacities, not on behalf of their employer organizations.

PANEL I Executive Branch Perspectives

Consistent with tradition, the conference began with a roundtable discussion of new developments in national security law from the perspective of the executive branch. Moderated by Colonel M. Tia Johnson, US Army, Legal Advisor, Defense Reform Commission, the first panel included senior officials from the National Security Council, the Central Intelligence Agency, the Federal Bureau of Investigation, the Department of Defense and the Office of the Joint Chiefs of Staff.

John B. Bellinger III, Senior Associate Counsel to the President and Legal Adviser, National Security Council, discussed the legal issues associated with the conflict in Iraq during the past year, which he described as a case study in the work of a national security lawyer in the administration.

Bellinger noted that in November 2002, the United Nations (UN) Security Council adopted Resolution 1441, which deemed Iraq in material breach of its disarmament obligations, provided Iraq one final opportunity to comply, and found that if Iraq did not comply with its new obligations it would be a further breach, resulting in serious consequences. Saddam Hussein did not comply with the new obligations.

From November 14, 2002, the date of adoption of the UN Security Council Resolution 1441, to March 20, 2003, the date military action began in Iraq, administration lawyers worked diligently to plan for war and peace in Iraq. Despite media criticism to the contrary, Bellinger advised that there was in fact extensive planning by the intelligence agencies and the Departments of Defense, State, Treasury, Justice and others regarding both hostilities against Iraq and reconstruction efforts. Topics ranged from which buildings could be

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legitimate targets, to whether the local currency could be replaced with a new currency after the war.

Bellinger maintained that the United States was fully justified, under both domestic and international law, in using force against Iraq. The US, Bellinger said, did not require a new UN Security Council resolution to authorize the use of force as a legal matter. Rather, previous UN Security Council resolutions dating from the Gulf War—UN Resolution 678 in 1990 and UN Resolution 687 in 1991—already provided the US a legal basis to use all necessary means to ensure that Iraq complied with its obligations. The reliance on these already-existing resolutions was justified, Bellinger said, considering that, for the last ten years, US administrations relied upon these resolutions in applying no fly zones in various military actions against Iraq. Additionally, Bellinger noted that British Attorney General Lord Goldsmith based his support for British participation in the military action against Iraq upon these resolutions, and that the UN Security Council itself had relied upon these previous resolutions in its actions in the previous 10 years.

The resort to force was also justified, Bellinger stated, to address the threats posed to both the US and the international community by Iraq's refusal to comply with its international obligations. After seventeen ignored UN resolutions, the international community had exhausted diplomatic efforts to persuade Iraq to comply. As President Bush recently reaffirmed in his remarks in London, nations must be prepared, as a last resort, to use force to confront threats to the international community. Bellinger continued that the inability to uncover nuclear, chemical, or biological weapons does not amount to a lack of legal justification for the use of force against Iraq, given its continuous material breach of its disarmament obligations after the first Gulf War. This material breach provided the US and the UK full UN authority to use force against Iraq.

As the US prepared to commence military action in Iraq, said Bellinger, administration lawyers worked very closely with civilian and military lawyers from the Pentagon to ensure that the use of force in the war complied with the law of armed conflict. A significant amount of lawyering was required for each bomb that was dropped in Iraq. Efforts were made to minimize the number of civilian casualties, including the removal of certain high collateral damage areas from the target list, and the issuance of warnings to areas where there may have been civilian casualties.

Once hostilities in Iraq commenced, administration lawyers worked on three significant legal actions: (1) the President's report to Congress explaining the decision to use force, as required under the October 2002 Congressional Resolution authorizing the use of force against Iraq, consistent with the War Powers Resolution; (2) coordination with the State Department to prepare and submit a report to the UN Security Council explaining the use of force, consistent with the requirements of Article 51 of the UN Charter and UN Security Council Resolutions 678 and 687; and (3) the issuance of an Executive Order confiscating and vesting in the US

approximately \$1.6 billion in Iraqi government assets that had been blocked and frozen by the Treasury Department after the Gulf War to assist in the reconstruction of Iraq.

There were also several legal issues associated with the reconstruction effort. The first was how to feed the Iraqi people once the war began—a complicated issue since the oil for food program was controlled by the government. To resolve this issue, UN Security Council Resolution 1472 was passed to enable the UN Secretary General to stand in the shoes of the Iraqi government to release the funds.

Post-conflict legal questions studied by administration lawyers included the limits of occupation law, the use of Iraqi property, the handling of Iraqi government contracts and debts, the processing of Iraqi oil, the changes that could be made to Iraqi political institutions, and the obligations of the US, as a foreign force, to the Iraqi people.

Administration lawyers generally agreed that the applicable laws were the 1907 Hague Regulations and the 1947 Geneva Convention, which place numerous restrictions on occupying powers and assume that central political institutions would remain in place. Some of these obligations were relieved by later conventions that imposed different US obligations to the Iraqi people. Challenging issues were also presented by UN Security Council Resolutions 661 and 687, which prohibited Iraq from selling oil and prohibited other countries from buying oil or selling other goods to Iraq. Bellinger said it was necessary to seek a new UN Security Council resolution to lift the sanctions on the Iraqi people and provide a basis for the continued US presence that would permit additional

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changes in Iraq beyond those permitted by the Hague and Geneva Conventions. The State Department lawyers took the lead in drafting the resolution, which became UN Security Council Resolution 1483, adopted in May 2003.

Administration lawyers devised a plan to deal with war crimes committed by Saddam Hussein and his regime. The Iraqi people take the lead under the plan, Bellinger said.

On the domestic front, administration lawyers addressed issues regarding detainees, the treatment of war criminals, and the Proliferation Security Initiative (PSI)—the political framework for countries to work together under existing international law to interdict shipments of weapons of mass destruction. The NSC will continue to address these issues in the year to come.

Scott W. Muller, General Counsel, Central Intelligence Agency, stated the agency is addressing many more legal issues than in the past. Virtually all of these issues were matters of first impression that had to be analyzed under very short deadlines—issues directly relevant to the preservation of American lives in the US and abroad. Likewise, the events of September 11 and subsequent events in Afghanistan and Iraq have required the military, law enforcement and national security communities to work together in unprecedented ways.

Muller noted that the events of September 11 created a new and urgent mandate for the intelligence community to share information across government components and disciplines—military, law enforcement and intelligence—and to share information with local, state and foreign government agencies as well as private businesses. This mandate has been accompanied by a tension between the need to share and disseminate information on the one hand and the protection of sources and methods on the other. It also raises issues about the proper protection of privacy.

The new Terrorism Threat Integration Center (T-TIC), which became operational on May 1, 2003, represents a fusion of the FBI Counterterrorism Division, the CIA Counterterrorist Center, the Department of Homeland Security and other agencies. Muller described the purpose of T-TIC as enabling the full integration of terrorist related information and analysis. It has full access to all terrorist threat-related information available to the US government and is a key player in resolving information sharing issues and structural challenges, including the different uses of information to law enforcement and intelligence agencies.

The events of September 11 also brought into sharp focus the need to collect, analyze, disseminate and share information quickly and the importance of the use of technology to accomplish this goal. The intelligence



Scott W. Muller speaks during Panel I. Also pictured: M. Tia Johnson, M. E. “Spike” Bowman, John B. Bellinger III, Charles A. Allen, and Hal Dronburger.

community, Muller said, has a vast and growing technological capacity to gather information, to connect related facts in novel ways, and to disseminate rapidly the results of intelligence analysis. Muller described the challenge as the production of better foreign intelligence while preserving the value and conduct of US intelligence activities.

Muller called the legal and regulatory framework for foreign intelligence collection, processing, and retention insufficient. It was developed in the late 1970s and 1980s, when technology was very different. The guidance continues to be Executive Order 12333 and implementing regulations approved by the Attorney General. Together with the National Security Act of 1947, E.O. 12333 draws broad distinctions between information gathered for law enforcement and for intelligence purposes, relies on geographic distinctions to determine what is inside or outside the US, and creates special concerns for US persons. Muller noted that the war on terror knows no boundaries or national lines. Thus, the terrorist threat lies at the border of the law enforcement, intelligence community and military establishments. Muller acknowledged that this provides an area for friction, but said it also provides a tremendous opportunity for cooperation.

M.E. “Spike” Bowman, Senior Counsel for National Security Affairs, Federal Bureau of Investigation, indicated that despite the changing facts and rules in the war on terrorism, there have been a number of resounding successes, many of which are not always apparent. There have been a number of arrests, including arrests of individuals associated with terrorist cells operating in New York, Oregon and Virginia, and while less apparent, immigration laws have been used successfully to deport suspected terrorists.

There are several reasons for these successes, Bowman said. For one, the Patriot Act has significantly helped the FBI to make investigations and arrests. Bowman also noted that these investigations and arrests reflect successful information sharing and a full partnership among the law enforcement, intelligence and military communities.

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Suzanne Spaulding, Chair of the ABA Standing Committee on Law and National Security, outlined the conference format.

The law enforcement community has benefited from cross-detailing of FBI, CIA, NSC, FAA and Homeland Security personnel, Bowman reported. The expertise of individuals from these agencies has significantly expanded the resources of the FBI. Likewise, FBI agents have been detailed to each of these agencies.

The FBI's 56 field offices have created 63 Joint Terrorism Task Forces, which operate on the front lines to identify suspected terrorists. They are bound by rules of the US Attorney General for investigations to preserve the rights of American citizens in investigations. While this is a law enforcement function, Bowman said, it is important to understand that in the war on terrorism, the primary goal is not to prosecute, but to prevent a terrorist event in any way possible. Sometimes, the best way to do that is to prosecute.

Bowman also stressed that intelligence shared among various government agencies can lead to prosecutions that, while geared toward preventing future acts of terrorism, may not be related to an actual terrorist event. Prosecutions for cigarette smuggling, or lying to federal officials, or immigration violations can be a part of terrorism deterrence, Bowman said.

On October 31, 2003, the Attorney General signed new guidelines for foreign counterintelligence and foreign counterterrorist investigations. These guidelines represent a sea change, Bowman said, reflecting technological development and new investigation techniques. In moving

forward with these investigations, Bowman said, it is important to protect the First Amendment and the privacy rights of US citizens. It is also important to consider whether laws enacted 30 years ago are appropriate in today's world.

The FBI has concerns regarding information sharing that are unique to the intelligence community, Bowman said. Approximately 95% of the information collected by the FBI relates to US persons. Despite the Privacy Act, the Attorney General Guidelines, and E.O. 12333, there is always the question of how to share information and also protect the privacy rights of US citizens. FBI lawyers work on this question on a daily basis, Bowman reported.

Charles Allen, Office of General Counsel, Department of Defense, discussed the liberation of Iraq and the Iraqi rules of engagement. He noted that it was unclear what the US would encounter upon the liberation of Iraq. Despite precision bombings, the effects of the war could have been much worse. The US found decades of mismanagement by Saddam Hussein, the Iraqi people were left without essential services, and there were serious security issues.

The strategy the administration laid out mirrors the responsibilities and the authorities governing the usages of war under international law. While these authorities are recognized by UN Security Council Resolution 1483, they are not necessarily provided by that resolution. International law gives the coalition a number of duties and rights under occupational law.

The US government's instrument for discharging its obligations is the Coalition Provisional Authority led by Ambassador Paul Bremer. In consultation with the coalition partners and the Iraqi Governing Council, established in July 2003, the Coalition Provisional Authority makes the day-to-day decisions necessary to move Iraq toward the goal of establishing a secure, peaceful nation with a representative government. The President's vision is that Iraq will be a country that will stand against terrorism directed against the US, the region and the world.

The fundamental law will be developed by the Iraqi Governing Council in consultation with the Coalition Provisional Authority. The new law will include a bill of rights, will ensure a federal arrangement for Iraq establishing a federal judiciary and state control over the security forces, and will set a timetable for the drafting and ratification of a permanent Constitution. It will not be amendable and will have a two-year sunset clause. By June 30, 2004, elections will be held, the new administration will be recognized by the coalition and assume authority for the governance of Iraq, and the Coalition Provisional Authority will dissolve.

There is a tremendous amount of work to be done in the economic reform area. Other areas under development include foreign investment, trade liberalization policies, tax strategy, and securities law. It is also necessary to reach agreements with the government to cover a host of issues including the continued presence of coalition forces, as necessary, and the treatment of prisoners of war and other

detainees. The final step will be to hold national elections no later than March 15, 2005. This is an ambitious schedule and it will be a challenge to meet the deadlines.

Regarding the rules of engagement in Iraq, Secretary Rumsfeld was heavily involved in the development of the rules of engagement. There has been a paradigm shift in the way the rules were developed. The Central Command and the Chairman's legal counsel developed a process and result that was acceptable to all relevant parties.

The rules of engagement (ROE) had to define targets, targeting authorities, geographic boundaries, the types of weapons that could be used, and had to provide guidelines for employing military force in ways that could be executed effectively to achieve the military's objectives consistent with national policy and international law.

Captain Hal Dronburger, USN, Legal Counsel to the Chairman, Joint Chiefs of Staff, described the legal issues before the Joint Chiefs of Staff as complex. The level of detail and analysis required, and of interaction with other government agencies, exceeds the level that existed before September 11, 2001.

The US is still operating in Afghanistan, Dronburger noted. There are 16,000 US and coalition forces assisting the Afghan Interim Authority in establishing itself and setting the conditions for a new government. Assisted by members of the coalition, the US military is training and equipping the Afghan national army to ensure that they have the capability to protect themselves. There is also a provincial reconstruction team, consisting of civil affairs, engineers, and aid workers from the US and international organizations, extending the authority of the Afghan government to provide humanitarian relief and infrastructure development.

The UN recently extended the International Security Assistance Force mission for another year. NATO has assumed responsibility for the mission. Unfortunately, Dronburger said, security concerns in Afghanistan remain paramount. There is fighting along the border and daily operations by the US and the Afghan national army coalition.

Since the beginning of Operation Enduring Freedom, approximately 8,000 individuals have been detained by coalition forces, Dronburger said, raising legal issues for US forces. The vast majority of these individuals were screened and released in the immediate vicinity in which they were taken. Others were screened and released at intermediate stations. A small number were determined to be enemy combatants and were transferred to Guantanamo Bay. The US continually re-evaluates the status of individuals under its control, Dronburger said. Thus far, sixty people have been returned to their home country, with more to follow. In every case, these individuals have been treated consistent with the requirements under international law.

The Department of Defense has made significant contributions to the protection of the US from terrorism, said Dronburger. The new Department of Homeland Security

leads the effort to protect against terrorism in the US, to reduce vulnerabilities to terrorism, and to minimize damage and assist in recovery from terrorist attacks.

The Secretary of Defense has articulated three areas where the military may become involved in domestic activities, according to Dronburger. The first is the extraordinary circumstance where the US is expected to execute on traditional military activities such as flying combat air patrols over cities in the continental US. The second are catastrophic emergency circumstances, such as responding to an attack or assisting in response to a natural disaster. The third is a temporary act such as assisting another federal agency.

The biggest change in the military has been the creation of a new command, NORTHCOM, to conduct operations to deter, prevent, and defeat threats and aggression aimed at the US. The spread of weapons of mass destruction continues to pose a threat. The PSI effort is directed to the interdiction of weapons of mass destruction. It will be complemented by efforts to improve customs controls, domestic non-proliferation laws, intelligence sharing, and financial tools, and to strengthen non-proliferation between regimes. The strategy is to build a coalition of like-minded countries to authorize interdiction operations and to establish a new international norm that prohibits proliferation.

The trafficking of weapons of mass destruction is viewed as one of the most serious threats to international peace and stability throughout the world. PSI provides the framework to effectively pass information regarding suspect cargoes, enabling states to take appropriate action.

PANEL II Views from the Hill

Jeh C. Johnson of Paul, Weiss, Rifkind, Wharton & Garrison and former General Counsel, Air Force, moderated the panel. **David Schanzer, Minority Staff Director and Chief Counsel, House Select Committee on Homeland Security**, discussed the activities of his committee, newly created at the beginning of this Congress. It is a select committee, so the speaker and Democratic leader pick the members. The committee's jurisdiction is limited to the Homeland Security Act. The committee is required to issue a report on how the rules of the House should be changed to aid in homeland security efforts.

The future of the committee is uncertain, Schanzer said. It could be eliminated, or could become a permanent standing committee. The legislature has not reorganized to fight terrorism as has the executive branch. This presents problems, Schanzer said, because 88 subcommittees in the House and Senate have some degree of jurisdiction over the Homeland Security Department. That many masters can lead to choppy and inconsistent oversight. Consequently, outside of Congress, there is widespread support from both parties for a permanent standing committee.

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Schanzer described the committee as trying to look at the big picture in homeland security. There are continuing problems with vulnerabilities in a variety of areas. He focused on the inability of the government thus far to effectively allocate risk. The committee is trying to help the Homeland Security Department make decisions regarding resource allocation.

On the topic of transportation security, Schanzer noted that it costs approximately \$4 billion per year to screen passengers. Evidence suggests, however, that we are not doing a better job than we were Sept. 11, 2001, in preventing items from getting through the screening system. Less expensive measures, such as sealing cockpit doors, have helped provide better protection against the use of aircraft as missiles. But so far the big spending programs have produced few results. Proposals to equip commercial aircraft with anti-missile technology would cost more than \$7 billion, not including maintenance. Compared with other modes of transportation security, there is an 18:1 spending ratio on airport security. Schanzer suggested that we might not be allocating our resources wisely. We also spend approximately \$10 billion in biological defense, but \$4 billion on airport screening. Congressional oversight, Schanzer said, can help provide a big picture view, since agencies tend to have a narrower focus.

Schanzer noted that there is widespread concern about how to protect privacy when government is so obsessed with security issues. Stressing that he did not intend to demean the importance of privacy, Schanzer said that there is also a need to flip the question: how can we protect security in a world obsessed with privacy? Some programs with value for intelligence have been terminated because of privacy issues. This indicates the need to embed privacy concerns in programs right from beginning so that they hold up when exposed to public scrutiny.

Michael Davidson, Minority Counsel, spoke on the activities of the Senate Select Committee on Intelligence. Tasks are assigned within the committee without any consideration to partisan affiliation, but rather, with attention to expertise, he said. The House and Senate intelligence committees are currently reviewing prewar intelligence on Iraq, just as they did on September 11, 2001.

The most important legislative provision of the Intelligence Authorization Act, Davidson said, calls for independent cost estimates for major procurements. Congress and the administration can get locked into expensive long-term commitments. A long-term analysis and look at projected cost will ensure that Congress fairly and accurately anticipates what costs will be, and builds those costs into the system.

Davidson reported that prior to the Patriot Act, in order to obtain possible terrorist-related information from a financial institution, the FBI had to describe a connection between the financial institution and a suspected terrorist. Now, under the new legislation, there is no need to identify the person, only a link to a terrorist investigation. Davidson called for



Assistant Attorney General Jack L. Goldsmith addressed the expansion of international criminal jurisdiction and the International Criminal Court.

a serious debate about the provisions of the Patriot Act prior to their 2005 sunset.

Jonathan Scharfen, Majority Chief Counsel, House International Relations Committee, focused on two major new programs, the HIV/AIDS bill and the Millennium Challenge Account. Both mark increases in funding, departures from past practice, and increasing use of American soft power abroad. Chairman Henry Hyde and ranking minority Congressman Tom Lantos are both effective legislators, Scharfen said, adding that their “effective relationship” has helped the committee to function smoothly.

The President stepped in to win passage of the HIV/AIDS bill, after years of floundering legislation. The humanitarian concerns are well known, Scharfen said, given the high number of infections (40 million) and deaths (25 million) worldwide. The committee’s hearings, however, pointed out the national security concerns. “We’ve learned the hard lesson,” Scharfen said, of the consequences to the US of failed states. High rates of HIV and AIDS infection in South Africa, Nigeria, and Kenya—from thirty to forty percent—make it hard for these regional powers to engage in peacekeeping, and undermine their ability to maintain civil order. One of the most important aspects of the AIDS bill was the increase in funding, a \$10 billion increase over the \$5 billion that had already been apportioned. There was some controversy, Scharfen noted, due to an allocation of only \$2 billion in fiscal year 2004. This limitation arose because of the expectation that there would not be enough time to spend the full amount this calendar year. This lower-than-planned spending led to heavy criticism.

Scharfen reported that there is ambiguity as to where to focus the efforts. Fourteen countries—12 African, 2 Caribbean—are identified by name. Other states will be identified by the President. Southeast Asian states may be included.

The Millennium Challenge Account (MCA) will lead to an increase in foreign aid over the next five years. The President will produce a five-year strategy. A former Eli Lilly CEO is overseeing the effort. He meets regularly with NGOs. Scharfen acknowledged controversy over some of the spending, but said that the plan's compromises were well thought out.

MCA aid will not diminish other foreign aid programs, Scharfen said. Aid will be distributed according to indices of good governance: investing in public programs, investing in people, promoting freedom. The designers of the program were aware of the fact that some large recipients of foreign aid have suffered a decrease in their standard of living. The MCA is intended to reward and encourage sound management on the part of recipient countries.

Scott Stucky, Majority General Counsel, Senate Committee on Armed Services, reported that the fiscal year 2004 Defense Authorization bill had been completed the previous week. There are three functions of the Senate Committee on Armed Services. It authorizes appropriations for the Department of Defense and the national defense functions of the Department of Energy, accounting for roughly 70 percent of the DOE's funds; it provides the source of all legislation governing the armed forces, ranging from pay levels to programs; and it reviews the nominations of civilian and military appointees, approximately 50–60 confirmable in DOD and DOE each year. "This was a hard year," Stucky said, due to the volume of work and the existence of strong feelings on many issues.

At the moment, roughly one quarter of the Senate sits on the committee. Stucky conceded that this is an unwieldy number, but said it is unlikely to diminish. Members have a lot of work, Stucky said. They have many hearings and nominations and lengthy markups. Members serve because they are interested in what the committee does.

The House and the Senate have different outlooks, Stucky noted. The Senate Committee was dismayed at the House's proposals to require buying more American material—proposals that Stucky believed would disrupt procurement and relationships with our allies.

Concurrent receipts, the proposition that retired members of the armed services with a compensable disability should be able to collect both disability and retirement, is an "idea whose time has come," Stucky said. It is widely liked, but expensive.

Stucky reported strong feelings about tanker leaseings by the Air Force, which some members and observers considered wasteful corporate welfare. In the end, the Air Force wound up getting its tankers at a better rate than was originally planned. DOD also wanted to overhaul its system of civilian personnel. Stucky said that his committee lacks jurisdictional authority over civilians. In the end, DOD got much of what it wanted, as it did on the topic of exemptions from environmental provisions, over the objections of many Democrats.

Luncheon Keynote Speaker Jack L. Goldsmith III

Jack L. Goldsmith III, Assistant Attorney General of the Office of Legal Counsel in the Department of Justice, drew on his previous work as a professor and with the Department of Defense to discuss the International Criminal Court and universal jurisdiction. Goldsmith said that he, like the other conference participants, spoke only in his private capacity, and not on behalf of the government. He described a lack of accountability in the application of these new concepts. International politics and security are increasingly subject to legal regulation and judicial scrutiny, Goldsmith said, citing use of the Alien Torts statute as "an all purpose human rights provision" and the International Court of Justice's use of

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Friendship, Commerce, and Navigation treaties as “vehicles” for regulating the use of force.

From the US perspective, Goldsmith said, oft-cited flaws of the ICC include its imposition of liability on non-signatories, its tendency to diminish the authority of the Security Council, and the lack of checks and balances for prosecutors and the court.

The ICC prosecutor and court are “unaccountable to any democratic institution or any elected official,” Goldsmith said. A prosecutor can initiate proceedings or decline to prosecute on his own, unchecked by any elected body or prudential concerns. Appellate courts exercise review, but they too are unaccountable. Goldsmith drew a parallel to the lapsed US independent counsel statute. Absolute independence invites questionable and politically motivated investigations. The ICC lacks the institutional capacity to properly identify and balance the consequences of prosecution on political actors, Goldsmith said.

The wrong decision on prosecutions could aggravate rather than contribute to settlement of conflicts, Goldsmith argued, because some actors who have committed crimes in the past may be able to contribute to peace and reconciliation. Following a change in regime, international and domestic procedures sometimes include reconciliation commissions, and sometimes include trials. It is not possible, Goldsmith said, to make a permanent choice as to which of these procedures is most conducive to long-term stability. “The answer probably depends on context and contingent political factors that might not be reducible, in every case, to the rule of law,” he said, adding that a politically unaccountable court is not the best institution to make such choices.

Goldsmith expressed fears that the concept of universal jurisdiction may have similar problems. Recently, at least three cases were pending against the US in Belgium regarding the past two US wars with Iraq. The governments worked well together to dismiss these cases, he noted, but the suits remain instructive. There is no general agreement about the definition of war crimes, Goldsmith said.

In the US, said Goldsmith, the structure of prosecutions allows for the consideration of prudential concerns. Prosecutors are accountable to the community through their own election, or through their appointment by elected officials who are sensitive to how enforcement is perceived within the community. Such prosecutors can account for effects of prosecution on community “health, safety, and morale,” he noted. This discretion allows prosecutors to decline to prosecute or to negotiate a plea bargain. Their accountability helps ensure that this discretion will not be abused.

“There is obviously a balance to be struck,” he said, “between independence and accountability,” and he raised questions about whether universal jurisdiction prosecutions strike this balance correctly. Universal jurisdiction courts and prosecutors by definition do not hail from the area affected

by the prosecution. If prosecutors are accountable to elected officials sensitive to the consequences of prosecution, Goldsmith offered, then prosecutions from abroad might not be a problem. He suggested that Security Council authorization may be one way to impose such accountability. This path runs the risk of incurring vetoes, but the veto power gives support and legitimacy to prosecutions, as in tribunals for human rights violations in the former Yugoslavia.

The near-complete independence of prosecutors in Belgium contributes to insufficient concern for practical consequences of their prosecution, said Goldsmith. This problem is worsened in his view if, as is sometimes the case, prosecutors have a duty to investigate any plausible claims brought to their attention by private individuals. For example, the people who initiated the cases against the US in Belgium opposed the Gulf Wars, and had no incentive to consider the impact of the prosecutions.

This lack of accountability can result in frivolous lawsuits, and can have adverse effects on transfers to democracy, Goldsmith said. Future oppressors may realize that they cannot attempt to transition to democracy without running the risk of being prosecuted.

Goldsmith stressed that he did not believe the ICC and universal jurisdiction are inherently flawed concepts. There may be a role for such institutions to address “egregious human rights abuses that cannot be effectively addressed” in the legal system of the defendant’s country.

PANEL III

Reconstruction Efforts in Iraq and Afghanistan: Building Security, Democracy, and the Rule of Law

University of Virginia law professor John Norton Moore moderated the panel. He gave a brief introduction to the debate on reconstructing Iraq and Afghanistan. On the



John Norton Moore, Walter L. Brown Professor of Law at the University of Virginia School of Law, moderated Panel III.

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Keynote Address

Gen. Richard B. Myers

Gen. Richard B. Myers, Chairman of the Joint Chiefs of Staff, gave an address on the role of the military in the war on terrorism. He stressed that military efforts are just one component of American actions.

Currently, the US has 130,000 troops in Iraq, 12,000 in Afghanistan, and roughly 1,000 in the Horn of Africa in Djibouti. The troops in Iraq know that they are winning, Gen. Myers said, even those who have been wounded.

Gen. Myers said that our enemies in the war on terrorism depend on hatred, fear, violence, and intolerance, and hope to reduce the US to a shadow. There are essential diplomatic, economic, law enforcement, and intelligence aspects to the war on terrorism. We also must preserve liberty, Gen. Myers said. On intelligence, Gen. Myers advocated cooperation among agencies and with the private sector. He noted that this cooperation has improved greatly since September 11, citing the cooperation at NORTHCOM as an example.

Al Qaeda has been damaged by the war on terrorism, but is not vanquished, Myers said. Along with military attacks, there will need to be continuing efforts to fight the financing and education of Al Qaeda, as well as continued pressure on governments that sponsor or tolerate the group.

We will be engaged in Iraq until we are no longer threatened, Myers said. This will take time—the country is emerging from decades of suffering under a brutal dictator. The US is working to assist Iraqis in simultaneous economic and political progress. The Iraqi people and a variety of US agencies are building institutions. Schools are being rebuilt, new laws are being written, local governments are being reconstituted, and hospitals are mostly flourishing, Myers reported. More than 13,000 projects have been undertaken, with many more to follow.

The US brings an unwavering will to the war on terrorism, Myers said. Failure and disengagement are not options



Keynote address speaker General Richard B. Myers, Chairman of the Joint Chiefs of Staff.

because the enemies of the US will fight until their own death or ours. The costs have been high, not only in terms of money, but also in our sons and daughters. Gen. Myers said that the US leadership is very aware of these costs, but that the cost of not defending freedom is even higher. We are facing an enemy without borders or diplomacy or adherence to any law, he said.

The US has changed its way of thinking and organization. During the Cold War, we shared intelligence on a need-to-know basis, Myers said, but now, the bias should be “need-to-share.”

There are two ways for the terrorists to win, Gen. Myers said: destroy democracies, or create a state of fear such that democracies sacrifice their own liberties for security. The responsibility of lawyers in the war on terrorism is to help craft rules and to reinforce the importance of liberties.

importance of building successful institutions in those countries he said, “there is no debate between Democrats and Republicans, the left and the right, the US and the international community on this issue.”

Col. Todd Wilson of the Department of State’s Office of the Coordinator for Afghanistan discussed the competing views of progress in that country. In his view, the media generally presents a “glass is half-empty” view, while the government tries to present a “glass is half-full” view.

The half-empty view, as Col. Wilson described it, focuses on the fact that Afghanistan is still in bad shape. It is one of the world’s poorest nations, the new government has no control outside of Kabul, and insurgents are coming back.

The half-full view, Col. Wilson said, highlights the progress made since the US invasion. Afghanistan was in total ruins immediately following the invasion, but today the Bonn Process has created a legitimate government, commissioned a constitutional convention (a temporary *loya jirga*, or “grand counsel”) to create a constitution, established a legislature (permanent *loya jirga*), and held legitimate elections. The government is making efforts to replace corrupt leaders, though some remain. NATO and the Afghan government are working together to fight the insurgents, and to rebuild infrastructure, schools, and clinics.

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Based upon his experience, Col. Wilson said, he believes the glass to be half full. The media provide accurate snapshots in time, Wilson said, but they tend to overlook trends.

He explained that US policy in Afghanistan is to expand improvements in three sectors. In security, there are ongoing efforts to improve Afghan military and police forces. To promote the rule of law, the US and others are building judicial complexes, training judges and lawyers in civil codes, establishing counter-drug programs, and educating the public on the working of the legal system and their rights under the law. Finally, on infrastructure, Afghans are working with the international community on rebuilding roads, bridges, schools, hospitals, and retraining the population to take on civilian employment.

Ambassador Richard Schifter, former US representative to the U.N. Security Council, said that “There is no alternative but to build democracy and the rule of law in Iraq and Afghanistan.” Schifter suggested that one look at the Federal Republic of Germany and Japan as examples. The rebuilding of those two nations represents some of the best work the US has ever done.

Compared to Iraq, Schifter said, rebuilding Germany was easy. There were more troops in place to establish better security. Post-WWII Germany was in better shape; the republic had only been dead twelve years not thirty-five. The reconstruction effort followed a good plan and was well thought out; it took only six years to make West Germany self-sufficient again.

There are continuing efforts to build and create institutions in the former Soviet bloc, Schifter said. Through judicial exchange programs, criminal justice reform is expanding. There are both public offices and private sector NGOs working to remake Eastern Europe and Central Asia. For example, Georgia’s government is reforming with the help of the Department of Justice’s Overseas Prosecutorial Development, Assistance and Training (OPDAT) Eurasia Division.

Schifter touched upon Japan, noting, “This is another fantastic example of American efforts at nation-building. They have the world’s number two economy, and a truly great democracy.”

However, he said, it is important to remember that nation building “cannot be done on the cheap.” It is necessary work. Nobody knows how to do it better than the US, Schifter said—not the UN, Europe, or anyone else.

Former ABA President A. P. Carlton is currently chairing the ABA’s Iraq Initiative. He described the ABA’s role in ongoing nation building efforts. According to Carlton, the ABA has a strong commitment to spreading the rule of law, corresponding with the ABA’s Eighth Goal. For years, the ABA has run a program called the Central and Eastern European Law Initiative (CEELI), the largest private-sector version of the DOJ’s OPDAT office. CEELI goes overseas at the behest of other nations and assist them in reforming their criminal justice systems.

More recently, the ABA has fielded a growing Asian Law Initiative. The ABA is also building a South American Law Initiative, and a new African Law Initiative. Carlton noted that the Law Initiative does not impose any set legal system. Rather, the objective is to inform other nations’ leaders on several different types of legal models and let the host nation decide what works best within their existing government and culture. Remarkably, Carlton said, most CEELI lawyers work as pro-bono agents.

According to Carlton, the Iraq Initiative is built on a “new platform” which they will “use as a model for post-conflict zones.” One of the primary concerns for the Iraq Law Initiative is to find a way to create a new post-Saddam government while maintaining a secular identity to that government. Carlton said they want to find a way to draw a line between church and state—that the constitution may make reference to Islam, but will not impose a state religion.

Charles Allen, Deputy General Counsel of the Department of Defense’s International Affairs Office described the role of the Coalition Provisional Authority (CPA) in Iraq. UN Security Council Resolution 1483, he said, acknowledges the CPA as the legitimate state authority in Iraq. The UN set a timeline for the CPA to pull out from Iraq by summer of 2004.

The CPA has three aims, Allen said: security, reconstruction, and transition. Security is the first concern, as it is impossible to achieve the other aims if the country is not stabilized. Reconstruction is a close second; the reconstruction efforts are necessary to win over Iraqi public opinion, and serve the broad purpose of the original US intervention. The transition of power is not merely a moment in time, but a process, Allen said, measured by the preparedness of the Iraqi Governing Council to assume authority, and by the ability of the people to understand their new government.

The CPA must respond to the human interests in the rebuilding of Iraq, Allen said. The local CPA commanders “focus on the children.” Allen noted that doing so would win over the “fence-sitters” in Iraq. “If someone isn’t really crazy about your being there, he might take up with the local opposition. But if you feed and clothe and see to the health of his children, he’s not going to stab that in the back. And, he’s going to be a lot more likely to assist in finding those who want to stop the reconstruction—the Fedayeen, or the fundamentalists.”

Allen listed a series of CPA accomplishments that have gone largely overlooked, including the reinstating of courts, vetting of judges, efforts against corruption, and reworked police system.

Allen described the economic needs of Iraq, noting that Iraq has been a Soviet-style economy for 35 years under the Baathists. The CPA is moving the country back toward a market economy. On the political front, Allen outlined how the Iraqi Governing Council (IGC) will have to hold national elections by December of 2005. The new constitution will provide, for the first time in 35 years, for civilian control of the police, and will ensure an independent judiciary.

Christopher Spear, detailed from the Department of Labor to oversee the Ministry of Labor and Social Affairs in Iraq, described the situation in Iraq as a sort of planned chaos. He could not have prepared for what he was to find in Saddam's wake, because no one outside Iraq knew the extent of the Baathists' neglect.

When Spear arrived, there was nothing left to the Labor Ministry but the walls of the buildings. He said, "you know that phrase, that 'they've taken everything but the kitchen sink'? Well, they took that, too." Saddam ordered the looting of all ministries just before he left Baghdad, Spear said.

Spear described Hussein's Labor and Social Affairs Ministry as a misnomer. It merely handed out welfare checks to war veterans and built weapons. There were weapons factories inside the ministry buildings Spear uses.

He described relatively sturdy development in the Sunni regions and dilapidation in the Shiite areas. Under Saddam, Shiites did not receive training in labor skills necessary to be gainfully employed. In some areas, Spear found recruiting Iraqis for the reconstruction projects impossible because no one could perform the jobs. "Saddam's Labor Ministry was designed to keep people dependent upon the regime," Spear said.

Under Spear, the Ministry created a plan: assess the problem, establish security for Ministry buildings, renovate those buildings (especially the orphanages), reinstate an employee payroll that had stopped being administered under Saddam, reissue the welfare payroll, and start reapplying the Iraqi employment laws such as contracts and job requirements. Spear said that the 15,000 reconstruction projects in Iraq were only the beginning.

During questions and answers, Allen said that the primary reason for the dilapidation in Iraq was 35 years of favoritism for Sunnis and punishment for Shiites. US bombing did not cause widespread damage because it generally targeted less

built-up areas, and the bombings were very precise. Looting, Spear added, was only a major factor in Baghdad.

Carlton and Col. Wilson, in response to a question about building democracy in a country unfamiliar with anything but dictatorship, stressed the capabilities of the Iraqi people, and the expertise of the US in nation building. Allen remarked that transparency and accountability are essential for democracy.

PANEL IV Jurisdiction Over War Crimes: What Should Our Policy Be?

Stewart Baker, a partner of Steptoe & Johnson and former General Counsel to the National Security Agency, moderated the panel and highlighted the reservations of many in the US about the value of the International Criminal Court (ICC) and the validity of universal jurisdiction. **SAIS Johns Hopkins University Professor Ruth Wedgwood** maintained that "in the real world," both the ICC and universal jurisdiction lack credibility.

Universal jurisdiction, Wedgwood argued, is flawed because it gives a court power over people to whom it is not accountable. While human rights interest groups advocating universal jurisdiction are well meaning, she said, many of them lack expert legal advice. Publications advocating the concept are "not always the most educated opinions," Wedgwood said. Rather than the rule of law, she argued, invocation of universal jurisdiction is a "matter of moral politics," such that "a highly impassioned magistrate could set off World War III." She said that the Rome Statute's signatory states' waivers of sovereign immunity "will come

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William Hannay addresses the topic of universal jurisdiction prosecutions during Panel IV. David Rivkin, Ruth Wedgwood, Stewart Baker, and Diane Orentlicher also spoke on jurisdiction over war crimes.

as a big surprise when applied” to their own government officials.

Wedgwood also portrayed universal jurisdiction as at odds with other strands of European law. Given that European civil law jurisdiction is very dependent upon limitations such as the place of doing business or domicile of a party, she said, universally broad jurisdiction does not fit.

Varying definitions of crimes are likely to create disagreements among signatories in prosecutions, Wedgwood said. She suggested that a “slippery slope” is inherent in a concept as nebulous as universal jurisdiction. “Good guys will be prosecuted” for political reasons, she predicted. As an alternative to universal jurisdiction, Wedgwood advocated extradition treaties among states.

David Rivkin of Baker & Hostetler also argued against the enactment of the Rome Statute and the concept of universal jurisdiction. He said that universal jurisdiction is a “loose concept” lacking sufficient historical justification. The Israeli Supreme Court ruled that trials of Nazi war criminals in Israel were based upon the inherent interest of the Israeli state. Jurisdiction for the Nuremberg tribunal was grounded in the unconditional surrender of Germany.

Rivkin doubted that universal jurisdiction has deterred any “bad guys” from carrying out gross atrocities. Neither Saddam Hussein nor Slobodan Milosevic was deterred. Rivkin said that it is much more effective to have courts that are created specially for a certain purpose with original jurisdiction, either by virtue of being located in the country where the acts took place, or as created by a treaty.

Rivkin predicted that ICC prosecutions based on universal jurisdiction will have a chilling effect on “good guys” who take military action to stop atrocities. The effect Rivkin sees on “bad guys” is far less. A strongman with control of a country is less likely to pay mind to universal jurisdiction provisions than an elected president or prime minister, he said. The Rome Statute lacks credible enforcement, he added, noting the lack of the signatories’ military capacity to act extra-territorially, and the ICC’s lack of Security Council support.

Rivkin expressed support for absolute sovereign immunity. He would favor waivers of that immunity to another state’s prosecution, as in the Pinochet case.

Diane Orentlicher, international law professor with the American University, argued in favor of the ICC and universal jurisdiction. She said that the recent Belgian statute forswearing authority under claims of universal jurisdiction “went too far” as a self-correction measure. Regarding the historical roots of universal jurisdiction, Orentlicher said, “we may all conclude that the universal jurisdiction cases so far are flawed, but that doesn’t mean that the concept of universal jurisdiction is bad.” She also stated that the concept’s record is difficult to evaluate, as it is impossible to know all the “bad guys” who have been deterred by universal jurisdiction.

She said, “Milosevic wasn’t stopped by fear of the ICTY [International Criminal Tribunal for the former Yugoslavia] because the ICTY is very weak.” She also stated that the prosecution of Pinochet, the closest example so far to true exercise of universal jurisdiction, has enjoyed fierce support from many Chileans.

Orentlicher found hope in the character and discretion of the ICC prosecutors as a meaningful check on the ICC’s power. ICC prosecutors had refused to press charges against U.S. military personnel for the latest operation in Iraq, as some Iranian government officials had requested.

She stated that the concerns about universal jurisdiction can be addressed. Regarding the most common complaint, the lack of agreement over definitions for crimes, Orentlicher advocated a supplemental treaty requiring consensus among states to determine prosecutable offenses.

William Hannay III, of Schiff Hardin & Waite, defended the concept of universal jurisdiction as a part of international criminal law. He argued that “bad guys” are getting away with bad acts under color of law, and that universal jurisdiction can be part of the solution.

In regions such as Africa and Southeast Asia, a lack of international scrutiny allows dictatorial regimes to flourish. Hannay said that under current international law, it is necessary to get countries with original jurisdiction to prosecute. But those countries don’t exercise that power, he said, citing Cambodia’s decision not to prosecute the former Khmer Rouge strongmen. Hannay added that treaties have been ineffective.

In light of this situation, Hannay viewed universal jurisdiction as a powerful last option. Hannay conceded that universal jurisdiction as practiced now has problems, like the potential for prosecutorial abuse. But, he said, it is very important to move universal jurisdiction forward, because it has “more pros than cons,” such as its deterrence of “bad guys.”

The fallout from Belgium’s retreat from universal jurisdiction will depend on how other states interpret it, Hannay said. The Belgian universal jurisdiction law had been written so broadly that it allowed private persons to press charges for any crime, anywhere, against anyone, he said. If other states recognize the defects in Belgium’s original law, Hannay said, the ripple effect from its abandonment will be very small.

In response to a question, Wedgwood noted that while universal jurisdiction statutes have generally not included provisions for enforcement jurisdiction, such provisions are likely in the future, and will “create whole new problems, even for universal jurisdiction [advocates].” Hannay replied that there was some positive precedent for a limited application of enforcement jurisdiction in seeking out universal jurisdiction, such as when Israel kidnapped Nazi concentration camp commander Adolf Eichmann in Mexico. There was little outcry due to the gravity of the crimes for which Eichmann was wanted.

Orentlicher stated that the ICC had adopted the “Princeton Principles,” a series of guidelines on the appropriate

application of universal jurisdiction. One of these principles is that a crime fitting within the concept of universal jurisdiction should be so savage and far-reaching that wide consensus about its criminal nature exists among the international community.

PANEL V

Transforming the Department of Defense: Changing Support Positions to Warfighters

Panel V provided a lively discussion of the Department of Defense's (DOD) plans to realign the military. Duke University Law Professor Scott Silliman moderated the panel. He asked whether DOD's current plans to realign the military as proposed by the Secretary of Defense are the appropriate changes for the armed forces. He asked, "Can civilians take over roles traditionally held by military officers?"

Undersecretary of Defense for Personnel and Readiness Charles Abell began with the phrase, "Conversion is a journey," a theme he repeated throughout his discussion. He described reform as a process of elimination. The Secretary's office identified 330,000 military positions that "could" go to civilians, like scientists, physicians, engineers, musical bands, academics, chaplains, and recruiters. But, he said, not all of those 330,000 positions "should" go to civilians.

Abell noted that DOD hires contractors for some of those positions but that some assignments require military personnel. The bands are too central to *esprit de corps* for the Pentagon to consider doing away with them. Some academy instructorships will remain reserved for uniformed personnel because DOD wants academy students to have working relationships with military role models. Often,

engineers and physicians need to be deployed to war fronts, he said, making it grossly inadvisable to privatize these positions. And some recruiters will remain military personnel, because it is less effective to have civilians talking to civilians about service and duty.

According to Undersecretary Abell, after September 11, 2001, Secretary Rumsfeld did not want DOD to eliminate positions when converting them. Rather, the military personnel are to be reassigned for service elsewhere in DOD. Abell stressed that personnel are working harder, and performing nobly and laudably. He didn't know how many positions would convert, but that it would be "something less than 330,000."

Jack Spencer of the Heritage Foundation offered a technical perspective on improving efficiency. According to Spencer, several underlying administrative factors have to change before making a successful "transformation."

His premise was that the enemy is changing—not only are we facing more guerilla tactics in warfare, as in Iraq, but the rise of terrorist groups has also altered the battlefield itself—so the military must properly respond to the new threats. The ideal end goal is for DOD to be able to do more damage to the enemy with a smaller deployed force.

Spencer attributed the Pentagon's resistance to these changes to "momentum." DOD is such a huge machine, he said, that change requires forced realignments to get it to take a new direction. Spencer said that US military bases currently function with very specific personnel, material, and training that focuses on particular missions, but the intention now is to make all US bases multi-mission oriented.

Retired Air Force Major General William Moorman saw two major problems with "transformation." The first was that previous DOD conversions created the perfect military for fighting the previous wars. A response, he said, is a force

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Panel V on changes at the Department of Defense included moderator Scott L. Silliman, Charles S. Abell, Jack Spencer, William A. Moorman, and Peter K. Levine.



Tom C. Korogolos compared the timeline of rebuilding postwar Germany to the current situation in Iraq during his Luncheon Keynote speech.

that is “capability-oriented, not threat-oriented.” His second concern is that making changes could result in “weakening the fighting forces in the meantime.” Given DOD’s goals, Moorman said, officials should bear in mind that DOD is not a business, and should not be run like a business.

On converting DOD jobs to civilian positions, Moorman noted that many contractors consider past service in the military to be a competitive advantage. If non-core DOD positions are out-sourced, he said, the next generation of contractors won’t have this mark of reliability. Gen. Moorman remarked that under the Geneva Conventions, civilians have protections from being considered legitimate targets in warfare only if they do not intervene in the fight. He warned that using only civilians for non-core functions will make for a very inflexible support service. Moorman cited as an example the plight of the 507th Maintenance Unit in Iraq—if they had been civilians, they would likely have had even less preparation for the hazards they faced, leading to a potentially worse fate.

Moorman argued that many skills the military needs do not exist in civilian society, because some military requirements are unique to its own culture and training. Civilian security personnel, he said, follow no recognized rules of engagement and thus have no accountability. The General reiterated that even supporters in the DOD need to have military training.

Peter Levine, Minority General Counsel to the Senate Armed Services Committee, expressed serious reservations about military transformation. He said, “Nowhere near 330,000 positions can change to civilians,” because of lack of capacity. Hiring civilians for most, if not all, of these positions would be more expensive than using military personnel, he said.

Another drawback Levine found in the proposed conversions is that civil service makes it much harder than the military code to remove or discipline people. Such labor

protection may be deemed appropriate in certain civilian spheres, he said, but it is inappropriate in a military context.

Levine did not object to all plans to alter the mission or capabilities of DOD, but was not persuaded by the process the Secretary of Defense has chosen to make those changes. “To get the transition right, it has to be phased in,” he offered, but the Secretary “doesn’t want to wait.”

Luncheon Keynote Speaker Tom C. Korogolos

Tom C. Korogolos, Senior Counselor to Ambassador L. Paul Bremer at the Coalition Provisional Authority in Baghdad, discussed the progress that the US and its allies have made in Iraq. While much recent coverage of the situation in Iraq has focused on terror attacks, he maintained the overall picture is much more favorable. He noted that in January of 1946, Life magazine published an article by John Dos Passos, who argued that the US had “lost the peace” in Europe. Such snapshots, Korogolos said, obscure long-term progress. Citing a recent study of past American military operations, Korogolos concluded that a continued military presence does not guarantee success, but leaving early guarantees failure.

Korogolos offered his view of the “big picture.” “We’ve liberated 25 million Iraqis,” he said. “Saddam’s reign of terror is over.” Today, Iraqis have more religious and political freedom than any time in the past 40 years. Korogolos also described the extent of the terror Saddam Hussein inflicted upon Iraqis. Roughly 1.3 million Iraqis were missing due to wars and mass murders. About 40 mass graves had been found, with 300,000 Iraqis buried there, according to one human rights group. In one such mass grave, 1,200 children were buried.

The current goal of the US and its allies is Iraqi self-governance, Korogolos said. The new plan for transition has three parts: writing a constitution, creating a system of federal governance, and giving responsibility for security to the allies and the new Iraqi government. The goal of the US is the same as that of the Iraqi people, Korogolos said: “A legitimate constitutional democratic government elected by the people of Iraq.” Because Iraqis have lived under repression for 30 or 40 years, he said, there is a slow and methodical learning process in developing and running the institutions of self-government.

Korogolos described projects ranging from PTAs to courts to an Iraqi bar association to local and regional councils. The lights are back on; oil, water, schools, and hospitals are running. “Iraq is a rich country that’s temporarily poor,” he said. Iraq has energetic people and a bustling economy. In all, there have been roughly 14,600 reconstruction projects, many funded with money seized from Saddam regime, Korogolos said.

Citing the limited impact of smart bombs, Korogolos said, “war damage is not the issue, Saddam damage is the issue.” Neglect and sanctions have left an aging and decrepit infrastructure. Korogolos called passage of the US financial commitment to the Iraqi people “a proud moment.” Other countries have also donated substantial sums. American money, he noted, will be distributed by Americans. These donations will be augmented in coming years by oil proceeds. Iraqis will determine how to dispose of Iraqi oil, he said.

There is a direct link between progress on reconstruction and the security situation in Iraq, Korogolos asserted. Progress is best achieved by putting Iraqis in charge—they know how to reconstruct the country, he said, but need economic support. Hiring Iraqis also ameliorates the problem of unemployment. There must be “a source of legitimate income for Iraqis.”

Korogolos counseled against excessive preoccupation with terrorist attacks in Iraq, saying they “pose no strategic threat to our forces.” The terrorists consist of regime holdouts, foreign mercenaries, and criminals. However, he noted, crime in Baghdad is down 40% since June. Korogolos termed terrorist targets “things that work,” such as pipelines, police stations, and government buildings and workers. They are trying to create a climate of fear, but their efforts are being rejected by most Iraqis.

More than 130,000 Iraqis currently serve in police forces, border patrol, civil defense, and the new Iraqi army. Also, more Iraqis are coming forward to share intelligence. Numerous high-ranking officials had been caught with such information, including Uday and Qusay Hussein. American technological intelligence supplements human intelligence. Three weeks before the fact, Korogolos confidently predicted that the US would capture Saddam Hussein.

A democratic Iraq will be a model for the rest of the region, Korogolos said, but winning hearts and minds will take patience and perseverance by the US and its allies. To this end, the US is building radio stations and television stations in Iraq. The Iraqi press is permitted broad freedom so long as its reporting is not inaccurate or inflammatory.

PANEL VI

What is the Best Legal Forum for Bringing Terrorists to Justice?

Moderator John Cooke, Director of the Judicial Education Division of the Federal Judicial Center, framed the issue for discussion as the question of the best forum to bring terrorists to justice. The answer to that question will depend on whether the ultimate goal is bringing terrorists to justice, or preventing future attacks. The US has treated terrorism as both a matter for war and for legal action, Cooke noted. In November of 2001, President Bush issued a military order,

based on his constitutional authority as president, to try terrorism suspects in newly constituted Article II courts.

Joseph Onek, Senior Counsel, Constitution Project and Director of the Liberty and Security Initiative, assessed the contribution of military commissions to the goals of the war on terrorism. Onek contended that military commissions have not been viewed as legitimate in the international community, and are consequently ineffective in fighting terrorism and preventing future terrorist incidents. The ultimate goals of trials of suspected terrorists must be decreasing future acts of terrorism, and increasing support for moderate governments and people in the Islamic world.

In this regard, Onek felt that a US decision to proceed with military commissions would ultimately be proven incorrect, for three main reasons. First, the international community will not accept commissions that do not meet either the US or international standard of justice. Second, holding the commissions in Guantanamo Bay, where there is a restriction on the entry of private counsel, human rights groups, and the press, would symbolize the United States’ lack of respect for the principles of international law. Third, the operation of the commissions fail to provide any real form of appellate review, instead simply relying on the commission members’ ability to order a new trial or make a recommendation to the President or Secretary of Defense for reversal.

Onek also discussed two alternatives to the present operational structure of the military commissions. First, the United States could conduct military tribunals that operated within US and international standards of law, and allowed for civilian review of the proceedings. Second, the United States could conduct civil criminal trials, as it has done 143 times since the September 11th attacks. The trial of Zacarias Moussaoui is the only civilian trial that has had any trouble. Onek argued that the trial was complicated by the fact that the Department of Justice desperately wanted to pursue the death penalty despite a weak case. He also questioned the ultimate utility of imposing the death penalty on a half-crazed man whose mother speaks fluent Arabic and French.

Professor Viet Dinh, Georgetown University Law Center, discussed the proper context in which to view the operational organization of the commissions, arguing that the structure of the Constitution indicates that terrorists need not be tried in a traditional criminal court system. In those courts, most rights inherent in the American system of justice would have to apply. This forum is not proper in the context of an untraditional war, Dinh maintained. The president may use his authority as commander-in-chief of the United States armed forces to detain terrorist combatants in order to protect both the American military and American civilians. Under these circumstances, the president’s roles of commander-in-chief and chief law enforcement officer overlap. Therefore, in this context, the president must make the decision as to the jurisdiction over the trials of terrorist combatants.

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Joseph Onek addresses the issue of prosecuting suspected terrorists, as moderator John Cooke, Viet Dinh, Paul Schott Stevens, and Eugene Fidell look on.

Professor Dinh then addressed Onek's contention that the international community objects to the operation of the US military commissions as presently outlined. Dinh maintained that the military commissions themselves, not their location, are at the heart of the international community's displeasure. There is legitimate risk to US military personnel in the handling and trial of terrorist combatants, Dinh said, so there must be some deference given to the military in the immediate application of rights to the terrorist combatants. Dinh agreed, however, that it is time for the president and the military to initiate the military commission process.

Paul Schott Stevens of Dechert explored the question of which system of justice would provide guarantees of fundamental fairness. Stevens set out three findings of fact as predicate to this discussion. First, the goals of international terrorist groups include the creation of a state of armed conflict with a disruption in the operations of national governments. Second, the September 11th attacks were conducted by individuals acting alone and terrorist groups could potentially conduct the same kind of operations again, since their leaders are still being hunted by the United States. Third, the United States' ability to protect itself from further terrorist attacks largely depends on the operations of its military. In this context, civilian criminal justice trials are not sufficient. To protect the United States from future terrorist attacks, terrorists must face detention and trial by military commissions. Stevens said that military tribunals could be preferable to the "spectacle of justice in the United States," with Johnny Cochran in a New York City courthouse.

Stevens also contended that the situation the United States is currently facing is much larger than most people realize. The terrorists generally come from a civilization far different than that of the United States, and share very few American values. The real issue though is not the opinion of others, but the fundamental fairness of the commissions. Consequently, the real question in this debate must be whether or not civilian criminal courts are the systems best equipped for handling these concerns. Article III of the United States Constitution, Stevens contended, provides no guidance on this matter, and the context of war crimes tends to bring the charges outside of the jurisdiction of these courts, with the Geneva Convention calling for military

commissions. So the president must make a decision under Article II, in this "third zone," which is neither peace nor war. The matter is beyond the scope of the federal judiciary. And it is better to choose the historical and internationally accepted context of military commissions for trying terrorists rather than a new system developed by

Congress. Regarding international public opinion, Stevens concluded that some criticism may be deserved if the United States has not adequately explained the operation of its military commissions to the international community, but also argued that opinion in opposition to military tribunals was in part a result of false statements by human rights activists.

The final panelist, **Eugene Fidell of Feldesman Tucker Leifer Fidell LLP**, suggested that we must all broaden our perspective of the situation at hand. This involves the linkage of the military commission framework with the Guantanamo Bay detainees, citizen detainees, foreign detainees, and members of the military under scrutiny. From this linkage Fidell makes two observations. First, Fidell was not personally persuaded that US district courts are incapable of handling terrorist cases. Second, two real choices for trying terrorists, military commissions and district courts, have been mentioned, but there is a third option under the Geneva Convention—court-martials. The present military commission system is based on the system set in place by President Roosevelt in 1942. Military law has substantially evolved since 1942, Fidell maintained, particularly with the adoption of the Uniform Code of Military Justice (UCMJ) in 1950. The military justice system is now a "co-partner in the US justice system." Therefore review by the Court of Appeals for the Armed Forces (CAAF), which has an obvious familiarity with military concerns and a substantial body of jurisprudence, should be available in any system of trying terrorists. Congress could provide for this review by statute.

Fidell contended that public confidence in the current system of military justice in the United States would rise if the process of rule development were more transparent than the present method. Failure to employ conventional procedure, in the civilian courts or in military courts, contributes to the current system's perceived murkiness. Fidell criticized some of the rules in the newly constituted tribunals, including the lack of independent judicial oversight and impositions on attorney-client privilege. These rules contribute to the lack of civilian lawyers who have stepped forward to assist in the trials, he said. A notice-and-comment procedure in setting up the rules for the tribunals would have increased their legitimacy, Fidell said. **ABA**