



Law and National Security INTELLIGENCE REPORT

Atlanta Annual Meeting

ABA Approves Committee's War Crimes Resolution

The 1991 annual meeting of the American Bar Association (Atlanta, August 8-13) proved significant for the national security law community. Highlighting a series of victories was the virtually unanimous approval by the ABA House of Delegates of the standing committee's resolution calling for war crimes trials for Saddam Hussein and other Iraqi war criminals. The committee position also prevailed on resolutions dealing with a moratorium on the production of weapons-grade plutonium, the international environment, drug education and the death penalty. A last-minute resolution viewed by some as being critical of the Pentagon's handling of the news media during Operation Desert Storm was also overwhelmingly rejected by the House of Delegates.

The ABA had never before taken an affirmative position on war crimes and the 1945 Nuremberg Principles, even though at the 1946 annual meeting a reso-

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Standing Committee Welcomes New Members

ABA President Talbot S. D'Alemberte has announced four appointments to the standing committee for three-year terms to conclude in 1994. They are Mary Doyle, Miami, Florida; Michael S. Greco, Boston, Massachusetts; Lucinda A. Low, Denver, Colorado; and Diane P. Wood, Chicago, Illinois.

Mary Doyle is the Dean of the University of Miami Law School and a member of its faculty, specializing in

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Committee To Host Program on "Rule of Law Engagement"

The standing committee will host a conference on "The Rule of Law in U.S. Foreign Policy and the New World Order" at the International Club in Washington, D.C. on October 10-11, 1991. The conference, which will be co-sponsored by the Center for National Security Law of the University of Virginia, will examine how the United States might best assist the Soviet Union, the nations of Eastern Europe and other countries around the world in a transition to democracy and the rule of law. A special roundtable discussion entitled "The Soviet Revolution 1991: Assessing Needs and Modalities in Building a Democratic Legal Order" will focus on these events.

Many of the nation's leading experts in "rule of law engagement" will address the conference, including Richard Schifter, the Assistant Secretary of State for Human Rights and Humanitarian Affairs; Talbot S. D'Alemberte, the President of the ABA; Paula Dobriansky, the Associate Director of Programs for the United States Information Agency; Professor A.E. Dick Howard of the University of Virginia School of Law; Judge Danny J. Boggs of the Sixth Circuit; Judge Jane R. Roth of the Third Circuit; Ambassador Richard N. Gardner, now of Columbia University School of Law; Professor Lowry Wyman of the Harvard Law School; Penn Kemble of Freedom House; and Charles D. Smith, the General Counsel to the United States Institute of Peace.

For further information contact the standing committee office at 703-242-0629.

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lution critical of the Nuremberg trials was unanimously rejected. Now that the official position of the American Bar Association is in support of the Nuremberg Principles and in support of war crimes trials for Iraqi war criminals, the ABA is in accord with the U.S. Senate, the House of Representatives, the unanimous foreign ministers of the Council of Europe, and a variety of other groups.

Another resolution called for a unilateral U.S. moratorium on the production of weapons-grade plutonium and uranium. The standing committee argued that the issue was far too technically complex for the ABA to analyze coherently, requiring among other things consideration of some of the differences between U.S. and Soviet production facilities. For instance, the Soviets do not separate military from nonmilitary production, and unlike the United States they have on-line refueling and breeder reactors which could secretly be used to produce weapons-grade uranium. Verification of any agreement in this area would be extremely difficult and would involve serious risks to U.S. national security information. Perhaps most importantly, if the Soviets perceive that the U.S. government is under strong public pressure to act unilaterally, they will have little incentive to

make concessions of their own. The standing committee's position was unanimously endorsed by the ABA Section of International Law and Practice. During the House of Delegates session, the resolution was withdrawn by its sponsors.

The standing committee endorsed other resolutions before the House of Delegates calling upon nations to consider the environmental consequences of their policies and urging state and local bar associations to institute drug education programs for their members. Both passed without opposition. Impassioned debate developed over a last-minute resolution introduced by the Association of the Bar of the City of New York calling on the Department of Defense to conduct a study of its handling of the press during Operation Desert Storm. The resolution was defeated overwhelmingly on a voice vote.

The committee also opposed a resolution before the Assembly that would have declared that the death penalty was "a clear violation of the United Nations Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment." The standing committee pointed out that the Convention expressly provides in Article 1 that the term "torture" "does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions." Moreover, the Convention is not in force and has not been signed by the United States. The resolution failed.

Resolution (Report No. 118)

Approved by ABA House of Delegates August 13, 1991

RESOLVED, That the American Bar Association supports efforts to strengthen the rule of law in international affairs by an appropriate investigation and, if found warranted, the apprehension, prosecution, and punishment of individuals with respect to any violations of the 1945 Nuremberg Principles and/or other grave breaches of the laws of war associated with Iraqi aggression against other States.

BE IT FURTHER RESOLVED, That the American Bar Association supports the Nuremberg Principles as a part of customary international law and urges the Government of the United States to support policies which will strengthen these principles and insure that, where possible, present and future war criminals are held criminally accountable for their conduct through judicial procedures in which adequate safeguards are provided to insure the protection of the rights of the accused and the achievement of international justice.

BE IT FURTHER RESOLVED, That the ABA Blue Ribbon Committee on an International Criminal Court take this recommendation into account.

BE IT FURTHER RESOLVED, That a copy of this resolution be provided to the President of the United States, the Secretary of State, the President pro tempore of the Senate, the Speaker of the House of Representatives, and the Secretary General of the United Nations.

Book Review

By the Editor

Terrorism and Democracy by Stansfield Turner. Houghton Mifflin, Boston, 1991.

Terrorism has been with us since the beginning of the Republic. So records former CIA Director Stansfield Turner in his fascinating new book, *Terrorism and Democracy*, which studies the pressure that terrorism places on a democratic society.

Without the protection of the Royal Navy, the fledgling United States of America was bedeviled by repeated assaults by the ships of the Barbary pirates. Once passing U.S. vessels were captured, their cargoes sold and their crews held for ransom, successive presidents of the United States had to confront early on the problem of how to get hostages back. While he sounded tough in his 1795 report to Congress in which he promised that in the hostages crisis, "nothing shall be left undone," President Washington made the first arms-for-hostages deal in the form of a treaty with the Algerians. It called for the United States to pay almost \$1 million and another \$21,600 annually in naval stores as tribute, in return for

the release of sailors who were still alive, 14 of whom had been held for 10 years.

Throughout the remainder of Washington's second term and the term of John Adams, the United States continued to pay tribute, even extending it to the other Barbary states. Thomas Jefferson responded to the provocation of the Bashaw of Tripoli, who cut down the flagpole at the U.S. consulate there, by sending a small naval force into the Mediterranean. The expedition was not immediately successful. The frigate *Philadelphia* sailed into Tripoli harbor, ran aground, and the crew and the captain were taken prisoner. In due course, Jefferson was required to pay \$60,000 in ransom for the prisoners, although he did secure an agreement that there would be no more annual tribute.

Following the taking of the *Pueblo* by the North Koreans in 1968, the senior representative of the United States Military Armistice Commission in a prearranged deal signed a confession, but at the same time issued a disclaimer that he was signing the document to free the crew and only to free the crew. After the signing, the 82 hostages and the body of one dead sailor were returned.

The brief history recounted by Turner demonstrates that terrorism and hostage-taking are neither new nor have presidents become more adept in handling them over the years. The history serves as a backdrop to the book's account of the Carter administration's problems with the seizure of the U.S. embassy in Tehran in 1979. The story is by now mostly familiar, but there are several interesting new points.

One of these was the willingness of various U.S. national security officials to tread on spongy legal terrain in order to get results. Turner recounts the bitter legal dispute that split the administration over the question of whether to tap the Shah's hospital room telephone. Believing the issue to be governed by the Foreign Intelligence Surveillance Act (FISA), Turner and Attorney General Benjamin Civiletti were concerned that the FISA standard of justification could not be satisfied. National security adviser Zbigniew Brzezinski finally give Turner an ultimatum: place the tap, write the President why the tap could not be placed, or resign. As it happened, the Shah was quite open about his plans, and the tap was never needed, but the conflict between the requirements of law and the seeming demands of national security plagued the Carter administration, notwithstanding that President's well-advertised support for legal constraints on the national security community.

Turner delves into the details of the rescue plan and the reasons for its notable failure at Desert One. The stunning inability of the helicopter force to carry out its mission, the collision of a helicopter and a C-130 on the ground resulting in the deaths of eight men, and the

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environmental law, real property and water rights. She served as Associate General Counsel of the Environmental Protection Agency from 1979 to 1981 and as Deputy General Counsel in 1981.

Michael S. Greco is a member of the firm of Hill & Barlow, and a past president of the Massachusetts Bar Association. He has also served as member and vice chairman of the Board of Bar Overseers of the Massachusetts Supreme Judicial Court.

Lucinda A. Low is a partner in the Denver office of Sherman & Howard, specializing in international trade and investment transactions, as well as in export and import controls and regulation, and transnational litigation and arbitration. She also serves as Adjunct Professor at the University of Colorado School of Law, where she teaches International Business Transactions.

Diane P. Wood is the Harold J. and Marian F. Green Professor of International Legal Studies and Associate Dean of the University of Chicago Law School, where she has been a member of the faculty since 1981. She spent two years in the Economic and Business Affairs Section of the Office of the Legal Adviser, U.S. Department of State, and served from 1985 to 1987 as special assistant to the Assistant Attorney General of the Antitrust Division, U.S. Department of Justice, consulting on the revision of the international antitrust guidelines.

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puzzling failure of Colonel Charles Beckwith, commander of the Iranian hostage rescue mission, to proceed all raise important and troubling questions.

Turner is clear that at least the mission was not harmed by any intervention of the President.

He had left the planning to us; reviewed it thoroughly, without making changes his commanders in the field opposed; had not interfered during the operation, other than to concur in the recommendations he received through the chain of command; and now was shouldering with grace the responsibility for failure.

The helicopters are at the heart of the story. While unwilling to call the decisions to turn back wrong, Turner does seem clear that an understandable emphasis on safety factors for a peacetime military had carried over too far into combat situations. No-risk initiatives are likely to achieve few brilliant combat victories.

Likewise Colonel Beckwith's decision to abort the mission is subjected to Turner's skeptical analysis. At the end of the day, he credits Beckwith with being a superb combat officer of great courage—severely wounded in Vietnam—but questions whether he had the analytical skills to master a complicated multiservice operation involving different technologies and requiring quick and intricate analysis.

Turner's policy views are important. He believes that assassinations are neither an appropriate nor an effective counter-terrorist tactic and that the executive order making them illegal ought not to be abandoned. He does not rule out the possibility of punitive military attacks or covert actions, but is skeptical about their utility. He does not blame the media for lack of self-restraint in a hostage situation, although he recognizes that greater restraint would be ideal. At the end of the day, while he concludes that deals are an option that cannot be ruled out, legal recourse—apprehending the terrorists and isolating the states that support terrorism—is the most satisfactory policy option from the point of view of an American president.

This is a fast-moving and coolly analytical treatment of some highly controversial topics. Turner directs fire to Brzezinski's failure to field a unified national security team in a time of crisis. He faults President Carter for putting the rescue mission on the back burner too long. He points out the irony of President Reagan's record against terrorism: over 550 Americans killed; 57 Americans held hostage in Beirut; six still being held, one having been there several years; and an arms-for-hostages deal that contorted our constitutional process beyond recognition—yet the Reagan reputation, founded on his bombing raid against Qaddafi in 1986 alone, is paradoxically excellent.

There is much in this volume to ponder, and real wisdom from a public servant who served his country ably

as a naval officer, and again as Director of Central Intelligence. Once again he performs a vital service in offering these informed reflections on a troubling question that refuses, despite our best efforts, to disappear.

President's Report Sets National Security Strategy

As the coup unfolded in Moscow, observers began asking the big questions: Will the Soviet government revert to Stalinism? Will the USSR break up? Who has control of the nuclear forces? Prediction is difficult when theories are revised between the morning newspaper and the evening newscast. Nevertheless, there is a group of presidential advisers that has been wrestling with these big questions all along. Shortly before the coup was launched, the result of their work, the President's annual strategy report—*The National Security Strategy of the United States-1991*—was issued.

If the United States is to sustain change and take advantage of the sudden transformation of the Soviet Union, it is imperative that we consider the long run. If the coup in Moscow proves anything, it is that we should focus on the conditions that are forcing change, not on individual leaders. An excellent example of this strategic perspective can be found in the 1991 report.

The report is the result of an annual strategic review first mandated by Congress in 1986. Each year the President is required to issue a report outlining the strategic interests and goals of the United States. This document serves several important purposes. First, it reinforces communication between the executive and legislative branches. Second, it clarifies U.S. objectives and priorities for foreign governments. Finally, it imposes a certain discipline on national security agencies by forcing them to reconcile their policy perspectives.

As reasonable as this requirement seems, it took considerable effort and a number of years to put the process in motion. There was an understandable hesitancy to articulate principles that might restrict freedom of action in unforeseen contingencies. Likewise, strategy statements incorporate assumptions about the future which, if proved wrong, could embarrass an administration.

Dealing with foreign policy problems on an ad hoc basis can result in dangerous predicaments, however. In his book *The Crisis Years, Kennedy and Khrushchev, 1960-62*, historian Michael Beschloss explains the causes of the 1962 Cuban missile crisis. Chief among them was the reluctance of each side to declare its national strategy. Had leaders of both countries clearly articulated their respective priorities, this terrifying episode might have been avoided.

At the time of the missile crisis, the long-range planning horizon was the next weekend. The usual means of balancing were not available, and a chain of erroneous assumptions and misperceptions led the two superpowers to the brink of war. The Soviets did not anticipate

the U.S. response to the deployment of nuclear weapons to Cuba, and once the Kremlin had committed Soviet prestige in support of their Cuban ally, a face-saving withdrawal was extraordinarily difficult to arrange.

In the aftermath of this crisis, some strategists concluded that a national strategy could be formulated and articulated, taking into account the full range of international variables. Presumably a clear statement of vital national interests and goals would prevent serious miscalculations in foreign capitals and would contribute to international stability. Furthermore, because a statement of national strategy must be shaped by public opinion, foreign leaders gain that much more insight into the national will.

The President's report is read avidly by world leaders, yet outside of the academic and foreign policy communities, Americans are unaware of it. This document—34 pages in length—is the most authoritative statement of U.S. national strategy available. A copy can be obtained from the Government Printing Office. For citizens who are concerned about America's international role, it is vital reading.

One will find there a clear presentation of President Bush's concept of the New World Order. In this new strategic environment the United States is not burdened by the enormous military responsibility of defending against Soviet expansionism in every region of the world. The United States can now afford to devote a greater portion of its energies to other challenges, be they economic or political, cooperating whenever possible with other countries and international organizations.

Many of these challenges have security implications, and the report fully recognizes that the world remains a dangerous place. But it is no longer possible to define these security threats as variations on the same Cold War theme. Neither the Soviet Union nor the United States can unilaterally stem the proliferation of weapons of mass destruction. Even as the sole superpower, the United States needs to leverage its power with other countries if anything constructive is to be done about such problems as the Arab-Israeli conflict or the ominous overhang of international debt.

It is a time of historic opportunities. As we chart our course for the next century, it is increasingly important that Americans re-examine the set of assumptions that have guided us thus far. *The National Security Strategy of the United States* is a good point of departure.

Richard E. Friedman

The writer was rapporteur for a planning conference that assisted with the preparation of the 1991 President's report. A Chicago-based attorney, he is president of the National Strategy Forum and chairman of the standing committee's advisory committee.

President Signs Permanent Reauthorization of Exon-Florio

On August 17, 1991, President Bush signed H.R. 991, the Defense Production Act Extension and Amendments of 1991. The legislation removes Exon-Florio from the sunset provisions of the Defense Production Act, thus permanently reauthorizing it.

Since 1988 and the passage of the Omnibus Trade Competitiveness Act, the President of the United States has had the authority to block or rescind certain mergers or takeovers of U.S. businesses on national security grounds. The authority lapsed on September 30, 1990, although the inter-agency Committee on Foreign Investment in the United States (CFIUS) stayed open for business, receiving "voluntary" notices of foreign acquisitions. That legal and policy vacuum has now been filled.

Since 1988, on 575 occasions foreign companies have notified CFIUS of their plans to take over U.S. companies, but only 12 cases have received more than a preliminary investigation. Final regulations are expected to be issued soon, but no major changes from the proposed rules issued in 1989 are foreseen.

Other legislation has been introduced on the general topic of foreign takeovers. Some focuses on "economic security" as well as national security, while others deal with "critical" technology. The Bush administration opposes most of these proposals.

Calendar of Events

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| October 10-11 | Conference on the Rule of Law in U.S. Foreign Policy and the New World Order (co-sponsored with the Center for National Security Law of the University of Virginia School of Law), International Club, Washington, D.C. |
| October 17 | Breakfast Meeting, University Club, Washington, D.C. |
| November 15 | Conference on the State of the U.S. Defense Industrial Base (co-sponsored with the National Strategy Forum), Chicago, Illinois |
| November 21 | Breakfast Meeting, University Club, Washington, D.C. |
| January 16 | Breakfast Meeting, University Club, Washington, D.C. |

For further information on these events, please contact the standing committee office, 703-242-0629.

Letter to the Editor

Verdugo II: Another View

Sir:

Professor Robert F. Turner's clarion call to reverse *United States v. Verdugo*, (*Verdugo II*),¹ in the Summer 1991 issue of the *Intelligence Report* is surely one of the most bizarre constructs to emerge from the pen of the distinguished three-times chairman of the Standing Committee.

Beginning with the questionable legal proposition that "international law permits that which it does not forbid," Professor Turner faults the Ninth Circuit for relying on the purpose and scope of an extradition treaty in holding that the seizure of a fugitive on foreign soil for trial in the United States, without the consent of a foreign sovereign, is a breach of the treaty which the kidnapped person may raise as a bar to the jurisdiction of our domestic courts. In effect, Turner reasons that if an extradition treaty does not expressly forbid kidnaping, it permits it by inference. This conclusion is absurd and needs no belaboring.

On the policy side, murkily ruminating that there may be rare instances when a foreign government may unofficially consent to the removal of a fugitive while publicly protesting, Professor Turner urges that neither the Courts nor Congress should be involved in this dirty business. Rather, resolution of "rare" instances of abuse should be left to the Executive, so that the benefit of the unofficial consent is not lost in those cases where it is given. Ironically, a companion article in the same issue of the *Intelligence Report* details that since 1989, the Executive has taken the position that seizures of fugitives in foreign countries without consent of the foreign government are perfectly lawful. What sort of "rare" abuses is Professor Turner talking about? What strange fox is Professor Turner setting to guard the chicken coop?

In 1888 and on the same day the Supreme Court handed down its decisions in *Ker v. Illinois*² and *United States v. Rauscher*³. *Ker* established that where there is no governmental action involved in a kidnaping, there is no treaty violation barring jurisdiction. *Rauscher* delineated the principle of specialty, i.e., if you extradite someone pursuant to a treaty, you can only try him for

the offense specified in the extradition request. More importantly, even though the treaty did not forbid the practice expressly, *Rauscher* held that the practice was forbidden by implication and that the defendant could raise the issue as a plea in bar of jurisdiction. *Verdugo II* broke no new ground. The opinion follows authoritative precedent.

Now, as to the policy suggestions made by Professor Turner. Surely there is no aspect of the President's foreign relations power which has been so overlaid by judicial and legislative strictures as the matter of extraditions. Since the election of 1800, lost by Adams to Jefferson in part because of the "Jonathan Robbins" affair, when Adams sent a suspected mutineer from the United States to Jamaica for court-martial and hanging by the Royal Navy, it is an accepted principle of American law that the enforcement of extradition treaties is the business not only of the Executive, but of the Legislature and the Judiciary as well.⁴ *Verdugo II* broke no new ground here either, e.g., 18 U.S.C. §§ 3181, 3184; *McNamara v. Henkel*, 226 U.S. 520 (1913). So much for the Executive "flexibility" which Professor Turner deems so desirable.

Lastly, what about Turner's important drug and terrorism kingfish which might escape the net of American justice if *Verdugo II* is not reversed, in those instances when a foreign government deceives its own people by publicly protesting but unofficially encouraging a kidnaping? Professor Turner rightly notes the importance of "reciprocity" in international relations. I, for one, don't want our government to act reciprocally in such a nefarious manner. For me, the apprehension of these criminals is not worth the price of sacrificing law on the altar of expediency as Turner suggests.

Verdugo II ought to be upheld.

Axel Kleiboemer

1. No. 88-5462 (9th Cir. July 22, 1991).

2. 119 U.S. 436 (1888).

3. 119 U.S. 407 (1888).

4. 2 S.E. Morison, *The Oxford History of the American People* 80 (1972); S. Doc. No. 92-2, 92nd Cong., 2d Sess. 538 (1973).

Mr. Kleiboemer practices law in Washington, D.C. Over the years he has been actively involved in various projects undertaken by the ABA Standing Committee on Law and National Security.