



# National Security Law Report

## Conference Report: “National Security Law in a Changed World: The Fourteenth Annual Review of the Field”

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### Panel I: PERSPECTIVES FROM THE EXECUTIVE BRANCH

Moderator: Paul Schott Stevens

Panelists: John Rizzo, CIA; Valerie Caproni, FBI; Joe Whitley, DHS; Charles Allen, DOD; Hal Dronburger, JCS

The first panel was moderated by Investment Company Institute President and Committee member, Paul Schott Stevens. John Rizzo, the Acting General Counsel of the CIA, reviewed and added to comments he made at the 2002 Annual Conference, and provided insight into issues the CIA would be confronting in years to come. Rizzo first mentioned the issues he had missed or had given little attention to at the 2002 conference, such as the legal issues in an invasion of Iraq, and addressed the topic of intelligence community reform.

Rizzo noted that intelligence community reform had gained traction for a number of reasons. First, there was a consensus across the parties and government branches that the terrorist attacks of September 11, 2001 had revealed structural flaws within the intelligence community. In addition, Rizzo noted, the televised hearings of the 9/11 Commission had a powerful impact on the issues and helped to focus public concern. Rizzo said that this phenomenon was not unique to the 9/11 Commission—reform followed in the wake of the highly publicized Iran-Contra hearings, which addressed an issue



*Committee Chair Stewart Baker welcomes conference participants.*

much more distant to most Americans. Finally, Rizzo noted that the presidential campaign motivated the candidates to move quickly and seize opportunities. When Sen. John Kerry embraced all of the 9/11 Commission’s recommendations within two days of their release, attention on intelligence reform was again increased. At the time of the conference in mid-November, the fate of intelligence community reform remained uncertain. Congress was debating over how much control the new national intelligence director should have over Defense Department intelligence. Rizzo commented that it was “ironic that it’s hung up on something with a tangential relationship to 9/11.”

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Rizzo noted that he had mentioned at the 2002 conference that the consensus for more aggressive intelligence would shift within five years. In 2002, there was a general consensus that there was a new threat requiring aggressive action, and the old rules no longer applied. The CIA was criticized as too risk averse and too conscious of human rights. That consensus has begun to shift, he said. New concerns over civil rights and privacy in information sharing led President Bush to issue an Executive Order establishing a board on Civil Rights and Privacy. The USA PATRIOT Act has also come under fire, Rizzo said, and some sections will likely be modified. In 2002, the view that various agencies had to share information to connect the dots was predominant. Today, people are asking why the government needs this information. Similarly, the government's policy on War on Terrorism detainees has been criticized. The legal basis, legal status, and circumstances of confinement of the detainees in Guantanamo have all come into question. In 2002, the emphasis was on getting suspected terrorists off the streets; today, the focus is on how to handle the detainees once confined.

The second panelist, Valerie Caproni, General Counsel of the FBI, noted that the biggest development in the previous year from the FBI's perspective, was something that *did not* happen—the 9/11 Commission did not recommend dividing the FBI. Caproni said that the result of such a split would have created an agency like MI5, the UK's domestic security intelligence agency, which gathers intelligence but does not have the authority to prosecute. The FBI is focusing on improving its chain of command, analyst training, and disseminating intelligence.

Caproni recounted two recent court cases that have affected the FBI. In *ACLU v. Ashcroft*, the District Court for the Southern District of New York ruled that Title 18 section 2709, which allows the FBI to issue National Security Letters, violated the First Amendment and the Fourth Amendment. The ACLU, who had brought suit on behalf of an electronic service provider, won with its argument that the provision violated the First Amendment because it was a content-based, blanket ban, and it did not give appropriate respect for the right to anonymity of speech. Also, the court held that the provision violated the Fourth Amendment because there was no clear right in the law to challenge collection or to get counsel. The FBI responded that people apparently manage to figure it out because the FBI gets taken to court, but failed to convince the judge. Caproni said that while the government intends to appeal, there are some straightforward fixes to the law that would address these concerns. In the second case, *Hamdi vs. Rumsfeld*, the Supreme Court addressed the Guantanamo commission process. The FBI had assisted with the commission process at the request of the Defense Department.

Caproni mentioned that there are new rules for the FBI's collection of information under the USA PATRIOT Act. Many of the details of these procedures are classified; however, an essential feature is that the distinction between criminal and intelligence investigations has been eliminated, which Caproni said has smoothed the road for investigations.

The third panelist, Joe Whitley, General Counsel of the Department of Homeland Security, provided an overview of DHS legal work. Whitley began by noting that the creation of DHS is Congress' recognition that the threat of the 21<sup>st</sup> century is unlike anything before. Consequently, DHS has 1400 lawyers in 20 agencies, all working to prevent terrorist attacks and to reduce vulnerability. Whitley said that there was bipartisan support for creating DHS, and today, the agency still works to avoid politics. Whitley also said that we have been fortunate not to have seen a terrorist attack since September 11, but it is a question of when, not if, terrorists attack again. In addition to preventing attacks, DHS works to increase response capabilities and to decrease the harm that might result from an attack.

DHS was created in the fall of 2002 and began work in March, 2003. It combines TSA, INS, Customs, Secret Service, and a variety of other agencies. It has four statutory functions: information analysis and infrastructure protection, border and transportation authority, emergency preparedness and response, and using science and technology to understand and combat the threat.

Charles Allen, the Deputy General Counsel for International Affairs in the Department of Defense, discussed the legal

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issues arising from detention of enemy combatants in the war on terrorism and the war in Iraq, and the DOD's global posture realignment.

On the issue of detention of persons declared by the administration to be enemy combatants, Allen said that the DOD adheres to the law of war, including the terms of the Geneva Conventions when they apply, and Geneva principles at all times, including in Afghanistan and at Guantanamo Bay. Under the law of war, states may detain enemy belligerents until the cessation of hostilities. Justice O'Connor recognized this principle in *Hamdi*, which held that citizen-detainees in the U.S. must have the ability to contest their detention, Allen said. The Supreme Court also held in the *Rasul* case that Federal courts have jurisdiction over habeas petitions filed by Guantanamo detainees.

Combatant Status Review Tribunals (CSRT) review the cases of detainees held at Guantanamo Bay. Although the Supreme Court has only required that U.S. citizens have an opportunity to contest their detention, Allen said, the DOD has given this opportunity to the foreign Guantanamo detainees as well. Furthermore, Administrative Review Boards (ARBs) determine if enemy combatants continue to pose a threat and other factors relevant to whether they should remain detained. The ARB provides yet another opportunity to contest continued detention.

Regarding Iraq, Allen noted that the U.S. has maintained since the beginning of the conflict that the Geneva Conventions apply, as it is a traditional armed conflict. He also said that there had been no effort by the DOD to squelch the Abu Ghraib prisoner abuse issue. The DOD had investigated allegations thoroughly, he said, and had referred approximately 50 people for courts-martial. Despite the bad news coming from Iraq, Allen saw many reasons for optimism about democracy and the rule of law in the country. The Iraqi government is only four months old, he said, and it had quelled rebellions and promoted institutional and political development. Iraqi judges and legal counsel have received thousands of hours of legal and human rights training.

Allen concluded by commenting on the U.S. global posture realignment initiative. The U.S. is moving away from Cold War arrangements, he said, bringing thousands of military personnel and families home and increasing the flexibility of the military to deal with terrorism, WMD, and rogue nations. The main legal concern in this effort is creating legal arrangements for the protections of our personnel including criminal jurisdiction protections, exemptions from taxes and duties, and the ability to use U.S. forces elsewhere when



*Panel I participants discussed executive agencies' views on the war on terrorism.*

necessary. The U.S. will not renegotiate longstanding agreements that form our major alliances, and will meet new challenges through arrangements with new partner countries, Allen said. In addition to negotiating status of forces agreements, DOD will continue working, along with the State Department, to conclude agreements under Article 98 of the International Criminal Court Treaty for assurances that forces will not be surrendered to the ICC.

Navy Captain Hal Dronberger, Legal Counsel to the Chairman of the Joint Chiefs of Staff (JCS), spoke on the JCS's work in the global war on terrorism and in supporting homeland security. In homeland security, the DOD is reviewing its statutory authority, and providing support to the DHS if authorized by the Secretary of Defense in a given circumstance. In Iraq, there are military judge advocates (JAGs) on the ground offering advice and assessing situations as they arise.

To bolster its efforts at homeland security, the JCS has also reorganized its staff. The newly created US Northern Command (USNORTHCOM) in Colorado Springs is the first point of contact for military homeland defense activities. In fact, the biggest development in the past year has been maritime defense, Dronberger said. The memorandum of understanding between DHS and USNORTHCOM would ensure a single and workable response to situations that arise.

The JCS also provides support to civilian authorities in homeland security activities, such as consequence management, support at special events, border patrol, and counter-terrorism and counter-narcotics efforts at borders. Some are case-by-case responses, others are by agreement. Factors in determining whether to engage in a given homeland

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defense-related activity include its impact on other missions, whether it is appropriate for active duty troops, and whether it raises Posse Comitatus concerns. The role of the National Guard has been expanded in these missions.

In counterproliferation efforts, the Proliferation Security Initiative (PSI) to combat WMD proliferation has achieved positive results in a short span of time, Captain Dronberger said. The number of core participants has grown from 11 to 18. The group has conducted exercises in the Pacific, Caribbean, Mediterranean, and North Atlantic, a tabletop exercise in Newport, and has held meetings in six world capitals. After a PSI operation intercepted a shipment of WMD-related material headed for Libya, Libya announced that it would abandon its pursuit of WMD. UN Security Council Resolution 1540 called on all nations to support the efforts of the PSI. The U.S. has proposed amending existing international agreements to criminalize international shipment of WMD.

The panelists responded to several questions from the audience. In response to Paul Schott Stevens' question as to whether we were close to an enduring consensus on balancing civil liberties and security, both Rizzo and Caproni said that there was a divide that would last for years. Caproni cited the issue of data mining as one that provoked great disagreement between security agencies and civil liberties groups. Rizzo said that the pendulum would always swing based on reactions to recent events. "We in the national security legal community," Rizzo said, "are at the mercy of world events."

In response to another question, Rizzo said that any National Intelligence Director, to maximize effectiveness, should have budgetary authority and some flexibility to reallocate resources.

Whitley, responding to a question on government use of databases, said that a key concern of DHS was to make sure that people are who they say they are, particularly at public events such as plane flights, inauguration celebrations, and sporting events. Drivers licenses are often too easily forged, he said.

Several panelists and questioners commented that the intelligence community was playing catch-up in building support for the USA PATRIOT Act, in large part because it was passed with little debate or discussion.

In response to a question on whether DOJ had issued new guidance for detaining suspected terrorists, Rizzo said that DOJ had offered recent, specific, helpful guidelines on detention of suspected terrorists, to replace earlier guidelines that the DOJ had publicly repudiated.

Allen said that the involvement of groups like al Qaeda in warfare has complicated application of the law of war. The law of war developed among contracting states, and does not apply to terrorist organizations that are not nation states. New international law is developing by custom, he said.

## **Panel II: ROUND TABLE DISCUSSION: SURVEY OF NEW DEVELOPMENTS IN NATIONAL SECURITY LAW: VIEWS FROM THE HILL**

Moderator: Professor John Norton Moore, University of Virginia

Panelists: David Schanzer, House Committee on Homeland Security; Paul Clayman, Senate Foreign Relations Committee; Scott Stucky, Senate Committee on Armed Services.

Professor John Norton Moore, Director of the Center for National Security Law at the University of Virginia School of Law, moderated the panel. He noted that the current War on Terrorism is distinct from any previous war given the unpredictable nature of Al Qaeda-like organizations. Unlike previous wars, he said, the value of effective intelligence would be greater than any sort of weaponry in fighting the war on terror.

David Schanzer, Minority Staff Director and Chief Counsel of the House Select Committee on Homeland Security, noted that there are 88 committees with some degree of oversight over DHS. Various studies conducted since the committee's creation, including the 9/11 Commission and a Brookings Institution report, concluded that oversight should be consolidated. Schanzer said that debates about consolidation of oversight came down to "pork and turf"—many committees do not want to give up their jurisdiction over DHS, or to lose their ability to funnel homeland security funds to their districts.

Schanzer said that despite the tremendous work of DHS, there is a severe disjunction between the level of threat and the pace, vigor, and robustness of the homeland security effort. There is general agreement that the biggest threat we face comes from WMD. Still, he said, it had taken three years to get even halfway through the effort to better monitor imported cargo containers, and there is still no comprehensive strategy in place.

Paul F. Clayman, Majority Chief Counsel of the Senate Foreign Relations Committee, spoke about the legislative issues that the Senate Foreign Relations Committee is currently confronting. Clayman specifically referenced the challenges the United States faces in Iraq. He said that since the end of the Cold War, stabilization and reconstruction efforts were often *ad hoc*. Better civilian organization for such tasks is needed, he said. Ungoverned nations produce terrorists. He noted that the pressing need for elections and the increased need for security have undermined the Iraqis equally urgent need for the United States to assist them in their effort to reconstruct their country. Reiterating the position of the Chairman, Senator Richard Lugar, Clayman stated that further appropriations of aid to Iraq should better address the need for an increased emphasis on reconstruction for the purpose of creating a more secure and more stable Iraq.

Scott W. Stucky, Majority Counsel for the Senate Committee on Armed Services, spoke on the recently passed Department of Defense Authorization Act, H.R. 4200. The act was passed in order to fund all Department of Defense programs, providing the \$417.5 billion for fiscal year 2005. Stucky's speech to the conference consisted of a "blow-by-blow" description of the significant changes in appropriations made by the act. Stucky divided the changes in appropriations into two categories: the first category involved increases in armed forces benefits; the second category involved increases in funding for the United States' core defense programs.

In regard to the increases in armed forces benefits, Stucky noted that the act provides members of the armed forces with the following:

- 3.5% increase in pay for armed service personnel
- Extension of Tricare, an armed forces-sponsored health insurance program, to Reserve members on extended active duty
- Permanent increase in pay for special duty subject to hostile fire or imminent danger along with family separation allowances
- Increases in special pay for members the National Guard and Reserves for enlistment and re-enlistment
- Elimination of charges for off-base housing for most service members

In regard to the increases in funding for the United States' core defense programs, Stucky noted that Congress would provide funding for:

- The production of Arrow missile components in the United States and in Israel
- Submarine refueling, conversion, and procurement
- Providing \$10 billion for missile defense programs, an increase of \$1 billion from FY 2004 levels
- Increasing funding for the Army's Future Combat System by \$1.2 billion to \$2.9 billion
- The termination of the Comanche helicopter program and redistribution of its funding to other Army aviation programs
- Providing \$25 billion in emergency appropriations to support current operations in Afghanistan and Iraq
- Provision of \$586.5 million for Unmanned Aerial Vehicles
- Providing \$100 million for the Air Force to modernize its fleet of midair refueling tankers

Stucky also stated that the act grants the Secretary of Defense the discretionary authority to waive limitations on the procurement of defense items from a foreign country. He



*Moderator John Norton Moore and Panelists David Schanzer and Paul Clayman look on as Scott Stucky presents during Panel II.*

noted that two conditions must be present for the Secretary to use this power: first, the Secretary must determine that the limitations on procurement would invalidate cooperative or reciprocal trade agreements for the procurement of defense items, and second, the Secretary must determine that the country does not discriminate against the same or similar defense items procured in the United States for that country.

#### **LUNCH ADDRESS**

Keynote Speaker: John B. Bellinger III, NSC

White House Senior Associate Counsel to the President and Legal Adviser to the National Security Council John Bellinger focused his lunchtime address on then-pending intelligence reform legislation. Bellinger began his remarks by asserting that forecasts of the demise of the legislation were wrong and that the White House and Congress might reach a final deal on the reform package within hours.

Although Congress did not pass the historic reform legislation for several more weeks, Bellinger illustrated the White House's commitment to reform by highlighting the efforts the President had made to push the legislation through following the release of the 9/11 Commission Report. He pointed out that "many people forget that we have been negotiating night and day to get this legislation through the conference committee process." Noting that the President had made at least two phone calls to key House Committee members responsible for blocking the final passage, including Armed Services Chairman Duncan Hunter, Bellinger emphasized that it was "too soon to say that the White House was not committed or not engaged in the reform process."

Following the release of the 9/11 report, the President assigned relevant Cabinet members to a reform task-force responsible for developing a plan of action for pushing through intelligence reform legislation before the end of the 108<sup>th</sup>

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*Thursday's keynote speaker John Bellinger discusses the Bush administration's views on intelligence community reform.*

Congress. The policymaking process was then tackled on a day-to-day basis by sub-cabinet level officials via two tracks: 1) intelligence provisions, and 2) homeland security and antiterrorism sections.

Beginning on August 2, when the President created the National Counter-Terrorism Threat Center to integrate counterterrorism information sharing across agencies, Bellinger noted that the White House took several affirmative steps, including issuing four intelligence-related Executive Orders, to illustrate its commitment to the reform process. However, Bellinger urged continued patience with the transformation process. He pointed out that the country is in the final phase of a dialogue on intelligence reform which first began in 1978, with the introduction in Congress of a bill to create a National Intelligence Director ("NID"). While Bellinger conceded that the White House has continued to compromise with both sides in the reform debate, he emphasized that the President continued to adhere to several key policy requirements:

- The NID should receive substantial Congressional funding and should have the budgetary authority to apportion funds,
- The NID must have authority to manage national intelligence agencies as a joint enterprise, while maintaining the chain of command inside the Departments of Defense, Justice, and Homeland Security,
- Policy and politics in intelligence gathering must be kept separate. The position of the NID and the Counterterrorism Threat Center must not be positioned within the White House,
- The Homeland Security Council and the National Security Council must be preserved.

During the question and answer period, Bellinger clarified a number of lingering questions regarding the White House's position on a number of key reform questions. In response to questions about the role of the newly confirmed CIA director, Porter Goss, Bellinger indicated that the White House and Congressional negotiators determined that the CIA Director could not simultaneously serve as the NID.

When pressed to describe how the creation of the NID position would enhance the ability of the United States to improve human intelligence sources, Bellinger stated that the NID would serve as an overarching independent entity within the intelligence community to oversee and monitor human intelligence gathering separate from the FBI and CIA. He explained that this institutional arrangement would

enable the President to continue to improve human intelligence outside of the considerable bureaucratic obstacles of the intra-agency operations.

Bellinger offered support for the creation of the Civil Liberties Board called for in the Senate version of the bill. However, Bellinger said the Administration opposed declassification of the national intelligence budget top line, as mandated in the Senate bill.

In perhaps the most candid and foreboding remarks of his speech, Bellinger urged House and Senate conferees to cut to the chase and focus on the intelligence related provisions of each bill. With only 273 of the 562 pages of the Senate intelligence bill and 122 of the 676 pages of the House bill specifically related to intelligence issues, Bellinger highlighted what would continue to be the main challenge to passing meaningful intelligence reform for weeks to come; that is, cutting out non-intelligence-related "legislative fat."

### **Panel III: COUNTERTERRORISM TECHNOLOGY AND PRIVACY**

Moderator: Spike Bowman, FBI

Panelists: Kate Martin, Center for National Security Studies; Paul Rosenzweig, Heritage Foundation; Heather Mac Donald, Manhattan Institute; Kim Taipale, Center for Advanced Studies in Science and Technology Policy

Spike Bowman, Deputy General Counsel for the FBI, moderated the panel. He began the panel's discussion on the proper use of intelligence in the post 9/11 world and how seemingly competing concerns between national security and privacy might be accommodated.

Kate Martin, Director for the Center for National Security Studies, began by observing that the subject of counterterrorism should be considered in a "context divorced from political hijacking." Both Democrats and Republicans

had been guilty of politicizing the subject, as in debates over whether to merge foreign and domestic intelligence-gathering operations under a single intelligence director, a proposal that threatens to blur fundamental constitutional distinctions.

According to Martin, there has been far too little public debate on the soundness of allowing the Central Intelligence Agency or the Department of Defense to gather intelligence on individuals within the United States.

Similarly, Martin remarked, there has been almost no public discussion or evaluation of proposals to establish a so-called “shared information network.” These proposals generally envision a system whereby thousands of government officials would have instantaneous access to multiple databases enabling the creation of complete dossiers on any number of individuals, such as individual globalization protestors, or all Arab-Americans in Dearborn, Michigan. The 9/11 Commission’s recommendation of such a network was made without any public hearing on the subject. There has been no discussion about whether the goal of such an information-sharing network should be “more sharing or smarter sharing,” or how to figure out what information is important and should be shared. The changes in the law have been based on a “vacuum-cleaner” approach instead of encouraging better analysis. As it stands, almost no legal barriers remain regarding the sharing of even the most sensitive grand jury or wiretap intercept information with the CIA. As a result, the government can now assemble a comprehensive picture of millions of individuals quickly and at little cost. There are few safeguards against potential abuses like the use of inaccurate information, unauthorized access to information, or violations of existing laws, by those with access to the information.

The most fundamental unanswered question is how the information is going to be used and whether such a capability will be useful in capturing the next Al-Qaeda terrorist. There is every reason to fear that this capability will be used for selective enforcement against individuals based on their religion. The danger Martin sees is that the government will

use the information to bring criminal or immigration charges against Muslims, or get them fired even when there is no indication that they are involved in terrorism—and they would not be charged if they were not Muslims. When we have both over-criminalization of conduct and under enforcement, suspected minorities are at great risk. That will not help fight terrorism, but will threaten the liberties of everyone.

Paul Rosenzweig, a senior fellow at the Heritage Foundation, began his remarks by seconding Martin’s concerns that shared information in the fight against terrorism raises serious privacy issues. He pointed out, however, that “privacy” is a broad term, and that any attempt at protecting it must begin by defining what kind of privacy should be protected. Privacy is not just about keeping information hidden or secret, but rather, in the modern usage, is about notice, fairness, and consequences. Ultimately, privacy in the United States is about a “veil of anonymity,” or that “one is able to walk through life without the expectation of being monitored.”

Until the computer era, that expectation was protected by something very powerful—inefficiency. It was simply not possible to collect information about large segments of the population and use it in law enforcement. But now that is rapidly changing. Government (and private industry for that matter) is becoming able to overcome inefficiency with modern, computer-aided data collection. And, according to Rosenzweig, there will be no countervailing value if rules or legal norms are not imposed on this new paradigm.

Rosenzweig outlined a few points that he believes are necessary to prevent abuse. First, the technology employed in a shared information network should be “neutral.” That is, it should not be an excuse to change existing legal norms about privacy rights. In other words, just because it is easier to monitor people in the computer age, that should not be reason to modify people’s expectation of anonymity. Second,

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## **Standing Committee on Law and National Security**

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*Kim Taipale presents during Panel III as Moderator Spike Bowman listens, with Panelists Kate Martin, Paul Rosenzweig, and Heather Mac Donald.*

the technology should minimize, to the greatest extent possible, the intrusiveness into people's lives. Where possible, the collection and sharing of information should be overt and voluntary, and the use of government databases is to be preferred over commercial ones.

Finally, when possible, the information that is to be accessed should not always be personally identifiable. In many instances, data can be disaggregated from the individual about whom it was collected and should only be re-aggregated upon some sufficient showing, made by another source or agency, that there is reason to go forward with the information. According to Rosenzweig, this would protect many due process concerns.

Heather Mac Donald of the Manhattan Institute took issue with the idea that the public has a broad expectation of privacy. As she pointed out, "everyday, Americans give up vast quantities of their personal information via the Internet," including social security numbers and credit card information. This reality "makes fools of privacy experts." Indeed, Mac Donald said, public reaction to automated computer analysis, or "data mining," proposals, such as that of former Reagan National Security Advisor John Poindexter to create a "Total Information Awareness" network in 2002 at the Defense Department, was the result of a disinformation campaign by libertarians on both the right and left wings and was in direct contravention of the public's own behavior. As a result, the program was scrapped based on unfounded fear of "Orwellian scenarios" whereby the government would be able, as columnist William Safire put it, to "snoop on every public and private act of every American."

Whatever the likelihood of such a scenario, Mac Donald said that "being alive [by preventing terrorist attacks] is better," and that fear of data mining is really based on mystification

of technological capability. All the technology involves is nothing more than the automation of human analysis on a larger scale. Mac Donald cited the report of the Technology and Privacy Advisory Committee, which was charged in 2003 with advising the Secretary of Defense on permissible uses of data mining. The Committee's conclusion was that a human analyst may use data to look for leads in a criminal investigation, but before a computer may be employed for that task, a court order must be obtained. Mac Donald said that she failed to see how any privacy intrusion was greater when a computer scans legally obtained information than when a human does it.

Mac Donald identified two "fallacies" on which she believes distrust of data-mining rests. The first is that data-mining necessarily harms privacy. It is only the abuse of the technology that can result in privacy intrusions and that is why safeguards need to be implemented including an audit trail, which can identify just where in an investigation improper or illegal steps were taken. The second is the refusal to balance the risks associated with data mining against its potential benefits. There are ways to minimize risks that should be fully considered, especially in light of what might happen if nothing is done to prevent future acts of terrorism. It would be a mistake to shut down research on information technology because of the mere possibility of abuse, without determining the potential for the technology to reduce the terror risk.

The principles to guide the development of technology in this area, Mac Donald concluded, should be that there is no constitutionally protected interest in government inefficiency in the War on Terror. Moreover, the burden of proof necessary to initiate a computer search of individual records should be no higher than that required for human access.

The idea of balancing security and privacy was rejected by Kim Taipale of the Center for Advanced Studies, the panel's last speaker. Taipale said that there is a dual obligation by the government to provide both security and privacy, and indeed to maximize each within the constraints imposed by the other. This is not merely restating the problem. Privacy itself is a security need — "In a liberal republic, liberty presupposes security; the point of security is liberty." Further, security needs require the same kind of information management processes and supporting technologies that are required to meet privacy needs. The essential question in Taipale's view is how to share available information and

at the same time control how it is used. It is essential for both security and privacy to have policies in place that circumscribe how information is to be used and for technical systems to be able to support, enforce, and monitor such policies.

According to Taipale, the primary problem in the domestic security context is not technology or data access but rather the blurring of the traditional line between reactive domestic law enforcement and preemptive national security strategies in response to the widely accepted need to prevent terrorist acts before they occur. Preemption requires some form of surveillance or selective attention to information about individuals to determine if they are potential threats.

Because new information technologies have changed the economics of information management—making it cheaper to accumulate and store information for subsequent use than to decide ahead of time what information might be useful—the amount of information generally available will continue to increase. The result of this increase in data volumes is that there is a high collective expectation of privacy—that is, government cannot watch everyone—but a low individual expectation of privacy—that is, government can watch (selectively focus on) anyone. The policy question to be determined, according to Taipale, is how to allocate the burden of selective attention between the government and the individual.

Traditional rules to control government surveillance are based on determining the appropriate time or place of “searching or seizing” information about an individual. However, because data in a networked information environments is no longer transient and is always proximate—that is, it exists for use at any time or any place—these rules are no longer adequate. Further, since relevant data (that is, data about terrorist organizations and activities) is “hidden” within vast amounts of irrelevant data and appears innocuous (or at least irrelevant) when viewed in isolation, it is impractical to determine ahead of time what data may or may not be relevant. The question is no longer can government collect or access certain information, but under what circumstances can it use available information to selectively focus law enforcement resources on any particular individual or group.

Maintaining privacy in a world of ubiquitously available information requires developing rules and policies to guide data attribution. For example, determining under what circumstances information can be attributed to a particular individual, and selective attention, or when can government increasingly focus its attention, and ultimately its actions, on an identified individual.

According to Taipale, data aggregation and automated computer analysis are not substitutes for human analytic decision-making, but are tools that can help manage vast data volumes and help selectively allocate scarce security resources to more likely targets. Doing so within agreed policy guidelines requires building systems premised on a distributed architecture in which rules-based processing,

selective revelation, and logging and audit are featured to monitor and enforce policy.

## **INTELLIGENCE DEMANDS IN A POST-9/11 WORLD**

Keynote Speaker: David Kay, Potomac Institute

David Kay, a Senior Fellow at the Potomac Institute for Policy Studies and the former chief U.S. weapons inspector in Iraq, spoke after dinner. Kay reflected on and reviewed the search for weapons of mass destruction, focusing on three questions: what happened, why did the United States get it wrong, and what does this mean for intelligence reform as we go forward.

Kay explained that Iraq’s behavior had remained consistent over a twelve-year period. Iraq had constantly frustrated investigations by United Nations and United States officials and continued a clandestine importation of illegal equipment. Iraq had never committed to ridding itself of weapons of mass destruction, even with the threat of war from the United States. In December, 2001, the UN’s Hans Blix said that Iraq had not fully committed itself to disarming. Kay asked, why take the risk of going to war if you do not have these weapons?

In addition, Kay said, there were very few sources of information on Iraq’s WMD program. Inspectors were not permitted in the country for long stretches starting in 1995, so it was difficult to get a clear picture of what was taking place. What information the United States did have was scattered and obscure, including that from defectors.

U.S. analysis also overlooked that the overwhelming corruption in Iraq led to a deterioration in normal activity, as had happened in the USSR and East Germany. Corruption robbed Iraq of the capacity to make WMD, but the U.S. did not know it. Part of intelligence is understanding how a society functions.

Kay noted that the U.S. had little to no intelligence sources on the ground in Iraq. This made it difficult to check information being received from defectors. Part of the problem was that there were few verifiably controlled sources of information. After 1995, the lack of connected information forced the United States to depend on the help of liaisons. While the use of foreign intelligence is helpful, it is important that the United States verifies the information it receives. Compounding this problem, there was an absence of contrarian analysis and peer review.

Kay called Iraq’s suspected WMD program the “only glue holding the coalition together” starting around 1993. Some other Security Council member countries ranked trade with Iraq as a higher priority than did the U.S. The incentive to find that Iraq had a WMD program led to a two-tiered system of intelligence information. Information that said that Iraq had no WMD was dismissed, while defectors’ tales of WMD programs were embraced. When Iraqi families secretly met with intelligence groups and disclosed no evidence of WMD,

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*Banquet keynote speaker David Kay discusses his remarks with conference participants following his presentation.*

we pushed it aside and claimed that it was inconclusive and unreliable because it had been provided by Iraqis. Kay stated that there is a real danger when intelligence becomes the only evidence supporting and holding a theory together. That danger was made apparent in Iraq. In the future, we must be careful not to hastily make decisions without proper evidence and analysis supporting those decisions.

During the Cold War, Kay said, it didn't matter if our estimates of Soviet military capacity were off by 500 tanks. The focus was on preventing a Soviet first strike. Today, however, our problem isn't closed countries, but closed minds.

Today's chief foreign policy problem, Kay said, is failed states. Some democratically elected governments are hostile to the U.S. We need to learn to utilize the intelligence of other countries more efficiently; we need to train and equip our soldiers and intelligence officials to carry out the nation-building we have begun. This is not a purely military task. Surrounding Iraq are countries where the United States' presence is needed to help eliminate the threat of terrorism. Unfortunately, due to a lack of actionable intelligence, we are not able to carry out this necessary mission in the immediate future. Thus, we must work to build intelligence to secure our safety and the safety of the world.

#### **Panel IV: INTELLIGENCE ORGANIZATION AND THE 9/11 COMMISSION**

Moderator: Mary DeRosa, Center for Strategic and International Studies

Panelists: Suzanne Spaulding, Immediate Past Chair SCOLANS; Jeffrey Smith, Arnold & Porter; Philip Zelikow, Director Miller Center of Public Affairs; Howard Shapiro, Wilmer Cutler Pickering Hale and Dorr

The first speaker was former Committee Chair Suzanne Spaulding. Spaulding began her talk by emphasizing that intelligence reform must be driven by the ultimate objective, which is ensuring that the nation has the best intelligence possible, rather than by a general desire for change. In order to get the best intelligence, we need to instill the kind of "unity of effort" that Goldwater Nichols brought to the military. She noted that Bin Laden had managed to bring about a greater unity of effort among previously disparate terrorist groups and that we must match that success in our effort to defeat them.

Today, terrorist groups, who seek to inflict mass casualties, espouse an ideology that transcends national

borders. Such organizations are difficult to penetrate and raise an impending sense of concern about the likelihood of the use of weapons of mass destruction. In order to protect our country from another 9/11, intelligence reform must focus on greater synergy among the various collection disciplines. Spaulding pointed out that pre-9/11 intelligence collection was fragmented between agencies. In addition, reform efforts must provide mechanisms to achieve "robust discussion, dialogue and dissent" among analysts. In this area, Spaulding discussed the importance of implementing inter- and intra-agency technology that provides real-time communication capabilities.

To accomplish these objectives, Spaulding discussed methods to strengthen the position of the National Intelligence Director ("NID"). Here, Spaulding focused on the NID's budget execution authority as a means to keep track of ongoing programs and activities, increase awareness of how resources are deployed and what might be available at any given time, and create leverage for getting departments to comply. For example, using this budget authority, the NID is able to move money away from those departments which resist compliance and towards departments that embrace it. Spaulding stressed that serious efforts must be made to boost the credibility of our intelligence community: "It is critical to get the American public with us and restoration of credibility is key."

The next panelist was Jeffrey Smith, head of Arnold & Porter's public policy and legislative practice group. Smith was the General Counsel of the CIA from May 1995 to September 1996, during which time he was instrumental in drafting new regulations governing the conduct of U.S. intelligence activities.

Smith expanded on Spaulding's discussion of the role of the NID. He suggested that the position may be patterned after the Secretary of Defense, so that the NID's powers were closer to those of the Secretary of Defense vis-à-vis military departments. In order to be most effective, Smith argued, the execution of the NID's authority must be by officers in the field, not by Washington bureaucrats. Smith also urged for the NID to have adequate budget authority in order give the position sufficient leverage to execute authority.

Following his discussion of the NID's role in intelligence reform, Smith briefly talked about the importance of law in the formulation and execution of our national policy. He urged the audience to keep this fundamental principle in mind as we confront a post-9/11 world. In fact, he noted that "our country is held together by the rule of law, and the role law can play is enormously important to re-establish credibility and integrity in our national intelligence community both here and abroad."

The third speaker was Philip Zelikow, who was Executive Director of the National Commission on Terrorist Attacks Upon the United States, better known as the "9/11 Commission." Zelikow, who currently directs the Miller Center of Public Affairs and is a Professor of History at the University of Virginia, offered a "historical perspective on change."

He noted that the history of organizational change shows that none are accomplished in one approach. Rather, he suggested that legislative initiatives on organizational change move people onto different paths, rather than achieve goals in the first bill. For example, the 1947 National Security Bill created the Secretary of Defense. It did not create the Department of Defense. Following the 1947 Bill, a later legislative initiative created the Department of Defense. Zelikow analogized organizational change to evolutionary change. He noted that "in evolutionary change, there are long periods of gradual change with periods of 'punctuated equilibrium,' a sudden sideways shifts which set evolutionary development on entirely different evolutionary paths. We are at one of those moments of punctuated equilibrium. What it will do is set us on a new course [in] which a whole organism will develop in an entirely different way."

Zelikow then turned his attention to the organization of our government today and demonstrated its shortcomings in a post-9/11 world. He commented that the "executive branch of our government is organized in accordance with the best management principles of 1950. We have large, vertically



*Panel IV discussed possible changes in the intelligence community following the report of the 9/11 Commission.*

integrated, industrial-sized behemoths. What therefore happens is that each of the agencies does its job, and then tries to get others to cooperate—and vice versa. If they need a lot of help from other agencies, they create their own interagency processes." Zelikow gave numerous examples of these interagency processes. He noted that the CIA runs an interagency meeting almost every day, to enlist help in working on the daily threats. This is one example of the vertical integration pattern that plagued the pre-9/11 intelligence community. While there was a willingness to cooperate, there was not joint analysis or joint planning. Therefore, he noted, "joint analysis is critical."

Zelikow then turned his attention to the FBI and the history of its organization. He voiced significant concern over the FBI's institutional capability to analyze domestic intelligence. Unfortunately, he noted, "the role of analysts is not valued at the FBI the way it is in other intelligence agencies."

Howard M. Shapiro, former General Counsel for the FBI, added to the organizational history discussion by focusing on the changes in the FBI since 9/11. Shapiro began his discussion by painting a picture of the pre-9/11 FBI. He noted that "five years ago, intelligence and counterterrorism was not a priority. It just did not permeate the field. [As] the FBI is decentralized, there was a distant relationship between the central headquarters and its field offices." Since 9/11, the FBI has made significant steps to remedy this grave disconnect. One example Shapiro noted was that the FBI has devoted more funding and resources to counter-terrorism. In this area, the Bureau has taken steps to upgrade its analytical capabilities. Because of the undervaluing of analysts in the FBI, staff was not trained adequately and had a low level of expertise. In fact, "the analysts were not trained

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*Panel V addressed military commissions in the war on terrorism. Tony Loci presents, with Scott Silliman, Louis Fisher, Will Gunn, and John Altenburg looking on.*

intelligence professionals. This is a very important and limiting fact in understanding pre-9/11 intelligence failures.” With additional funding and resources devoted to counterterrorism, the intelligence mission within the FBI has shifted significantly. Similar to Zelikow, Shapiro warned that “you cannot turn an oil tanker into a speed boat.” Bringing the Bureau up to the needs of a post 9/11 world will take time. Although significant improvements have been made, there is much more to be done.

#### **Panel V: INSIDE MILITARY COMMISSIONS**

Moderator: Scott Silliman, Duke University Law School

Panelists: Col. Will Gunn, USAF; Toni Loci, USA Today; Louis Fisher, Congressional Research Service; Major General John Altenburg Jr., USA (Ret.)

As the detention times at Guantanamo Bay now stretch across multiple years, Professor Silliman, Executive Director of the Center on Law, Ethics, and National Security at Duke University School of Law opened up the panel to discuss the issue of processing these individuals legally, without running afoul of the principles on which the United States’ system of justice was founded.

Louis Fisher, the Senior Specialist on Separation of Powers for the Library of Congress’s Congressional Research Service, began his talk with a discussion of the history of military commissions. Beginning with the trial of John Andre, a British spy during the Revolutionary War, through the military commissions of the Civil War, and onto the World War II Nazi Saboteur military commissions, Fisher described a system of tribunals unlike the traditional military courts-martial. He portrayed them as trials where the rules were not set in stone and were actually subject to the political pressures of the time. His historical analysis of the use of

military commissions suggested that the problem we face today is one of guaranteeing the detainees certain rights afforded by domestic and international law in a manner consistent with U.S. national security interests.

As we are facing an enemy without national ties or uniformed soldiers, Major General John D. Altenburg, Jr., U.S. Army (Ret.), the current Appointing Authority for Military Commissions at the Department of Defense, stated that the government’s first order of business was to determine how to classify those detainees suspected of committing war crimes. Once the administration decided to classify the detainees as unlawful combatants instead of prisoners of war, it stepped outside of the

traditional courts-martial or civilian court determinations, and employed a military commission to handle the detainees. This established a new system, which is in the process of developing procedures with the assistance of JAG officers and civilian appointees, such as Major General Altenburg.

The Commission, while not entirely developed, is proceeding ahead with the trial of detainees charged with war crimes. It consists of the neutral and impartial Appointing Authority, which ensures a full and fair trial process, resolves interlocutory issues, and reviews decisions. The prosecution and defense are both handled by JAG officers, none of whom report to the Appointing Authority.

Colonel Will A. Gunn, the Chief Defense Counsel in the Office of Military Commissions at the Department of the Defense, was adamant that JAG officers are well qualified to serve as defense counsel. They not only swear to uphold the laws of the United States, but are also obligated to provide a zealous and vigorous defense for their clients. Furthermore, in the follow-up questions, Colonel Gunn noted that there was a general confidence expressed in the efforts of the JAG officers to remain faithful to their commitments as lawyers.

Toni Loci, a reporter for USA Today, discussed the government’s decisions in balancing a defendant’s right to a fair trial against national security interests. The government, she said, has erred on the side of secrecy, particularly in the case of Zacarias Moussaoui. Much of the evidence against him was sealed, and he was denied permission to talk to captured al-Qaeda members he insisted would assist in his defense. It is too early in the process of trying suspected terrorists, Loci said, to determine whether the government will continue to favor secrecy at the expense of a defendant’s right to present a defense at trial.

The military commissions are in their early stages, and are admittedly imperfect. There are still determinations to be made on how long the detainees can be held and whether that decision will be based on the U.S.'s declaration that the War on Terrorism is over. The panelists pointed out, however, that the concern this war could be indefinite calls for a close examination of the protection of rights, how the Geneva Conventions could apply, if at all, and an adherence to the principles of international law, in order to protect our soldiers who continue to battle this elusive enemy. It was noted also that those serving in the Office of Military Commissions are cognizant of these challenges and are working to ensure that the system takes them into account. As President Bush stated on September 11, 2001, "Terrorist attacks can shake the foundations of our biggest buildings, but they cannot touch the foundation of America." As Colonel Gunn noted in his remarks, "That foundation is the rule of law."

#### **LUNCHADDRESS**

Keynote Speaker: James Steinberg, Brookings Institution

James Steinberg, Vice President and Director of the Foreign Policy Studies Program at the Brookings Institution, and former Deputy National Security Advisor during the Clinton Administration, observed that the challenge of counterterrorism is two fold. As echoed by recent reforms in the legislature, the primary challenge is that of gathering and using intelligence effectively. The second challenge is ensuring civil liberties while pursuing national security policy.

Steinberg noted that in order to adopt a coherent and effective intelligence policy we must first understand the functions and challenges facing the intelligence community. The ultimate goal of the intelligence community is the collection of timely, relevant and actionable intelligence to be organized, analyzed and disseminated to those who need it. The war on terrorism has complicated intelligence collection in various ways. During the Cold War we knew the enemy and we knew where to find this enemy abroad. Today we face attacks from overseas as well as from terrorist cells that have infiltrated the homeland. The enemy within our borders seeks to remain unidentified, its objectives are less clear, and uses cyberspace to communicate and coordinate terrorist operations. As a result, detecting terrorism, once the purview of the Government and the CIA, must now involve the public, state and local officials, and the private sector, Steinberg said.



*James Steinberg of the Brookings Institution discussed how intelligence policy might respond to the threat of terrorism during Friday's keynote remarks.*

Steinberg pointed out that we have focused our counterterrorism efforts on three major points. First, we have attempted to keep the fight abroad. Second, we have made marginal changes to the organizational structure of the government. Steinberg considers the changes made as marginal because the basic organization of the U.S. government from the Cold War remains unchanged and the divide remains between foreign and domestic. He cited the numerous and overlapping functions of advisory bodies such as the National Security Council and the Homeland Security Council as an example. Finally, we have seen an expansion of legal authority to collect intelligence here at home. The "police method" of knowing who you were after, worked well in tracking the leaders of al Qaeda. According to Steinberg, as the threat evolves we are less likely to know the identity of those who threaten us. Thus a broader approach or a "wide scan" approach is needed.

This "wide scan" approach to identify terrorist threats will include the use of new technologies such as data mining and pattern recognition, and will require the assistance of the private sector such as data aggregations and credit card companies, as well as health care providers, and airline companies. The use of new technologies, however, may run the risk of violating civil liberties and thus a debate on the costs and benefits of such technology is appropriate. Accordingly, he noted, this debate to reconcile civil liberties and national security policy should incorporate policy and technology components. Clear guidelines as to whom and under what circumstances this information could be collected and with whom it can be shared must be created to protect against intrusion and at the same time give clear parameters for government actors and ensure effective operations.

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Once the intelligence has been collected, the information must be disseminated to all those who need it to ensure effective national security policy. In the past a rigid system of security clearances and need-to-know status protected our secrets but made it difficult to share information. Steinberg expressed his support for a decentralized network for intelligence sharing and new technologies drawing on the peer-to-peer approach (such as “Napster”) or the internet based network used to identify the SARS virus as potentially helping in this endeavor. In addition to new technology new policy is needed to facilitate sharing. The “need to know” mentality must be replaced by a “need to share.”

Steinberg believes that the significant benefits to openness outweigh the dangers. According to Steinberg, “We need a new approach to avoid the zero-sum outcome. The same system that will help us share intelligence can keep it from our enemies. There are opportunities but we need get public support by providing transparency.”

#### **Panel VI: WILL THE USA PATRIOT ACT RIDE INTO THE SUNSET?**

Moderator: Elizabeth Rindskopf Parker, University of the Pacific, McGeorge School of Law

Panelists: Professor Viet Dinh, Director of the Asian Law & Policy Studies Program at Georgetown University School of Law; Professor David Cole, Georgetown University School of Law; Andrew C. McCarthy, Senior Fellow at the Foundation for the Defense of Democracies; and Sampak Garg, Minority Counsel for the House Committee on the Judiciary

The final panel discussion focused on the fate of the USA PATRIOT Act, and brought together a number of scholars and individuals who were instrumental in producing the final language of this controversial legislation. Moderator Elizabeth Rindskopf Parker, Dean of the University of the Pacific, McGeorge School of Law, set the stage for the discussion with a comment on her belief that the bad reputation of the PATRIOT Act stems from a lack of understanding and uninformed debate. The panel’s goal was to clarify and enlighten the gathered audience.

The first speaker offered a perspective from the enforcement side of the PATRIOT Act. Andrew C. McCarthy, now a senior fellow at the Foundation for the Defense of Democracies, spent most of the 1990’s prosecuting terrorists who attacked American interests both at home and abroad. Having dealt first hand with the limitations the law imposed on counterterrorism efforts, he contended that the current debate focusing on abstract arguments is not the best way to deal with the Act. Rather, practical application of the law should be at the center of the debate and everyone should avoid giving undue weight to worst-case scenarios.

As an example, McCarthy sees the debate over the library provisions of the PATRIOT Act as assuming a level of malevolence behind the law that just does not measure up with his experience. He noted that the library provisions did

not open up records that were not already available through other means. Furthermore, these records were already in the hands of third parties, undermining arguments about privacy concerns.

The PATRIOT Act is important because it puts intelligence agents on equal footing with criminal law enforcement agents, and marries older techniques with 21<sup>st</sup> century technologies. The Act also facilitates interagency communication because it lowers the wall erected between the intelligence agencies that were established by the Foreign Intelligence Surveillance Act (FISA).

According to McCarthy, the fact that FISA focuses on national security issues as opposed to criminal issues is important to realize for those who fear abuse by the government. Those critics must recognize that in order for the government to obtain authorization to conduct a search or a wiretap under FISA, it must show the FISA court probable cause that the target is an agent of a foreign power. Terrorists commit many ordinary crimes, so having an unnecessary wall between criminal and intelligence agents made it difficult to stop terrorists before they could strike since intelligence agents who learned of the crimes through FISA could not share that information with criminal investigators. That turned FISA into a defense mechanism for terrorists. Lowering this wall has allowed government agencies to work together in preventing attacks.

The second speaker, Sampak Garg, Minority Counsel for the House Committee on the Judiciary, offered a little history of the Act’s development in Congress from the Democratic Party’s perspective.

According to Garg, when Attorney General John Ashcroft called for a new law in the weeks after the September 11, 2001 terrorist attacks, the House responded immediately and the bipartisan law went through committee with unanimous support. Despite the hard work, a new and different bill ended up making its way to the House floor for a vote. This turn of events, Garg said, is the reason for the hesitancy with which Democrats approached the new legislation. The pressure to pass the law exerted on Senate Democrats was also unsettling, being told that if this effort to respond to the terrorist attacks failed, the Democrats would be at fault.

Substantively, Democrats had particular concern over the business and “sneak and peek” sections of the proposed legislation. Likewise, Garg noted, there was a concern for the Republicans’ effort to expand the Act’s powers concerning deportation and the death penalty.

Garg said that getting answers to their concerns was more difficult than it should have been. And, of the answers they received, some yielded surprising results. For instance, there have been few, if any, actual convictions in connection with the USA PATRIOT Act. Also, the Department of Justice’s answers at first did not cite the use of Section 215, which allows the government to seize tangible items while

barring disclosure of the seizure. Officials claimed the information was classified. Then, when the Attorney General finally declassified them, it appeared that this provision had not even been used.

Garg closed by hailing the good-natured bipartisanship behind the original legislation and held out hope that the same would prevail as the sunset provisions came up for debate.

The next speaker, Professor Viet Dinh of Georgetown University School of Law, drew on his experience as Deputy Attorney General during the USA PATRIOT Act's development to give a detailed presentation of the legislation's path to the President's desk.



*Elizabeth Rinskopf Parker moderated Panel VI on the USA PATRIOT Act.*

The USA PATRIOT Act was fundamentally an exercise in bipartisanship, according to Professor Dinh. That fact is even reflected in the name, which used the words "USA" from the Senate version, then controlled by the Democrats, and "PATRIOT" from the House under Republican leadership. By his estimation, this means that the need for privacy was well balanced against the need for getting information to government and counterterrorism officials.

On the issue of the library provisions, Professor Dinh's records indicate that agents have only visited bookstores or libraries 50 times since the bill was passed, and most of these were in the context of criminal, not national security investigations. More tellingly, most of the visits were initiated by the owners of these establishments.

Professor Dinh said that the USA PATRIOT Act will not, as the panel's title mused, ride into the sunset. He advised Congress to take the opportunity presented in its next session to develop safeguards to prevent abuse in the future if they so desire, but he urged legislators not to be the victim of blind political accusations.

David Cole was given the final word as the last panelist of the Conference. Also a professor at Georgetown University School of Law, Cole began with an appeal to the audience to understand that Professor Dinh's ability to take the messy facts of the USA PATRIOT Act's history and turn them into a beacon of bipartisanship was truly remarkable.

Professor Cole, like the moderator, also noted that the debate about the USA PATRIOT Act was ill informed, but his contention is that there is too little concern for some of the USA PATRIOT Act's worst provisions, particularly those not concerned with surveillance.

For example, First Amendment issues arise in the Act's criminalization of expert advice to "terrorist groups," including advice that discourages violence. For instance, human rights advocacy to the Kurdish Worker's Party could potentially be considered aid to a terrorist organization and therefore punishable under the Act.

Another provision receiving little notice is the authorization for retroactive deportation of anyone found to have given support to any group of two or more who used weapons.

The USA PATRIOT Act also allows foreign nationals to be locked up without the government being required to show anything more than a risk that the person might flee. According to Professor Cole, 5,000 people have already been locked up; none have been prosecuted.

Further, the assets of "terrorists" can be frozen without any showing of wrongdoing and, according to Professor Cole, this order can be defended with secret evidence that is unavailable to opposing counsel. In practice, this provision has resulted in Muslim charities being essentially closed down without a hearing. Professor Cole made sure to note that none of these examples involve the use of sunset provisions.

Professor Cole claimed that the administration will lose legitimacy if it goes forward in bad faith. A lucid example is the "torture memo," which stated it was unconstitutional to bar the President from authorizing torture. This interpretation of the law, he noted, only came about after the torture at Abu Ghraib was made public. In Professor Cole's assessment, this administration pursued a maximalist strategy to the detriment of our national security. •

## ANNOUNCEMENTS AND UPCOMING EVENTS

### *Save the Date:* May 19, 2005 program on International Tribunals

The ABA Standing Committee on Law and National Security, along with the Section of International Law and the Section of Administrative Law and Practice, will present a program on International Tribunals. The program will include an overview of tribunals and a discussion involving what kinds of tribunals are appropriate for what circumstances. Moderated by **Professor John Norton Moore**, Center for National Security Law, University of Virginia School of Law, the program will include **David Crane**, Prosecutor, Special Court for Sierra Leone, **Judge Patricia Wald**, and **John Davis**, Associate Deputy Attorney General, Department of Justice.

The Wine and Cheese Reception and Program will be held from 5:00 p.m. - 7:00 p.m. at the University Club, 1135 16th Street, NW in Washington, DC. Watch your mailboxes or visit our website at [www.abanet.org/natsecurity](http://www.abanet.org/natsecurity) for the invitation.

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The Standing Committee is a collaborating organization for the fourth annual conference on The Public's Health and the Law in the 21st Century. The conference is sponsored by the Centers for Disease Control and the American Society of Law, Medicine & Ethics. The conference, to be held in Atlanta on June 13-15, 2005, will feature sessions on public health emergency legal preparedness, addressing such issues as quarantine law, coordination of interjurisdictional legal preparedness, judicial preparedness, and Canadian federal and provincial legal developments since the SARS outbreak. There will also be discussion and analysis of international matters, including a keynote address by former Attorney General of Ireland David Byrne, who is charged to secure broad approval of the new International Health Regulations. More information is available at [www.aslme.org](http://www.aslme.org).

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University of Virginia Professors and former Committee Chairs John Norton Moore and Robert F. Turner are editors of the second edition of *National Security Law*, a new textbook published by Carolina Academic Press.

Professor Moore, now a Counselor to the Committee, began teaching Law and National Security at the University of Virginia School of Law more than 30 years ago. Professor Moore and Professor Turner co-founded the Center for National Security Law at the University of Virginia School of Law in 1981.

The new textbook includes contributions by more than two dozen experts in law and national security, including former directors and legal advisers to U.S. national security-related agencies and distinguished professors.

The textbook may be ordered by phone at 800-459-7486, by fax at 919-493-5668, or at a discount online at [www.cap-press.com](http://www.cap-press.com).

### [www.law.edu/NSLR](http://www.law.edu/NSLR)

For links to hundreds of national security-related organizations, and to read prior National Security Law Report issues, please visit [www.law.edu/NSLR](http://www.law.edu/NSLR). It's a great resource for information about current events, panels, and meetings taking place in the national security field around the Washington, D.C. area.

This website is maintained by the National Security Forum, an organization located at the Catholic University of America's Columbus School of Law.