



National Security Law Report

Perspectives on a US-China Strategic Relationship

By Richard E. Friedman

The People’s Republic of China (PRC) government invited me to meet with their top echelon political, military, communist party, and policy research leaders in early June 2004. The origin of the meetings was an earlier meeting in November 2003 in Chicago arranged by the US Department of State with a delegation composed of the directors of several influential PRC research institutes. In Beijing and Shanghai we engaged in 25 hours of pointed discussion on a wide range of issues. The purpose of the meetings was to analyze the elements of a mutual, complementary strategy that could result in a solid and sustainable relationship between the US and the PRC. This article presents perspectives expressed by my interlocutors at these meetings.

From the US perspective, a mixture of enlightened policies is needed to mold the relationship. Chinese leaders have great respect for the US. They regard China as a rising power that will not achieve great power status for another 20 to 30 years. They perceive the US as the leader in the relationship and they would be receptive to progressive US policy initiatives.

My hosts were a young generation of leaders; all of them spoke fluent English; most of them had Ph.D.’s. Their knowledge of US foreign policy and US domestic social and political issues was academic rather than based on first-hand experience. They do not fully understand the mysteries and

Continued on page 2

BAKER APPOINTED CHAIR

New Committee Members Selected

ABA President Robert Grey has appointed Stewart Baker as Chair of the Standing Committee. Baker, Partner, Steptoe & Johnson, also serves as General Counsel of the Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction and previously served as General Counsel of the National Security Agency.

Other appointments to the Committee for a three-year term include: Professor Willie Curtis, U.S. Naval Academy; Eugene Fidell, President of the National Institute of Military Justice and retired Lieutenant Commander, U.S. Coast Guard; Wyndee Parker, Counsel, House Permanent Select Committee on Intelligence; and Michael Wermuth, Senior Policy Analyst, RAND Corporation and former Project Director for the Advisory Panel to Assess Domestic Response Capabilities for Terrorism Involving Weapons of Mass Destruction. All have been involved with the Standing Committee in the past and bring impressive professional credentials related to the Committee’s work at this important time.

They fill vacancies created by the departure of David Anderson, Colonel, U.S. Marine Corps, currently with the U.S. Court of Appeals for the Armed Forces; Susan Cahoon in private practice in Atlanta; Angeline Chen, Associate General Counsel, International Launch Services; and Jeh Johnson, private practice and former General Counsel, Air Force. These members have worked hard on Committee projects and we wish to thank them again for their contributions.

Other members of the Committee include: Eugene Bowman, Deputy General Counsel for National Security Affairs, Federal Bureau of Investigation; Rodney Bullard, Captain, USAF, US Air Force JAG Department; Albert Harvey, former member of the ABA Board of Governors; M. Tia Johnson, Colonel, US Army, Legal Advisor, Department of Defense International Criminal Court Task Force; Nicholas Rostow, General Counsel and Senior Policy Advisor to the Ambassador, UN Mission to the United Nations; and Professor Scott Silliman, USAF (ret.), Director, Center on Law, Ethics and National Security, Duke University School of Law and former Air Force Judge Advocate.

Watch the next *NSLR* for a summary of the appointments made to the Advisory Committee.

INSIDE THIS ISSUE

Event Summary: 9/11 Commissioners	p. 3
<i>Homeland Security</i> Book Review	p. 4
Intelligence Community Reform Legislation	p. 5
Event Summary: Judge Chertoff	p. 6
Event Summary: Cong. Harman	p. 7
Event Summary: Supreme Court Panel	p. 8
National Security Agenda	p. 12

US-China Relationship

Continued from page 1

nuances of America. The reciprocal is that we do not understand China. There is a need for government and civilian leaders of both countries to exchange visits that would result in enhanced understanding of mutual culture and goals.

There is cause for optimism about the proposition that the US can exercise its primacy and leadership by shaping the US/China political terrain. China has mastered the art of political theatre and I was an audience of one. Yet, in each of the twelve meetings that averaged two to three hours in length, I sensed warmth and affection for Americans and the US. These leaders were scarred by the Cultural Revolution that ended in 1976. There is a pervasive conservatism and caution, and recognition of the awesome responsibility of guiding their country on a path that will continue the remarkable progress that has been achieved since 1949.

My optimism is tempered by legitimate concerns voiced by respected US commentators that suggest that there are negative trends that are moving the relationship in the wrong direction (See the *June 2004 Report to Congress of the US-China Economic and Security Review Commission*). My Chinese hosts recognized this. Their view is that tension and conflict issues should be addressed cooperatively with the expectation that many, but not all, issues can be resolved or ameliorated. Conflict and tension is inevitable, but it is in the interest of US national security that rough patches be managed by friends and partners rather than by adversaries.

My hosts noted that there was negligible "hate America" attitude among the Chinese leadership and people. One major gap in my meetings was a lack of discussion of the nature and degree of control and repression of political dissent. Anecdotally, when CNN was about to mention the anniversary of Tiananmen Square my television screen went dark.

My concerns about the US/PRC relationship follow:

1. If China continues its rapid economic growth, it will translate its prosperity into military power resulting in security competition with the US in Asia.
2. China may attempt to dominate Asia and become the regional hegemon; US long-standing policy is not to tolerate peer competitors in Asia or Europe.
3. The US policy response may be to contain China similar to the US-Soviet Union policy during the Cold War. The US may seek to contain China by creating alliances with Japan, India, Russia, South Korea, and Vietnam.
4. The Taiwan independence issue may not be settled diplomatically and China could take military action to reunify Taiwan with China. How will the US respond militarily, economically, and diplomatically to China?

5. A US/PRC energy security competition may result in a re-armed Japan. In the US, Europe, and Japan, new demand for energy is outpacing supply. China's energy demand is voracious and may double by the year 2020. An oil dominated world energy economy may induce unavoidable US/PRC competition.

There are three fundamental issues tangential to the concerns expressed above that need to be addressed:

1. Is China's economic and domestic political success or failure in the best interest of the US?

My response is: The US should consider developing policies that would support China. One assumption is that the US has a dynamic rather than static economic potential that will counter the negative effect of China's economic growth on the US economy. China's domestic political stability is based on meeting the expectation of China's population that prosperity will continue to rise. If this goal is not met, the Communist Party (CCP) could be tempted to turn to military adventurism in the region (similar to Argentina and the Falklands War). Induced nationalism would result in anti-Americanism and the likelihood of a positive relationship with China would be diminished. The five major US policy concerns listed above require a fully informed public debate.

2. Is the US willing to adapt its primacy and share power in Asia?

Continued on page 9

THE ABA NATIONAL SECURITY LAW REPORT

<http://www.abanet.org/natsecurity/>

EDITORIAL BOARD

Suzanne E. Spaulding
Stewart Baker
Richard E. Friedman
Elizabeth Rindskopf Parker
Pamela Parizek
Holly Stewart McMahon
Matthew Foley, *Editor*

The *National Security Law Report* (N.S.L.R.) contains articles concerning the law relating to the security of our Nation and associated topics. The N.S.L.R. is sponsored by the ABA Standing Committee on Law and National Security. The views expressed in this publication are not necessarily those of the Standing Committee, the ABA, or any governmental agency or private enterprise.

To receive the N.S.L.R., contact Holly Stewart McMahon at 740 15th St., NW, Washington, DC 20005-1009; (202) 662-1035; FAX (202) 662-1032; or hmcMahon@staff.abanet.org.

Copyright © 2003 American Bar Association, ISSN 0736-2773.

9/11 Commission Members Assess Prospects for Change in Intelligence

By Margaret Lee Wood

With the 9/11 Commission Report in the forefront of public debate and on the New York Times Bestseller List, the ABA Standing Committee on Law and National Security held its monthly breakfast meeting on September 23, 2004, to consider the report and its implications. 9/11 Commissioners Slade Gorton and Jamie Gorelick attended to share their thoughts on the results of the Commission and the road ahead for the United States. Gorton, formerly a United States Senator from Washington, is now counsel with Preston Gates & Ellis LLP. Gorelick is a partner at Wilmer, Cutler, and Pickering

Gorelick recounted the concerns she faced when initially appointed to the Commission. She worried that like a multitude of previous government commissions, the 9/11 Commission would labor away in obscurity, and its recommendations would ultimately be unheeded. She noted, however, that Tom Kean, the Chairman of the Commission and Republican former Governor of New Jersey, was determined not to allow this to happen. By employing transparent procedures, open hearings and dialogue with the media the Commission has thus far achieved success.

Before the Commission proceeded to analyze the events of September 11, however, Gorelick noted that the Commissioners also agreed to adhere to two principles. First, the Commissioners decided to focus primarily on facts instead of ideology, allowing for a full account of the events leading up to and during the terrorist attacks. Second, the Commission created a bipartisan forum in which decisions could be reached fairly and without bias.

Gorelick emphasized that an additional factor distinguishing this Commission from its predecessors was the grassroots movement from the families of the 9/11 victims. Many initially fought to establish the Commission, and were also an important and vigilant force when it came to overcoming the resistance that some officials put up to the Commission.

Agreeing with the analysis set forth by Gorelick, Slade Gorton acknowledged two miscalculations he made at the outset of the Commission's formation. First, although he originally believed that holding a large number of public hearings was excessive, he ultimately realized that the hearings provided the requisite basis of credibility that the Commission needed to be successful. By providing the opportunity to establish facts and correct mistaken beliefs as they arose, Gorton noted that the hearings turned out to be one of their most powerful tools. Gorton's second miscalculation concerned the release of the report. During an election season, he stated, there was a high probability for the findings of the report to be placed in the center of a vicious and negative debate. However, the results point to the contrary; and, in fact, the report's release has created a competitive environment that has encouraged swift action

by both the legislative and executive branches. Gorton stood behind the call for swift action by asserting that a lack of immediate action will place the political liability of another terrorism incident on the shoulders of Congress.

Gorton also expressed concern for the disproportionate amount of coverage given to varying proposals offered by the Commission. For example, the Commission's definition of "the enemy" as a politico-religious sect, which is unwilling to compromise, receives a great deal of attention. Other recommendations, such as those that denote how to identify and protect the great majority of peaceful Muslims from the few radical extremists, are getting significantly less attention.

The Commissioners also addressed their lingering worries. Gorelick cited two main concerns. First, she pointed out that there is still no one in charge to provide for joint planning and emergency coordination. Within the government, there are a number of individual entities that plan for what they would do in the event of another attack, but there is no coordinator of the entities to ensure the existence of a cohesive plan. Second, Gorelick noted that the Commission's two chapters outlining a plan of action have been, for the most part, overlooked. Consequently, there is currently a disparity in debate preventing the concrete ideas from being implemented.

Gorelick commented on the current Congress's unwillingness to reform itself. She noted that this is a necessary step to improving the inherent strength of our system, and that Congress must soon take certain actions that will ensure continuity and legitimacy in planning, such as tying the appropriations and authorization processes together.

Gorton's primary concern centered around what he considered to be the most vulnerable point in our system—travel. He supports a worldwide standardization of driver's licenses and passports for citizens of the United States. Gorton expressed concern for the fact that internal bureaucracies still block the placement of many commonsense measures, such as a comprehensive no-fly list.

The Commissioners concluded by pointing to some of the inadequacies that September 11 revealed about our government in a state of emergency: inability to reach the President, miscommunications between the Secretary of Defense and the Vice-President, and the absolute lack of communication among planes in the air. Now that the Commission has completed its investigation of the facts, it is in the hands of Congress to implement their plans.

To download a copy of the Commission's report please visit <http://www.9-11commission.gov/report/index.htm>.

Margaret Lee Wood is a student at Catholic University of America Columbus School of Law.

Book Review

A War of a Different Kind: Military Forces and America's Search for Homeland Security

By Stephen M. Duncan

Reviewed By Jennifer Stahlschmidt

The attacks of September 11, 2001, fundamentally altered America's national security paradigm. Among their many newly assigned tasks, policy-makers were forced to rethink the appropriate role of the armed services in bolstering homeland security, as well as fighting a global war on terror. In *A War of a Different Kind: Military Force and America's Search for Homeland Security*, Stephen Duncan provides thoughtful analysis of these issues, with particular attention paid to the military's place in defending the homeland.

As a former federal criminal prosecutor, assistant secretary of defense, and decorated war veteran with over forty years of service, the author is able to authoritatively traverse the many distinct but related aspects of his subject matter.

For years, some inside the government and military, as well as outside sources, had been asserting that the United States was vulnerable to an attack on its own soil. Some analysts began to develop a homeland security strategy, examining how to reorganize the military in order to prevent such an attack, and how it could react if such an attack did occur. This required determining how to coordinate policy and operations among the federal departments and agencies, and between the federal government and state and local governments. Complicating this was the question of what role the military would play in areas that had traditionally been under the control of the civil law enforcement agencies (border security, airport security, port security, etc.). These hurdles hindered the establishment of an effective homeland security strategy prior to the terrorist attacks on New York and Washington.

Following 9/11, reorganizing the military and formulating a homeland security strategy became the number one priority of the Bush Administration. Duncan supports this track, acknowledging that, "the constitutional and political history of the United States makes it clear that the first priority of the federal government is the safety of the country."

Questions, however, were raised over how the new homeland security entity would manage the more than 87,000 different federal, state, and local governmental jurisdictions in the United States. Concerns were also voiced over the relationship of intelligence to homeland security—specifically, the blurring of lines between domestic and foreign intelligence activities, as attempts to overhaul the intelligence community were aimed at eliminating sharing-barriers that led to major failures in the months and years prior to September 11.

Ultimately, the reorganization and modernization of the military was undertaken to prevail over an enemy that is bent

on attacking American soil. This task proved to be the most problematic: first in assessing the legality of using the military for homeland security, and then in structuring the military so that this would even be feasible while simultaneously operating in theaters around the globe.

Duncan favors a role for the armed services in homeland security when necessary tasks cannot be performed by civil law enforcement. He points out that the Constitution as well as numerous Supreme Court decisions authorize the President to exercise authority in the event of a national emergency, including the authority to mobilize the armed forces. Critics, however, argue that the Posse Comitatus Act forbids the president from utilizing the military in domestic affairs. According to Duncan, while this statute is deeply-rooted in our history, it is only a legislative enactment, which means it can be amended or even repealed. Furthermore, he says, "Because any use of the regular armed forces...will be effectuated only through the civilian secretary of defense acting at the direction of the nationally elected president and its use must be funded by the elected members of Congress, it is difficult to see any significant risk to what the Supreme Court has called 'this Nation's tradition of keeping military power subservient to civilian authority.'"

Duncan also examines the debate surrounding war on terror detainees and the question of whether they should be afforded the same civil liberties as Americans. Quoting Judge Posner, "We are a nation under law, but first we are a nation," Duncan argues that while it seemed logical to afford some protections to detainees, only the bare minimum should be allowed because these detainees could provide useful information in helping to prevent future attacks on the United States.

Three years after the terrorist attacks of 9/11, questions remain. Is there an effective homeland security plan in place? What is the proper role of the military in domestic security? Has the modernization of our military really begun? While significant steps have been taken in the right direction, there is much to be done.

Duncan concludes that the nature of this new war will require policy-makers to think and plan differently, and to continually reassess strategies and priorities. The defense forces charged with protecting America will henceforth include firefighters, police officers, public health and local emergency personnel, as well as many others, although the brunt of the burden will continue to be carried by the men and women of the military.

Continued on page 12

Intelligence Community Reform: Pending Legislation

By Michael Van Hall

Since the July 22, 2004, release of the report from the 9/11 Commission, lawmakers have proposed a steady stream of legislation responding to Commission recommendations. The bipartisan and unanimous report urges fundamental changes to the United States Intelligence Community (IC) and calls on Congress to overhaul the 1947 National Security Act that established the modern security regime.

The Commission's 41 recommendations would enhance Congressional oversight and establish a National Intelligence Director (NID) to oversee and control the budgets for the entire IC, including a proposed National Counterterrorism Center (NCTC). The NID would be the President's chief advisor on intelligence and be authorized to approve and submit nominations to head the CIA, Defense Intelligence Agency (DIA), FBI Intelligence Office, National Security Agency (NSA), National Reconnaissance Office (NRO), and Homeland Security Information Analysis and Infrastructure Protection (IA & IP). The NCTC would be staffed by personnel from various agencies and be involved in joint operational and intelligence planning with other IC components. The Commission advocated moving covert paramilitary operations from the CIA to the Defense Department.

Intense lobbying by Commission members resulted in proposed legislation to enact all 41 recommendations, with leaders from both chambers promising the passage of reform measures before November 2. With the introduction of the House Republican leadership's bill on September 23, the parameters of the political battle have been set. This article reviews proposals in Congress as of Friday, October 1.

On the Senate side, several bills have been introduced either directly or as part of broader security proposals. The most important legislation is a bipartisan effort being offered by Senators Collins and Lieberman and was just released from the Government Affairs Committee. This bill accepts nearly all of the 9/11 Commission's recommendations, but does not address Congressional oversight. During the week of October 4, a separate bill on oversight initiated by Senators Reid and McConnell was to be introduced.

In the House, Representative Shays introduced bipartisan legislation closely tracing the Commission's recommendations, in addition to that offered by House Minority Leader Nancy Pelosi. However, the House Republican leadership's bill, introduced by Majority Leader Dennis Hastert, took center stage amid complaints from Democrats and Republicans backing the Shays bill that Republican leadership prevented consideration of the bipartisan proposal.

Like its Senate counterpart, the House Republican leadership's bill takes up the 9/11 Commission's plan for the

establishment of an NID and NCTC; however, it also includes controversial measures not seen in the recommendations of the 9/11 Commission that enhance the power of law enforcement and border control agencies.

The legislation would make it easier to deport immigrants who violate the law, set new minimum standards for state driver's licenses, and increase scrutiny of foreign travelers to the United States. It would also allow greater freedom to law enforcement agencies to track "lone wolf" terrorists not connected with any particular terrorist groups. The House proposal, unlike the Senate version, does not include a national network to facilitate interagency information sharing about citizens. These differences may ultimately present challenges to the easy passage of any intelligence reform legislation before the end of the year.

As each bill progresses, it is likely that the central debate will focus on the details of the leadership role to be granted the NID. The Collins-Lieberman draft creates a president-appointed, senate-confirmed NID that is separate from the CIA director—essentially splitting the current Director of Central Intelligence into two positions. The NID will have budget authority over the "National Intelligence Program," a label encompassing all IC components serving "national" customers; that is, those serving more than one department. The bill also specifically precludes NID authority over tactical military intelligence, which is to remain under the control of the Defense Department.

The House legislation more closely resembles the view of the Bush Administration, granting a more limited role to the NID. While still overseeing all 15 intelligence agencies, including the CIA and DIA, the NID would not have significant nominating power for the leadership of the various IC components, nor would the position have the same degree of budget control as the Senate bill. For instance, whereas the Senate measure creates an overall budget authority in an intelligence comptroller under NID auspices, the House version leaves the Defense Department in charge of the intelligence budget, and keeps secret the total amount spent on intelligence annually. Any requests for transfer of funding between intelligence programs by the NID would require approval by the Office of Management and Budget in the White House.

The looming deadline of a mid-October adjournment puts pressure on both houses to act quickly. With little time left to reconcile the two versions, a group of influential former policymakers, led by Henry Kissinger, has urged caution and pleaded with Congressional leaders to slow the pace of efforts to implement the 9/11 Commission's recommendations.

Michael Van Hall is a student at Catholic University Columbus School of Law.

BREAKFAST PROGRAM

Judge Chertoff Addresses Challenges to the Legal System in Fighting Terrorism

By Thomas Lyons

Assume that the date is September 10, 2001. The FBI just received word from a reliable and confidential source that members of an international terrorist organization are planning to hijack commercial airlines and bomb lower Manhattan and Washington, D.C. Legally, is there anything that the FBI can do? Certainly they would arrest these members, but on what charges would they hold them; on what charges would they prosecute them? The confidential nature of the sources may preclude exposure; moreover, the bulk of the information is likely based on hearsay. Judge Michael Chertoff of the Third Circuit, speaking on April 13, 2004, before the ABA's Standing Committee on Law and National Security, posed the question, "what then?"

Prior to September 11, the division between intelligence gathering and law enforcement was vast. In fact, walls were specifically created to maintain this division and to preserve the integrity of state secrets. Intelligence information is often based on confidential sources, hearsay, and fragmentary information. The information is, moreover, usually a product of compromising methods. Thus, the public disclosure of one will lead to the dissolution of another.

In the criminal justice system, however, a conviction will only be obtained if the suspect is proven guilty beyond a reasonable doubt. Contrary to the intelligence world, which uses information to prevent future acts, law enforcement utilizes past conduct to deter future acts. Moreover, suspects are innocent until proven guilty.

This system poses a problem for effective anti-terror management. And, although many of the barriers that divided the intelligence and law enforcement field prior to September 11 have been minimized due to congressional acts, such as the PATRIOT Act, the principal difficulty remains.

For example, if law enforcement received information regarding a terrorism threat involving U.S. nationals, the only effective reaction is incapacitation. This, of course, negates the idea of innocence until proven guilty, and circles us back to the question of detention and prosecution. For this reason, Judge Chertoff reasoned that the legal field must

begin to discuss the options facing our system. What changes should we make to our systems to manage threats while balancing civil liberties?

According to Judge Chertoff, there are currently three lines of thought. The first system, modeled from the Guantanamo cases, denotes suspected terrorists as enemy combatants. The purpose of this system is to incapacitate the threat, not to punish. Similar to the current enemy combatant detention process, Judge Chertoff noted that this method is established under the authority of the laws of war. As such, it is controlled entirely within the Executive Branch, and similar to the current detainees, incorporates review procedures within that Branch.

A second approach focuses on the use of military commissions. Currently, citizens of the United States fall outside of the jurisdiction of these commissions; Judge Chertoff queried whether this should be altered. On the one hand, it may allow for more flexibility. On the other hand, current procedures in military commissions maintain evidence standards similar to the criminal system. Consequently, this may not be a suitable answer.

Finally, we could simply alter the Article III procedures in place today. This would provide the legitimacy needed to protect civil liberties; however, the system could not be altered with ease. Additionally, there is concern that once the system is altered it will be subject to future exploitation. At some point, an attempt will be made to expand the definition of terrorism to include ordinary criminals and thieves. For this reason, the legitimacy that Article III courts will bring may be outweighed by the implication of alteration.

In closing, Judge Chertoff stressed the necessity of open discussion. We are at a point when time is working against us; moreover, we are in a position to potentially suffer great infringements of our individual constitutional rights. Thus, the legal community should analyze the benefits of alternate systems, even taking into consideration the systems of our foreign counterparts in England and France. In the end, however, our Congress needs to provide a system that properly balances our interests in national security against our rights as individuals.

Thomas Lyons is a student at Catholic University Columbus School of Law.

Rep. Harman on Changing U.S. Intelligence Community

By Jennifer Stahlschmidt

On May 20, 2004, the American Bar Association's Standing Committee on Law and National Security welcomed Congresswoman Jane Harman to its monthly breakfast program. Congresswoman Harman is currently the ranking member of the House Permanent Select Committee on Intelligence.

Congresswoman Harman began with a discussion of inadequacies related to Congressional oversight on issues of intelligence and national security. She cited the example of Abu Ghraib, where Congress was not informed of the prisoner abuse when the investigations began, only finding out when the information was released to the public. According to the Congresswoman, "it is critical in our system of checks and balances that Congress be informed."

She also acknowledged the imperative of reestablishing bipartisanship, noting that because terrorists care little for distinctions between Republicans and Democrats, Americans must similarly avoid drawing party lines when formulating national security policies. Congresswoman Harman suggested bipartisanship could be buttressed by expanding the number of seats on the Intelligence Committee.

The Congresswoman shed light on deficiencies in the way the budget is created for the intelligence community. The budget is not included in the initial budget but rather is funded through supplementals, severely inhibiting congressional oversight, particularly by the Intelligence Committee.

In early 2004, Congresswoman Harman, along with others on the House Permanent Select Committee, introduced "The

Intelligence Transformation Act" (H.R. 4104) intended to modernize and transform the intelligence community. The thrust of the problems, she indicated, is that individual agencies move information within their respective agency but do not share the information with other agencies. According to the Congresswoman, this legislation is "timely, workable, and acceptable to connect the 15 stovepipes that encompass the intelligence community" and had it been in place in 2001, would have prevented the most significant intelligence failure in our history: the attacks of September 11.

This legislation would create a new position called the Director of National Intelligence (DNI). The DNI would head the Intelligence Community, provide the President with independent assessments, and be given significant budgetary authority, through the ability to build the intelligence budget as well as license to move funds around to meet emerging priorities. The DNI's authority would also allow it to require agencies to work jointly and facilitate inter-agency data sharing. According to Congresswoman Harman, this Act would encourage a need-to-know culture that embraces bipartisan and common sense ideas.

For more information on Congresswoman Harman and the House Permanent Select Committee on Intelligence please visit <http://intelligence.house.gov/>.

For more information on the Intelligence Transformation Act please visit <http://thomas.loc.gov/cgi-bin/bdquery/z?d108:h.r.04104:>.

Jennifer Stahlschmidt is a student at Catholic University Columbus School of Law.

Standing Committee on Law and National Security

Chair: Stewart Baker

Members: Eugene Bowman, Rodney D. Bullard, Willie Curtis, Eugene Fidell, Albert Harvey, Tia Johnson, Wyndee Parker, Nicholas Rostow, Scott L. Silliman, Michael Wermuth

Advisory Committee Chair: Richard E. Friedman

ABA Board of Governors Liaison: Charles A. Powell III

ABA Law Student Division Liaison: James Quinlan

Staff Director: Holly Stewart McMahan

740 15th St., NW

Washington, D.C. 20005-1009

(202) 662-1035 -- FAX: (202) 662-1032

E-mail: hcmcmahon@staff.abanet.org

Web page: <http://www.abanet.org/natsecurity>

Panel Assesses Long-Term Impact of the Supreme Court's 2004 National Security-Related Decisions

By Matthew Cloud

At its monthly breakfast meeting on July 2, 2004, the Standing Committee on Law and National Security convened a panel discussion on the Supreme Court's three recent decisions involving the detention of "enemy combatants" in the war against terrorism. The panelists were Eugene R. Fidell, President of the National Institute of Military Justice; Elisa Massimino, Washington Director of Human Rights First; columnist Stuart Taylor, Jr., of *National Journal*; and Ruth Wedgwood of the Paul H. Nitze School of Advanced International Studies at Johns Hopkins University. Suzanne E. Spaulding, chair of the Standing Committee, moderated the discussion.

Most on the panel agreed that although the Court's decisions, announced on June 28, 2004, are widely regarded as a defeat for the Bush Administration and a victory for civil liberties, their practical effect is not yet known. In the case of *Rasul v. Bush*, for example, where a majority of the Justices upheld the habeas corpus petitions filed by prisoners challenging their detention in Guantanamo Bay, Ruth Wedgwood suggested that the Court's holding, written by Justice Stevens, left open some "potentially difficult" issues. In particular, she said, was the possibility that American military prisoners held anywhere in the world – including Iraq presumably – could sue the government in American courts, an implication that could impose new and possibly onerous evidentiary obligations on military personnel in the field.

Similarly, in *Hamdi v. Rumsfeld*, a plurality opinion authored by Justice O'Connor, the Court held that the Constitution's Fifth Amendment guarantee of due process required that an American citizen captured abroad in a theater of military action—in this case Afghanistan—be afforded meaningful judicial review. Stuart Taylor commented that the burden of proof that the government will have to meet in that circumstance is possibly the most important practical aspect of the Court's rulings. To detain a captive as an enemy combatant, Mr. Taylor explained, the government need only present "credible evidence" that the detainee is affiliated with al-Qaeda or the Taliban. At that point the burden shifts to the detainee to prove otherwise. Mr. Taylor went on to say that while this standard clearly required a citizen-detainee to receive notice of the factual basis for his detention and to be able to appear, at least initially, before a neutral decision-maker, it did not seem to require the full panoply of traditional criminal procedural protections. Hearsay declarations, for example, would be permitted. And, the Court implied, the

determination that a citizen may be an enemy combatant could be undertaken by military tribunals—not necessarily Article III courts.

Another unanswered question from the Court's opinions is whether an American citizen who is captured within the United States can be detained as an enemy combatant at all. In *Rumsfeld v. Padilla*, the alleged "dirty bomber" José Padilla sought to challenge his more than two-year detention in a Naval brig in South Carolina through a "next friend" who filed a habeas petition against Secretary of Defense Donald Rumsfeld. In a 5-4 decision by Chief Justice Rehnquist, the Court held that the Defense Secretary was not the proper respondent and that suit should have been brought against Mr. Padilla's immediate custodian, the commander of the brig where he is being held.

Panelist Elisa Massimino explained that *Padilla* was the Administration's most difficult case and that is why the government put such emphasis on jurisdictional issues. Although designed to prevent "forum-shopping" by a plaintiff seeking jurisdictions with judges favorable to his position, the majority's holding, she said, seemed to permit the government that very tactic. Eugene Fidell pointed out that Mr. Padilla was "spirited out" of the Second Circuit in New York and removed to the South Carolina brig only after a New York court had established jurisdiction over his habeas petition. That, he said, was the very type of unilateral executive action that centuries of development of the rule of law had aimed at preventing. Still, the majority made clear that the Second Circuit was not the proper place to sue. Also troubling, added Ms. Massimino, was the potential that in a similar case, the next friend of a suspected enemy combatant may not know where to sue given that the detainee's location may not be publicly disclosed.

In many ways, then, the question of whether the holdings in the *Padilla*, *Hamdi*, and *Rasul* cases will coalesce into a coherent policy for the handling of enemy combatants remains to be seen. Ironically, there still is no legal definition of just what an enemy combatant is. As Suzanne Spaulding summed up: The Bush Administration is left in effect with the Court saying that it might scrutinize these types of detentions but, "we'll tell you later."

Matthew Cloud is a student at Catholic University Columbus School of Law.

US-China Relationship

Continued from page 2

My response is: The US can attempt to contain China, but this will prevent the maturation of the US/PRC partnership and create the political environment for an Asian Cold War. China is a formidable power in the region. Better practice suggests that the US should restrain China from becoming the regional hegemon by recognizing the principle of US shared regional power with China, Japan, India, and, to a lesser degree, with Russia, South Korea, and Vietnam.

3. What should the US do to resolve the China/Taiwan reunification-independence issue?

My response is: The US is not well positioned to resolve this problem by acting as a facilitator or mediator. The US should continue to adhere to the long standing "One China" principle and ensure that it does not send imprecise or conflicting signals to Taiwan that would encourage independence. China has clearly stated that the ambiguous status quo of the past thirty years is nearing an end because Taiwan is creeping towards independence under cover of the 2008 Olympic Games in China. China may be considering a "new thinking," innovative approach that addresses the major sticking point of Taiwan's aspiration for complete sovereignty. This would be a demonstration of China's incremental flexibility on the matter. However, I noted in my discussions that China has not wholly kept its promises made to Hong Kong and that political unrest in Hong Kong would encourage Taiwan's independence movement.

Following are summaries of some of the topics of discussion from the Chinese perspective:

A Rising Power

- China aspires to great power status, but it recognizes that it will not attain this goal for another 20-30 years. It must resolve its internal domestic problems before it becomes a global power.
- Its focus is on internal domestic issues rather than international issues.
- China's Gross Domestic Product per person is \$1,660 compared to US GDP of \$36,300.
- Seventy percent of China's 1.3 billion people live in rural areas. There is great disparity between prosperity in urban and rural areas.

Domestic Problems

- Rapid economic growth has caused growing inflation, unsecured real estate bank loans, and overbuilding.
- There is massive migration from rural to urban areas resulting in unemployment and under-employment.

- Widespread corruption.
- Environmental problems resulting from rapid industrial growth.
- Shortages of basic materials: steel, cement, lumber, and shortages of electricity and water.

China's Perception of US World Primacy and Leadership

- China regards the US as the major state power globally and in Asia.
- There is disappointment that the US has squandered its leadership potential subsequent to the end of the Cold War.
- China has muted its criticism of the US in Iraq and the recent Iraq prison abuse revelations.
- China is prepared to respond positively to US leadership, if the direction is consistent with China's strategic objectives.
- Stylistic concerns: the US must respect China as an equal; sometimes the US ignores courtesy norms.
- US primacy is regarded as being unilateral, arrogant, and absolute. The cure is respect and advance consultation.
- Notwithstanding these concerns, there is great admiration and respect for the US and a desire to build and strengthen the US/PRC relationship.

China and the US in the Asian Region

- The PRC goal is to avoid creating a regional rivalry with the US that would result in a US policy of containment involving a US alliance with India and Japan.
- India is at least ten years behind China's economic development. A strategic alliance involving the US, India, and China would involve one-third of the world's population and a major part of the world economy.
- Japan is sensitive to its diminishing power in the region and, if it feels threatened militarily or economically, it may re-arm. Japan must be a full partner in any US/PRC regional consortium.
- The US must recognize that its primacy in the region may be coming to an end. The US should take the lead in establishing a new balance of power in the region involving the US, China, India, and Japan.

Human Rights

- US criticism of China's human rights policy is based on misperceptions and the US does not take into account the cultural and political imperatives that are involved.
- The US must recognize its human rights shortcomings when it criticizes China and other states.

Iraq

- China has minimized its criticism of US policy in Iraq because it would not change US policy and it would interfere with closer relations with the US.

Continued on next page

US-China Relationship, *continued from previous page*

- China believes that the US is mired in Iraq and has not focused on the importance of Asia.

Democracy

- China believes that vigorous marketing of US-style democracy is counter-productive. China has adopted elements of democracy but it is loath to identify itself as being on the path leading to democracy.
- The PRC perspective is that American style democracy may not be in the best interest of many developing states.

Communism

- My hosts believe that many Americans and US policymakers view China through the eyes of long deceased Senator Joe McCarthy and that the US fails to understand the rapid political and doctrinal changes that have been made as predicates to China's global market economy.
- Marxism is an anachronism and is not useful for China's orientation towards the contemporary world. The Communist Party is all-inclusive and is not limited to workers.
- The CCP recognizes that it is vulnerable because of a rising middle class and accessibility of communication (the internet and cell phones).
- The CCP must adapt to changed circumstances before it is over-run by contemporary change. The CCP research arm was a leader in moving China towards its market economy policy.
- The present orientation of the CCP is to solve problems rather than preach doctrine.
- China has a fragmented internal political structure. The CCP provides the political glue that holds the structure together.

Terrorism and Proliferation of Weapons of Mass Destruction

- China is vulnerable to acts of terrorism.
- There have been many acts of terrorism in the western provinces with large Muslim populations that have not been reported.
- China's view of terrorism is similar to that of Europe—less important than the US priority. Counterterrorism is a police function rather a military function.
- China will continue to participate in an international regime that bans the export of WMD technology.
- China will cooperate with the US in intelligence gathering. They see this type of cooperation as an opportunity to strengthen relations with the US.

Globalization and the US Trade Deficit

- Globalization and world trade is the vehicle for China's prosperity. China will participate in international trade organizations and continue to adapt its market economy to international norms.

- China is sensitive to the US trade deficit with China. They recognize that the US trade deficit and job loss are important US domestic political issues, and that China will be blamed.
- China's foreign direct investment policies benefit US corporation subsidiaries that operate in China and return profits to the US. General Motors recently invested \$3 billion to manufacture vehicles in China. US consumers benefit from lower prices.
- China wants to purchase dual use technology from the US. However, US technology export restrictions force China to make technology purchases elsewhere.
- China holds approximately 10 percent of all US securities.

The Economy

- China favors state-owned enterprises that are inefficient and do not make investments in technology research. China depends on foreign investment for its domestic industries.
- China's companies tend to be non-collaborative within their respective industries; they depend on foreign innovation.
- China may be faced with looming economic problems: a \$5 billion foreign trade deficit; increasing inflation; rapid real estate development that may result in over-building and a burst real estate bubble; and shortages of steel, cement, lumber, electricity, and water.
- The current economic growth trend will decrease because the backlog of basic unfilled demand will be met; it is anticipated that annual economic growth will be reduced in future years.

Policymaking

- Policymaking is a consultative, bottom-up process involving five or six consultative bodies. The Communist Party Central Committee is first among equals.
- There was uniform agreement among high echelon representatives of the consultative bodies on many of the issues discussed, but nothing that approached a "party line," with the exception of a uniform view regarding the gravity of the Taiwan independence issue.

Chinese Military (People's Liberation Army, the PLA)

- I met with the PLA deputy chief of staff and the director of the PLA National Defense University. Our discussions focused on international political issues rather than military matters.
- China's economic prosperity will enable the PLA to modernize. Their goal is to move towards high technology similar to the US military model. However, a relatively limited amount of money is available for military modernization—much less than the US military budget.

Continued on next page

November 18–19, 2004

Fourteenth Annual Review Conference

Where can you go to learn the most about national security law issues from senior lawyers in the Executive and Legislative Branches while receiving continued legal education credit?

Join us for the **14th Annual Review of the Field of National Security Law Conference** on **November 18-19, 2004** at the **Crystal City Marriott Hotel in Arlington, Virginia.**

In addition to panels on Counterterrorism Privacy and Technology, Intelligence Organization and the 9-11 Commission, Inside Military Commissions and a Discussion of the Provisions of the USA PATRIOT Act, there will be ample time for networking and further discussions with the panelists. Two lunches and a dinner will feature prominent national security speakers.

This popular conference regularly sells out, so register soon! Check out the Standing Committee's website at www.abanet.org/natsecurity for the latest program updates. If you need sleeping rooms, please call the Crystal City Marriott—1-800-228-9290—by October 27 to receive the conference rate of \$150. **See you there!**

US-China Relationship, *continued from previous page*

- The PLA is sensitive to the political dimension of military modernization because of the anticipated US negative reaction. My military hosts asserted that modernization is for defensive purposes and that there is no likelihood of a PLA/US military confrontation, other than Taiwan.
- The US military presence in Asia is not perceived to be a threat to the PLA. We did not discuss the increased US military presence in Central Asia that may be related to the potential oil/energy issue.
- The PLA "lecture" to me was that the US must do everything possible to prevent Taiwan's independence. The use of military force projection against Taiwan was not discussed. The issue was framed as one of pride and honor. The message is that Taiwan's independence would require China to respond militarily and that indirect US military involvement would be anticipated.
- The potential threats to China are a re-armed Japan, and unresolved disputes with India and Russia. None of these threats are deemed imminent.
- As an example of PLA's defensive military posture, they asserted that they have no plans to build an aircraft carrier fleet.

- The PLA has five seats on the Communist Party Central Committee. This will be reduced to two seats as an example of the PLA's desire to voluntarily diminish but not relinquish its political role in government.

The Olympic Games (2008)

- The Olympics provides China with an opportunity to demonstrate its importance to the world. Beijing and Shanghai are extraordinary modern cities.
- China is engaged in a charm offensive that will continue through the run-up to the Olympic Games. Conflict with the US in the pre-Olympics period would be disastrous to the success of the Games.
- China believes that Taiwan may base its independence strategy on China's political and economic vulnerability during the period 2004-2008.

North Korea

- China sees its role in North Korea as a facilitator rather than as the lead state in negotiations with North Korea.
- China has minimal power over North Korea, but they will continue to work with other states to resolve the problem.

Richard E. Friedman is Chair of the Advisory Committee and President of the National Strategy Forum.

National Security Agenda

By Dana DeCore

The Maritime Transportation Security Act of 2004

On September 21, the Senate passed The Maritime Transportation Security Act of 2004. The purpose of the bill is to build upon and enhance implementation of the Maritime Transportation Security Act of 2002, an act that established the first Federal requirements for maritime transportation security. The bill, S. 2279, would require the Homeland Security Department to make recommendations on how to handle port security issues and to evaluate current maritime security systems for deficiencies. The bill includes a number of report and security plan refinement requirements, which are designed to further clarify maritime transportation security objectives. The bill also would authorize \$35 million each year from FY 2005 through FY 2009 for the Homeland Security science and technology directorate to promote research and development on port security. Possible areas of research include: detection of explosives, chemical, biological and radiological agents and materials; tags and seals for tracking shipping containers; tools such as satellite tracking systems for identifying potential terrorist threats; applications for applying technologies from other sectors to ports; and, better container design, including blast-resistant material.

Upon passage by the Senate, this bill was referred to the House Committee on Transportation and Infrastructure.

Aviation Security Bill approved by Senate Committee on Commerce, Science and Transportation

On September 22, the Senate Committee on Commerce, Science and Transportation approved legislation that aims to solve ongoing aviation security problems. The bill, S.2393, seeks to increase security for both cargo and airport perimeters, establish higher screening standards and provide advanced technologies for screening baggage. Prior to approving the bill, the committee also endorsed a substitute amendment to incorporate additional security provisions. According to the bill summary, the substitute amendment establishes:

1. A requirement that the Federal Aviation Administration (FAA) develop a system for issuing pilot's licenses to

protect against tampering, counterfeiting or stolen identifications. For example, the FAA must include digital photographs and unique identifiers such as scanned fingerprints or irises on the licenses. The bill also would authorize \$50 million in FY 2005 for the initiative.

2. A requirement for the department to develop screening standards at the nation's airports to ensure that the "average aviation-security-related delay experienced by airline passengers does not exceed 10 minutes." The measure would develop a grant program to develop, test, purchase and deploy devices to screen air cargo. It also would require that cargo-aircraft operators build carriers and hardened cockpit doors between the aircraft flight decks and cargo compartments. The Homeland Security secretary would need to outline a schedule for replacing trace-detection equipment used to screen checked baggage with explosive-system equipment.

3. The amendment would also: require charter aircraft carriers to put the names of passengers and individuals renting aircraft through the Transportation Security Administration; mandate that the Homeland Security Department increase inspected cargo; require the department to report on the threat of shoulder-fired missiles; and require two other reports on screening devices to detect chemical and plastic explosives and the number of air marshals. The legislation would authorize funds for advanced explosive-detection systems; portal devices to detect biological, radiological and explosive materials; research and development of biometrics technology; and airport perimeter security.

A similar bill, Safe Passengers and Lading in Aviation for the National Enhancement of Security Act, was introduced in the House on May 6, 2004, and referred to the Committee on Transportation and Infrastructure.

For complete text of these bills, please visit <http://thomas.loc.gov>.

Dana DeCore is a student at Catholic University Columbus School of Law.

Homeland Security Book Review

Continued from page 4

A War of a Different Kind is a well-documented, thoughtful and timely analysis of the complexities of transforming the military to meet the challenges of homeland defense and the larger war on terror. Perhaps the book's greatest strength, however, is its unwillingness to become ensnarled in the debate over how to achieve lasting victory. Duncan soberly focuses his analysis on the immediate task of defending

America proper from attack, while refusing to join the largely academic debate, as it stands, over long-term and undoubtedly less tangible objectives (for example, the winning of hearts and minds). Duncan shares the wisdom of Sun Tzu, who believed that "the good fighters of old first put themselves beyond the possibility of defeat, and then waited for an opportunity of defeating the enemy."

Jennifer Stahlschmidt is a student at Catholic University Columbus School of Law.