

**Law and National Security
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Robert F. Turner, Chairman

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**Soviet Developments
Call for Close Attention***By James Arnold Miller*

The United States needs to remain cautious about the Soviet Union. So noted Roger W. Robinson, former Chase Manhattan Bank corporate vice president and former senior director for International Economic Affairs for several years on President Reagan's National Security Council staff. Mr. Robinson, who now heads his own international consulting firm, spoke on January 17 at the Standing Committee's breakfast meeting at the University Club in Washington, D.C.

Robinson highlighted many disturbing developments in the Soviet Union. In his view, *perestroika*, or the campaign to revive the economy, has been dead for over a year. In any case, the Soviet leaders never actually planned to undertake the systemic transformation of their economy. They had hoped to merely tinker with the existing economy to improve efficiency and productivity. *Glasnost*, or openness, has suffered severe reverses as well.

The Soviet Union's economic problems are severe, worsening, and unlikely to improve, Robinson said. The substantial capital flows on the way from the West most certainly will be squandered by the failed economic command system. Therefore, U.S. lending agencies, the American taxpayer, and corporate shareholders should be made aware that their money invested in joint ventures in the Soviet Union is at risk. A major factor, he emphasized, is Soviet energy production, which is likely to decrease significantly. Since the USSR obtains some 60 percent of its foreign exchange from energy exports, this drop in energy production will further cripple Moscow's ability to purchase food as well as other critical imports.

Robinson said the Soviet economic situation is worsened by the unchanged commitment to maintain a

strong military. The Soviets continue to devote some 20 percent of their annual Gross National Product to military expenditures. And they continue to spend billions of dollars and provide other support to Havana, Hanoi, and other extremist regimes.

The economic problems in the Soviet Union are feeding unrest throughout the individual Soviet republics in most of which the desire for freedom is strong and still growing. The recent violence by Soviet military units against the pro-independence movements in Lithuania and Latvia is illustrative of a leadership in Moscow that is dedicated to re-centralizing economic and political power. Especially appalling was the attack against the communications facility in Vilnius which resulted in the death of 13 unarmed Lithuanian civilians. In Robinson's view, President Gorbachev was fully aware that his instructions to local military commands could result in acts of violence, and therefore it came as no surprise when bloodshed did in fact occur.

Indeed, Robinson asserted his belief that Moscow's

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Old Friends Salute Morry Leibman

On February 1, over 200 friends met for breakfast at the Grand Hyatt Washington in Washington, D.C., to salute Morris I. (Morry) Leibman, one of the "god-fathers" of the ABA Standing Committee on Law and National Security. The occasion was the celebration of Morry's 80th birthday (the actual date is February 8). The guest list would have read like a Who's Who of official Washington. It was a special tribute that the newest Supreme Court Justice, David Souter, was present.

Several speakers paid tribute to Morry and detailed some of his countless achievements. John Norton Moore, a former chairman of the Standing Committee, noted that Morry Leibman has been active with the

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Soviet Developments Call for Close Attention

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crackdown against the reformist forces in the Soviet Union almost certainly will be expanded in the weeks ahead (e.g., the republic of Georgia). Robinson also believes that it was no coincidence that Gorbachev decided to move against the freedom-bound Baltic states in mid-January at a time when the world was preoccupied with the possibility that the crisis in the Persian Gulf might develop into a wider war.

Hostilities in the Persian Gulf erupted on the evening before Robinson spoke at the breakfast. Robinson concluded his remarks by suggesting that the Bush administration and the United States government continue to closely monitor developments in the Soviet Union and that they take a series of actions designed to underscore the connection between increased freedom for all the peoples of the Soviet Union and the long-term national security of the United States and its allies.

Verification, Compliance Problems Hamper Chemical Weapons Agreements

The current crisis in the Persian Gulf has forced the world community to contemplate once again the ugly spectre of chemical and biological warfare. According to participants in a United States Institute of Peace workshop, the international community will continue to encounter difficulties in limiting the spread of chemical and biological weapons among nations with very different perceptions of their legitimate security needs. Beyond disagreements over questions of morality and acceptable conduct, the panelists agreed, primary impediments are the lack of proven and effective methods for verification and enforcement of international agreements.

In a recent Institute publication, *Is It Feasible to Negotiate Chemical and Biological Weapons Control?* based on the workshop, panelists debate what lessons can be drawn from the 1925 Geneva Protocol banning the use of chemical weapons and subsequent multi-lateral discussions on the topic, including the 1989 International Conference on Chemical Weapons in Paris. In the preface, the Institute's President, Samuel W. Lewis writes:

It is clear that the chemical weapons issue . . . can no longer be relegated to debate on the periphery. It is, in fact, becoming one of the central features of regional conflict. The more real this problem becomes, the more frequently we will encounter proposals for dealing with it in the future.

Referring to the difficulties in negotiating any treaty with regimes like Saddam Hussein's, former Institute

Fellow Robin Ranger concludes:

The Iraqi willingness to openly and unambiguously operate in violation of the [1925 Geneva] Protocol . . . points to the observation that if we have poison gas treaties that are not observed, they are poison treaties.

Among the possible remedies discussed is a proposal by Ranger and another former Institute Fellow, Raymond Cohen, for the formation of an International Chemical Weapons Authority (ICWA) that would offer an "insurance policy" for nonchemical-weapons states against threats from states with such weapons. Among the agency's most provocative capabilities would be the option of supplying victims with military means of defense including a supply of chemical weapons to deter further attack.

Is this an innovative proposal that would discourage countries from developing chemical weapons, or a far-fetched notion that would only create further instability? These opinions and others, as well as the full text of the Cohen-Ranger proposal, are contained in the publication, the latest installment in the Institute's series of Dialogues from Public Workshops. After its initial release in 1989, the proposal generated discussion in the press and other public settings. A *New Republic* editorial said:

Between unveiling an American proposal for banning chemical weapons at Geneva in 1984 and pledging no more gasses in 1988, [President George Bush] cast the tiebreaking vote in the Senate to jump-start American chemical weapons production in 1986. It's time to pick a policy that makes sense and stick to it. For starters, he could put Ranger's and Cohen's proposal on the table at Geneva. It's an imperfect idea, but this is an imperfect world.

(Publication announcement by the United States Institute of Peace. Reprinted with permission. To obtain a complimentary copy of the publication, write to Public Affairs and Information, U.S. Institute of Peace, 1550 M Street, N.W., Washington, D.C. 20005.)

New Committee Address

As indicated in the article on page 4, following a decade of exceptionally able service the committee's staff director, Mrs. Mary Lee, will retire. One of the many consequences of this transition is that effective immediately the committee's new address and phones are as follows:

Standing Committee on Law and National Security
1501 Trombone Court
Vienna, VA 22182
Tel. 703-242-0629
Fax. 703-938-1727

Why the Sanctions on Iraq Were Unlikely to Succeed

By Robert F. Turner

President Bush's attempt, in coordination with the United Nations Security Council, to resolve the crisis in the Persian Gulf through the use of an economic embargo was both admirable and in keeping with the finest traditions of American foreign policy from the earliest days of our country. Unfortunately, it was almost guaranteed to fail.

On May 1, 1794, as war with Great Britain appeared increasingly likely, U.S. Secretary of State Thomas Jefferson proposed a radical alternative to the traditional remedy of military force in redressing international grievances. In a letter to Tench Coxe, assistant secretary of the treasury under Alexander Hamilton, Jefferson wrote that he loved peace and was "anxious that we should give the world still another useful lesson, by showing to them other modes of punishing injuries than by war, which is as much a punishment to the punisher as to the sufferer." He reasoned: "I love, therefore, . . . [the] proposition of cutting off all communication with the nation which has conducted itself so atrociously. This, you will say, may bring on war. If it does, we will meet it like men; but it may not bring on war, and then the experiment will have been a happy one."

Thirteen years later, during his second term as president, Jefferson put this theory to the test during another crisis with Great Britain when he persuaded the Congress to enact the Embargo Act of 1807. History records that it was perhaps Jefferson's greatest failure, and, in response to widespread popular protests, the statute was repealed by Congress shortly before Jefferson left office.

In retrospect, Jefferson's error may have been not the general theory of substituting economic pressure for military force, but rather in pressuring the wrong target. As a result of the 15 month-long embargo, raw cotton exports to Great Britain from the New World dropped more than 80 percent, the price of cotton rose 50 percent, an estimated 60,000 looms were left idle, and angry workers protested in Manchester, Liverpool, and London. But cotton processors were hardly a major base of political power in England at the time, and the growing pressure within England to compromise with the Americans was dwarfed by the domestic opposition within the United States to the unpopular embargo—which cost \$50 million in lost exports per year—a sum Jefferson acknowledged was probably three times the cost of fighting a war with Great Britain.

Above all, however, the potential success of the embargo was undermined by the perception in London that the United States was *divided* over the issue and that the Congress would likely "pull the plug" before the level of damage to Great Britain became unbearable. More than any other single factor, Jefferson's Republicans

were undercut by the opposition Federalists—who milked the dissatisfaction among injured merchants and exporters for every political advantage it was worth. Ultimately, with the failure of the noble embargo experiment, the two nations reverted to more primitive forms of dispute resolution in the War of 1812.

If there was one clear "fatal flaw" in the embargo strategy against Iraq, it was that, ultimately, the people of the civilized world cared far more than does Saddam Hussein about the safety and welfare of the innocent women and children of Iraq. Saddam could be expected to take what food and resources he needed for himself and his Republican Guards. Indeed, he might well intentionally increase the level of hardship on the most defenseless elements of his society—and invite CNN and the other television networks in to cover close up the suffering he would attribute to the embargo. We are dealing, after all, with a man who not only sacrificed hundreds of thousands of his nation's young men in an aggressive war against Iran, but who also used poison gas to eliminate not only his military enemies but dissident elements within his own society.

Long before the lack of replacement ball bearings significantly undermined Iraq's military effectiveness, Saddam could be reasonably confident that humanitarian pressures around the world would be brought to bear to ease or abandon the embargo. In a few months, much of the world might well have forgotten the details of the tragic rape and devastation of Kuwait—but the nightly news would not let them forget the starving women and children of Baghdad. Indeed, there would be some merit to the charge that it is not only ineffective but morally *wrong* to try to punish Saddam Hussein by starving a bunch of innocent women and children—people whose primary "fault" was to have the misfortune of being born in a country run by a ruthless dictator. The fact that the United Nations was willing to provide humanitarian relief through the International Committee of the Red Cross/Red Crescent Society might go largely unnoticed.

Saddam Hussein understands that in virtually every protracted U.S. effort to deter international aggression in the past 30 years, when significant public opposition has surfaced, the Congress has ultimately "pulled the plug." It happened in South Vietnam, Laos, and Cambodia; it happened in Angola; and it happened in Nicaragua. The partisan bickering on Capitol Hill as early as November gave every indication of more of the same in the current crisis. President Bush knows first hand the horrors of war, and anyone who believes that he relished sending American soldiers into combat is mistaken. If the president seemed to some to be overly anxious to commit U.S. forces to combat, it may be because he realized that—in the absence of national unity behind his efforts to achieve the nation's goals by *deterrence*—his other options were almost certain to fail.

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Why Sanctions Were Unlikely to Succeed

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The key to a successful outcome, ultimately, is national and international unity against the aggressor. Without unity, the embargo was unlikely to succeed. The congressional opposition may view this crisis as a golden opportunity to gain political advantages over the current administration by crassly portraying the president's strong rhetoric aimed at deterring Saddam Hussein as evidence that Mr. Bush was insensitive to the horrors of war; but any such gains will ultimately be at the expense of international peace and the safety of American forces in the Gulf. As I sat waiting to testify before the Senate Judiciary Committee on January 8, and listened to prominent Democratic Senators talking seriously about possibly impeaching the president if he used force in defense of Kuwait without first getting authorization from Congress, I could not help but wonder how reports of the hearing would be received in Baghdad. It certainly must have looked as if George Bush was "on the ropes" and unlikely to answer the bell for the next round. Why should Saddam Hussein even consider throwing in his towel under such circumstances?

Nearly two centuries ago, in a 1799 letter to General Thaddeus Kosciusko, Thomas Jefferson set forth the standard which should guide the behavior of Democrats and Republicans alike in the face of Saddam Hussein's

aggressive assault on the international rule of law—"If we are forced into war, we must give up political differences of opinion, and unite as one man to defend our country."

Lee, Martin to Retire: Miller Named New Staff Director

After a decade of exceptionally able work as staff director to the Standing Committee on Law and National Security, Mary Lee will retire in mid-March. She will be succeeded by Dr. James Arnold Miller, an old friend of the committee who has a distinguished background in national security work. The committee is also losing the services of consultant David Martin, who has worked as associate editor of the *Intelligence Report* and has performed other valuable work for the committee.

Mary Lee came to the committee in March 1981, following 24 years with the U.S. Independent Telephone Association. She served the committee under four chairmen; and all of them joined in singing her praise at the December meeting in Washington. Current Chairman Robert F. Turner spoke of Mary's "professionalism, dedication, competence, [and] sense of humor"—not to mention her "patience"—and concluded that she would

Conference to Review Field of National Security Law

The Standing Committee on Law and National Security is hosting a major conference on "National Security Law: Review of the Emerging Field," in Washington, D.C., on April 3-4. The conference, open to the public, will present an overview of the field and will include discussions of some of the most important national security legal issues facing the nation. The program will be designed both to facilitate an exchange of ideas among leading experts in the field and to introduce the subject to a wider audience of non-specialists.

Over the last two decades, a new field of national security law has been born. Growing out of a synergy between the international law of conflict management and an emerging national law of war powers, intelligence, national security controls on trade and many other national law issues, the new field has begun to exert substantial influence on the national security process within the United States. As one rough indication of the growth of this new field, in 1964 the congressional publication *Legislation on Foreign Relations* totaled 658 pages. Twenty-five years later, the same publication required five volumes of more than 1,000 pages each.

The ABA Standing Committee on Law and National Security and the University of Virginia Center for National Security Law have played prominent roles in pioneering the new field. Thus, the first course on national security law was initiated by Professor John Norton Moore at the University of Virginia School of Law during the 1970s. By the early 1980s, it had become increasingly apparent that a major impediment to the widespread teaching of the new field was the absence of an appropriate text. After nearly a decade of development and classroom testing—involving the cooperative efforts of the members of the Standing Committee and the University of Virginia Center—a law school case book on *National Security Law* was published by Carolina Academic Press last year. It has already been adopted for use at 19 law schools; and plans are underway for a summer institute to train law professors and others to teach out of the new casebook. Two other publishers have also produced textbooks dealing with this subject.

For further information on the conference call Dr. James Arnold Miller, the committee's staff director, at 703-242-0629.

be "irreplaceable." Former Chairman Morris Leibman added: "The old era of the committee which started with Justice Powell and Bill Mott reached a new level when you took over as staff director. The committee has grown in stature, importance and effectiveness over the years and you have had a major part in developing its contribution to America's law and national security." Mary, a native of Northern Ireland, intends to travel and to spend part of each year in Scotland where she also has a home.

David Martin came to the committee in 1980. A veteran of more than 20 years in the legislative branch of government, David was perhaps best known for his work as national security adviser to the late Senator Thomas J. Dodd of Connecticut during the late 1950s and 1960s. A letter which President Reagan sent him on the occasion of his 70th birthday spoke of his outstanding services after World War II in protecting and defending refugees from totalitarianism, and of his contributions to the national security and the war against drugs. A highly respected scholar, David is the author of three major books on General Draza Mihailovich, leader of the nationalist resistance forces in Yugoslavia during World War II.

David and his wife Virginia intend to remain active in committee functions but he decided to retire in order to be able to devote more time to his own research and writing and to better conserve his energy.

While Mary Lee may well prove "irreplaceable" as staff director, the committee is extremely pleased to have secured as her successor Dr. James Arnold Miller. Jim has a B.A. in international relations from UCLA, and masters and Ph.D. degrees in international relations from The American University in Washington, D.C. He spent 11 years in the Air Force before establishing his own consulting firm in 1979. He is an experienced planner, organizer, writer, and editor. He has organized conferences on and written reports on such diverse topics as space, Soviet strategy, international energy security, and environmental issues. To provide for a smooth transition period, Jim has already begun to work.

Former Ambassador to Germany Loses FOIA Case

In a recent case (*Rush v. Department of State*, 748 F. Supp. 1548, USDC S.D. Fla. 1990), Kenneth Rush, a former United States Ambassador to West Germany, sued under FOIA to obtain certain documents with which he had an official connection while serving as ambassador. The stated facts were as follows:

The plaintiff is a former United States Ambassador to the Federal Republic of Germany who was involved in the 1971 Quadripartite Negotiations (hereinafter "Berlin Negotiations") regarding the status of Berlin.

In addition to the official negotiations, President Richard Nixon and Dr. Henry Kissinger, then Assistant to the President for National Security Affairs, authorized the plaintiff to conduct secret discussions with officials of the Soviet Union. Correspondence between the plaintiff and Dr. Kissinger regarding the secret discussions was routed through a special "backchannel" established by Dr. Kissinger, rather than through official lines of communication. The correspondence consisted of the plaintiff's candid status reports, detailed analyses of the secret discussions, comments on proposed draft language for the agreement, and Dr. Kissinger's instructions and background information. The plaintiff retained copies of this correspondence.

In March 1977, the plaintiff transmitted his copies of the correspondence, which he described as "highly secret," to the Department of State (hereinafter "DOS") for inclusion in the Berlin Negotiation files.

The arguments by Ambassador Rush and the Department of State are broadly summarized in the court's decision as follows:

After listing his extensive background in the field of foreign relations on behalf of the United

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Calendar of Events

March 21	Breakfast Meeting, University Club, Washington, D.C.
April 3-4	National Security Conference on "National Security Law: Review of the Emerging Field," Washington, D.C.
April 18	Breakfast Meeting, University Club, Washington, D.C.
May 29-30	National Security Conference on "Preserving the Separation of Powers in Foreign Policy: Checks and Balances and the New Congressional Activism," Washington, D.C.
October	National Security Conference on "Strengthening Regional Security and the Rule of Law in Latin America and the Caribbean"

For further information on any of these events, contact James Arnold Miller, 703-242-0629.

Leibman Honored on 80th Birthday

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committee for nearly three decades, including serving as chairman in 1962-1967 and 1975-1982. He has also been active in helping to build a half dozen "think tanks" and public policy institutions in the private sector devoted to the promotion of human rights and the deterrence of aggression. Morry, Moore said, was instrumental in creating the National Strategy Forum in his home town of Chicago where for a long time he has been a litigation attorney with the firm of Sidley and Austin.

Ambassador David Abshire, now president of the Center for Strategic and International Studies, lauded Morry for turning so many ideas into new and effective organizations; for being able to quickly draft action plans to deal with complex issues; and for always being positive. Above all, he said Morry has worked tirelessly in a Washington that was normally prone to shortsightedness to promote the development of long-term strategies based on unity and consensus.

The Honorable Sam Skinner, secretary of transportation, a long-time colleague of Morry's at Sidley and Austin, said Morry's main trait is consistency, always staying the course, never straying. Ambassador Max Kampelman said people grow old by deserting their sense of mission and sense of values—but he added that Morry had not done so. Morry, stressed Kampelman, continues to focus on mission and values. He continues to create new ideas, institutions, and movements.

When Morry rose to speak, he said that his wife, Mary, his legal profession, and all of his friends would have made for a great life. But then, as he put it, the "fairy godmother hit me with her wand and sent me off to the enchanted world of national security and national strategy." He said that he derived great pleasure from working closely for so many years with so many fine people, collaborating on "a pilgrimage to preserve the miracle of America—the greatest system of human liberty." He urged everyone to continue to remind our citizens of the vital importance of national security and national strategy as the keys to maintaining the rule of law, freedom and justice.

This festive occasion concluded with a rousing rendition of "Happy Birthday," with the musical accompaniment provided by Ambassador Edward L. Rowny

and his inseparable harmonica!

To what was said on the morning of February 1, may the members and staff of the Standing Committee on Law and National Security add their own "Happy Birthday, Morry"!

The occasion was made possible through the generosity of the Dr. Scholl Foundation.

FOIA

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States, the plaintiff avers that based on his knowledge of the contents of the documents, most of which he authored, he firmly believes release of the information could not possibly damage national security. He states the documents have educational value for diplomats.

The defendants' reply in support of their motion for summary judgment contains the declaration of Mr. Curtis Kamman, Acting Assistant Secretary of State for European and Canadian Affairs with responsibility for relations with those countries involved in the Berlin Negotiations. Mr. Kamman reviewed the 41 documents and concluded that the classification of the documents was proper pursuant to Executive Order 12356. Mr. Kamman also stated that the documents contain highly sensitive exchanges at a senior level of government; their release would be damaging to our policy interests in Europe.

The portion of the decision denying the FOIA request stated:

The defendants have provided evidence that the documents were properly categorized and classified by a person authorized to make such classifications. The plaintiff has failed to provide evidence sufficient to rebut the defendants' evidence.

The opinion confirms the decisions reached in a line of cases to the effect that, merely because an official of the government has had possession of, or even initiates documents, does not give him the power to later declassify or obtain those documents, thereby enabling him to publish or otherwise disclose the contents.

Larry Williams

The Intelligence Report, which is published monthly, reviews court cases and books concerned with (1) national security, and (2) intelligence. It also reports on developments in these two fields in the U.S. and abroad, and, in addition, on national security conferences sponsored by the Standing Committee on Law and National Security. The views expressed in this publication are not necessarily those of the American Bar Association or the Standing Committee on Law and National Security. Questions or comments should be directed to W.C. Mott, Editor, 1501 Trombone Court, Vienna, VA 22182, Tel. 703-242-0629, Fax. 703-938-1727.