



National Security Law Report

Conference Stresses "Rule of Law Engagement" in United States Foreign Policy

The Standing Committee sponsored a conference on "The Rule of Law in United States Foreign Policy and the New World Order" in Washington on October 10-11. The theme of the conference was the importance of systematic efforts to assist the democracy revolution around the world as a major component of U.S. foreign policy.

Since at least the Copenhagen Document within the Conference on Security and Cooperation in Europe, it has been widely understood that promoting democratic structures and the rule of law is an essential next step in the ongoing global struggle for human rights. Moreover, many realize that democracy is important in avoiding major wars, which have killed millions in this century, and also mass killing by totalitarian governments of their own populations, termed "democide," which may have killed more people than all wars in this century put together. For some time economists have been aware of the failure of centrally planned economies in contrast to free market capitalism. That trio of premises gave the conference a basis for prescribing a blueprint for "rule of law engagement."

A keynote speech by the Honorable Steny H. Hoyer, Chairman of the U.S. Commission on Security and Cooperation in Europe, characterized the Copenhagen Document as the Magna Carta of rule of law engagement, noting that it reflects an extraordinary consensus that liberal

democracy and the rule of law are necessary for full realization of human rights and peace. He commented that the failed coup attempt in the Soviet Union illustrated that the process of democratization, once started, is irreversible.

Professor R.J. Rummel, who has been one of the principal theorists of rule of law engagement, spoke on the interplay between democracy and the elimination of violence. His view was that, although democratic states are less likely to be involved in war than totalitarian states, that is only part of the picture:

War is not the most deadly form of violence. Indeed, I have found that while about 37,000,000 people have been killed in battle in all foreign and domestic wars in our century, government democide (genocide and mass murder) have killed over 148,074,000 million more, and I am still counting. And over 85 percent of these were killed by totalitarian governments.

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Judge Webster Says Changing World Requires New Intelligence Approaches

The Central Intelligence Agency and the entire U.S. intelligence community need to adapt to a rapidly changing world. So noted William H. Webster to a capacity crowd attending the September 26 breakfast meeting of the Standing Committee in Washington, D.C. Judge Webster, who recently stepped down after four years as the Director of Central Intelligence, spoke of the important lessons learned by the nation as the result of the Iran-Contra affair.

Judge Webster described three objectives at the CIA: to increase trust and confidence with Congress and the American people; to separate intelligence information from policy-making; and to adapt to the great changes in the world. The CIA, he stressed, must be open where possible, honest with those to whom it reports, and accountable and responsible. The American people must

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Rule of Law Engagement

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Judge William W. Schwarzer, Director of the Federal Judicial Center, emphasized the importance of an independent judiciary as a predicate to the rule of law. Likewise Judge Danny J. Boggs, U.S. Court of Appeals for the Sixth Circuit, noted that overcoming the mindset of judges who have a had a tradition of acting as implementers of government policy will be a major hurdle to building a tradition of political independence. The experience of Germany after World War II, in which a well-functioning judicial system was adapted from a system without a rule of law tradition, was cited by Frederick Quinn, International Counsel of the United States Information Agency.

Associate Director of Programs of the United States Information Agency Paula Dobriansky identified a range of technical assistance that will be useful, but cautioned that the U.S. should recognize diverse elements of history and culture in emerging democracies that may cause them to adopt models that differ from traditional Western democratic structures. Whatever the precise form of the assistance, Professor A.E. Dick Howard of the University of Virginia Law School pointed out that it was a continuation of the process so successfully begun when the founding fathers adapted important thinking of European political philosophers in the Declaration of Independence and the U.S. Constitution.

Agency General Counsels Set National Security Agenda

The post-cold war operation of the defense and intelligence community, the health of the defense industrial base and the close relationship between economic well-being and environmental protection were among topics recently suggested for future emphasis by the Standing Committee. These "agenda items" were identified at the Committee's October 10 annual dinner in Washington, D.C., given for general counsels from a variety of federal agencies and congressional committees that deal with national security law issues.

In attendance were current and former top legal officers from entities including the

Departments of Agriculture, Commerce, Energy, Defense (including Army, Navy and Air Force) and State, and the President's Intelligence Oversight Board, the Central Intelligence Agency, House Armed Services Committee, Senate Select Committee on Intelligence, and U.S. Institute of Peace. They were joined by Standing Committee members and advisers, and by many of the speakers from the Rule of Law conference (see article on page 1).

In small group discussions and in concise presentations by a half-dozen "designated speakers," an apparent consensus emerged that the United States now needs to examine and adapt its national security-related priorities, budgets and organizational arrangements to the post-cold war world. But this must be done carefully.

For example, there are numerous proposals to "downsize" and reorganize the intelligence community, or to decrease the defense budget. Yet the United States must still cope with such challenges as the future disposition of Soviet nuclear weapons and other forces; international terrorism; drug trafficking; the proliferation of nuclear, chemical and other weapons of mass destruction; environmental degradation; underdevelopment in the Third World; persistent conflicts such as in the Middle East; and law enforcement problems occasioned by the opening up of borders and increasing flows of immigrants. A major challenge is maintaining America's international economic competitiveness.

Richard E. Friedman, chairman of the Advisory Committee to the Standing Committee, and the dinner's master of ceremonies, said the dinner discussions would help provide direction as the Standing Committee plans future conferences, task force and working group activities and research and writing projects.

Robert F. Turner

Chairman, Standing Committee on Law and National Security

John H. Shenefield

Editor

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New Intelligence Approaches

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have confidence in their government and believe that it is working for them and not against them. He quoted William Stevenson ("Intrepid") as once telling him that the most important requirement for an intelligence officer is integrity.

Intelligence community officials, observed Judge Webster, must work within the rules, even though they may try to change them legitimately. These officials may disagree on such matters as the number of briefings before congressional oversight committees and on the content of the briefings, but in any event, testimony to the Congress must follow the "rule of four Cs:" it must be candid, correct, complete and consistent. Questions that cannot be answered must be taken back to the intelligence organization for careful analysis and response, so as not to divulge sensitive sources and methods. Judge Webster said integrity must also characterize the process of preparing national intelligence estimates, which should clearly reflect all divergent views.

In dealing with the rapidly changing world, a major focus for the CIA is the Soviet Union and whether "the threat" continues to exist. For example, Washington constantly needs political, economic and social answers about the changing relationship between the center and the republics, and especially about the potential for instability. Special areas of interest include the Soviet nuclear arsenal and food distribution. Whatever the continuing momentous changes in the Soviet Union, far less than 20% of the CIA's resources are devoted there because there are so many important events underway in the rest of the world that are competing for an intelligence officer's attention.

Judge Webster said that the United States must stay on top of widespread regional conflicts and their nationalistic, ethnic and other underpinnings. For example, developments underway in Africa and Asia (such as in the Koreas) require more and not less intelligence. While President Bush says the United States is not going to be the world's policeman, he still needs maximum information to make well-founded foreign policy decisions.

Terrorism and narcotics trafficking are two very important transnational issues according to Judge Webster. Terrorism has a great impact on citizens, can cause enormous destabilization, and can have great political consequences. During

Operation Desert Storm, the U.S. intelligence community worked aggressively to identify and blunt potential actions by Saddam Hussein's terrorist teams.

Global economic competitiveness should receive significant emphasis by the U.S. intelligence community in the future. Foreign intelligence services, stressed Judge Webster, often assist their own companies with economic trend data and other information, frequently to the competitive disadvantage of U.S. firms. The U.S. intelligence community needs to find ways to help American companies, but in accordance with our system and its laws. A sometimes related issue that demands more attention is technology transfer.

Perhaps the greatest challenge facing the intelligence community is the proliferation in the Third World of biological, chemical and nuclear weapons and their means of delivery. As intelligence points up violations, international inspectors will have the daunting task of evaluating them on the ground. While in the past the bulk of U.S. intelligence monitoring and satellites were focused on the Soviet Union, the changing world situation means that increasingly such capabilities need to deal with weapons proliferation everywhere.

At the heart of intelligence collection and analysis, suggested Judge Webster, is the search for truth, a process that is familiar to lawyers. Intelligence must be used to support the rule of law. He concluded by stating that he was grateful to have recently been appointed Counselor to the Standing Committee and that he looked forward to working to advance the rule of law.

BOOK REVIEW

By Pamela M. Jimenez

Repealing the War Powers Resolution: Restoring the Rule of Law in U.S. Foreign Policy, by Robert F. Turner, Brassey's (US) Inc., McLean, Virginia, 1991.

Robert Turner's most recent contribution to national security law, *Repealing the War Powers Resolution: Restoring the Rule of Law in U.S. Foreign Policy*, searches out the heart of constitutional democracy and exposes some errant political processes that have come to undermine the national security of the United States. The War Powers

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Resolution was enacted in the wake of Vietnam, ostensibly to prevent "adventuristic presidents" from dragging the nation "kicking and screaming" into foreign conflicts against the will of Congress. In a brilliantly crafted, insightful and meticulously documented analysis of the War Powers Resolution, Professor Turner challenges the validity of this notion, and advocates the repeal of an "unconstitutional law" enacted by an insecure Congress for purposes of political expediency.

Professor Turner's multidimensional case for repeal examines the political climate that prompted Congress to enact the controversial statute, the constitutional framework governing the conduct of U.S. foreign policy, and the implications of the Resolution for the implementation of U.S. military objectives. Professor Turner begins by reminding us that Congress was hardly dragged into the Vietnam conflict. In fact, congressional support for the use of armed force in Southeast Asia was overwhelming: the Gulf of Tonkin Resolution of August 1964 was approved 416-to-0 in the House of Representatives, and 88-to-2 in the Senate.

Only when public support for the war began to waver following the 1968 Tet offensive and President Johnson's near-defeat in the New Hampshire primary did Congress reconsider its position on U.S. intervention in Vietnam. In an attempt to avoid the blame, Congress determined to "legislate an end to the war" and to ensure that no future president would drag the nation into another unpopular war against the will of Congress. Those efforts resulted in the repeal of the Gulf of Tonkin Resolution in 1971, and subsequently, the enactment of the War Powers Resolution in 1973.

Professor Turner forcefully argues that, in enacting the War Powers Resolution, Congress "flagrantly violated the constitutional doctrine of separation of Powers" and the fundamental principle that ours is a government of laws, not of men. Professor Turner's conclusion proceeds from the premise that the Constitution vests the President with exclusive control over foreign affairs, subject to important but limited exceptions reserved for Congress. One such exception is the power to declare war. While Professor Turner readily concedes that congressional authorization is required to initiate an offensive war, he contends that no such authorization is necessary for the defensive use of force to respond to foreign attack.

The distinction between the power to declare war and the need to preserve peace is central to Professor Turner's criticism of the War Powers Resolution. Equally prominent is the practical reality that only the executive branch is capable of acting with the secrecy, unity of plan and speed essential to effective diplomacy.

But perhaps the most persuasive justification for the repeal of the War Powers Resolution is Professor Turner's illustration of the "unprincipled way the statute has been used by Congress." Congress approved the Mayaguez rescue but leaders of both parties condemned President Carter's unsuccessful Iran hostage rescue attempt. The 1983 Grenada operation was first criticized, then supported in Congress when the facts became known and the American public reacted with thundering approval. Turner believes that Congress commonly uses the Resolution to harass the executive branch when public opinion disapproves of the presidential exercise of foreign affairs powers.

Professor Turner also contends that the War Powers Resolution undermines the operational effectiveness of U.S. armed forces and endangers the safety of U.S. troops. When would-be aggressors are convinced that the U.S. lacks the will to respond to military force, severe damage has been done to the nation's security.

Recent events in Eastern Europe and the Middle East attest to the need for a consistent and comprehensive U.S. foreign policy. Yet, as Professor Turner illustrates, U.S. foreign policy has been, and continues to be, jeopardized by the War Powers Resolution and the virtual straitjacket Congress has seen fit to thrust upon the President in the exercise of U.S. foreign policy. This, Professor Turner asserts, is not only unconstitutional, but inimical to the security interests of the United States.

Based upon the history of the War Powers Resolution, its questionable constitutional validity, and its uncertain implications for the conduct of U.S. foreign policy, Professor Turner makes a compelling case for the repeal of the War Powers Resolution. Professor Turner's book is a must-read for all who are concerned with the preservation of peace and stability in an all-too-unpredictable world.

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Strategic Sealift: Lessons Learned from the Gulf War

No one can dispute that the sealift operation, the largest such operation in history, was one of the great success stories of Operation Desert Shield/Desert Storm. Fully 95% of all military cargo transported to the theater during the 161 days of Desert Shield was moved by sea. But despite its success, various critical shortcomings in strategic sealift quickly became apparent. Now it is clear that our strategic sealift posture must be upgraded to better implement the emerging power projection policy of deploying the maximum possible amount of force possible to anywhere in the world. Based upon my service at five Military Traffic Management Command port operations during Desert Shield/Desert Storm, I offer the following observations on how that can be done.

There are two different kinds of ships available for transporting military cargo. So-called roll on/roll off ("RO/RO") vessels are designed so that tanks and other vehicles are driven directly on and off the ship. By contrast, cargo is loaded on a breakbulk ship by crane, a relatively inefficient process for loading military vehicles.

Desert Shield saw the first use of the Ready Reserve Fleet, a fleet of 96 mothballed breakbulk and RO/ROs which are to be ready to sail on short notice. By the end of the ground war, 73 Fleet ships were ready for use,¹ but unfortunately, only 17 of these were RO/ROs and only 24% of activated Fleet vessels were delivered on time.² Many of the breakbulks were in poor condition and suffered from constant mechanical failures. They ought to be scrapped in

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Conference to Consider U.S. Defense-Industrial Base

The state of the U.S. defense-industrial base will be explored at a conference co-sponsored by the Standing Committee and the National Strategy Forum in Chicago on November 15.

A distinguished group of lawyers, policymakers, scientists, industrialists and regulators will take part in two panel discussions: Encouraging Research and Development in New Technologies, and Downsizing the Defense-Industrial Base and Private Arsenal Systems.

The United States is embarked on a sweeping reformulation of national strategy, and the viability of the defense-industrial base is one of the most pressing problems confronting policymakers. In order to sustain an adequate industrial surge capacity in a time of decreasing defense budgets, the regulatory environment must allow the private sector to exploit advanced technologies commercially. This strategic objective may require changes in the way the Department of Defense does business, particularly in the areas of proprietary rights and antitrust enforcement.

Participants in the conference include: Gordon Adams, The Defense Budget Project; Gordon Corlew, AIL Systems, Inc.; C. Stanley Dees, McKenna & Cuneo; Richard Friedman, The National Strategy Forum; David Hirsch, MASCO/NI Industries; George Millburn, National Center of Advanced Technologies; Ivan Oelrich, Office of Technology Assessment; Alan Peterson, Peterson Consulting; Colleen Preston, House Armed Services Committee; Donald Putnam, General Dynamics Corporation; John Shenefield, Morgan, Lewis & Bockius.

Calendar of Events

November 15

Conference on *The State of the U.S. Defense-Industrial Base* (co-sponsored with the National Strategy Forum), Executive House Hotel, Chicago, Illinois

November 21

Breakfast Meeting, University Club, Washington, D.C.

January 6-7

Conference on *Strengthening Regional Security and the Rule of Law in Latin America and the Caribbean* (co-sponsored with the North-South Center of the University of Miami), Miami, Florida

January 16

Breakfast Meeting, University Club, Washington, D.C.

February 20

Breakfast Meeting, University Club, Washington, D.C.

For further information on these events, please contact the Standing Committee office at 703-242-0629.

Strategic Sealift

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favor of modern RO/ROs. In fact, the deployment to the Gulf was completed only because of the numerous high-quality RO/RO vessels chartered from various allies. The acute shortage of trained American merchantmen also necessitated reliance on foreign crewmen and retired seamen, some of them over 80 years old, who were recalled to duty.

Perhaps the most noteworthy success of the operation was the performance of the Marine Corps Maritime Prepositioning Force ("MPF"). Marine Corps equipment and supplies are prepositioned aboard MPF ships, which are homeported throughout the world.³ When the troops are airlifted into the theater of operations, the MPF ships immediately set sail. All of this saves considerable time by eliminating the need to transport unit equipment all the way from the United States through a commercial port where it may sit on the pier awaiting the arrival of a cargo ship. Just eight days after being ordered to action on August 7, 1990, the first of the MPF ships discharged equipment in Saudi Arabia.⁴

The speed with which the MPF vessels arrived in Saudi Arabia may well have been a critical factor in deterring Iraq from invading. Because prepositioning on a limited scale worked so well in Desert Shield, the Army would be well-advised to adopt the MPF concept for future sealift requirements.

There was also some good luck involved. The Saudis possess modern deep water ports capable of accommodating the largest of the RO/RO fleet. Moreover, Iraq never contested the sea lanes; the Suez Canal remained open and there were no terrorist attacks. As a result, no ships were lost.

Obviously, the United States cannot count on enemy inaction during future deployments. The services are, therefore, taking steps to create a more credible maritime projection force. For example, the Army recently requested that additional RO/ROs be made available in lieu of breakbulks so that the Army can move two divisions with 600 tanks anywhere in the world within 30 days.⁵

Such ships are immediately available on the international market for \$40 million apiece. Estimates are that such ships could eventually be built in an American shipyard at \$200 million apiece. The need to upgrade sealift capacity must surely proceed independently, and cannot wait for the reinvigoration of the U.S. ship-building industry.

If it were possible to design a ship with both military and commercial applications, it could be built under a program by which peace-time use is given over to

American and allied commercial carriers. In the event of national emergency, the government would assume control of the ships and use them for ferrying military cargo, in the same manner that the Military Airlift Command utilizes the Civil Reserve Air Fleet. Such a program would result in net savings to the government by ensuring that the ships are utilized regularly, thereby improving maintenance and operability.

Unfortunately, the Army has rejected establishment of its own MPF. Although the Army keeps fuel, food, consumables and war reserve materiel aboard ships in an "afloat prepositioning" program, the Army has decided not to reposition unit equipment on cargo ships. This decision should be reversed.

As combat divisions are deactivated, the Army will have excess equipment in the inventory. The Army could load heavy division equipment aboard MPF ships and establish several "floating depots." By emulating the Marine Corps MPF program, the Army would dramatically shorten the time between receipt of deployment orders and the arrival of equipment in the theater.

This equipment could be offloaded for use in National Guard and Army Reserve training exercises. While such exercises are conducted, the MPF ships would undergo regularly scheduled maintenance. A reserve merchant marine force could be established to perform tours manning Army MPF ships, in order to keep their skills current and to ensure the MPF vessels are in a high state of readiness.

Upgrading sealift capabilities is important. An Army MPF program, adding new RO/ROs to the Fleet and solving the shortage of qualified seamen must all become national priorities. After all, of what use is the most modern tank and artillery systems if they cannot be transported to the battlefield in time to influence the outcome?

Jayson L. Spiegel

Mr. Spiegel is the liaison of the Young Lawyers Division to the Standing Committee. He spent much of his last year on active duty in Desert Shield/Desert Storm.

NOTES

1. Hessman, "Key Word is Ready," *Sea Power* at 9 (May 1991).
2. Thompson, "Sealift Testimony Irks Some on Hill," *128 Armed Forces Journal International* 12 (April 1991).
3. Brown, "Call in the Marines," *9 Amphibious Warfare Review* 21 (Summer 1991).
4. Donovan, "Test of Sealift Planning," *47 Defense Transportation Journal* 60 (June 1991).
5. Thompson, "TRANSCOM CinC Supports More Sealift to Meet Army Needs," *128 Armed Forces Journal International* 13 (June 1991).