

**Law and National Security
INTELLIGENCE REPORT**

Volume 13, Numbers 6-8

Robert F. Turner, Chairman

Summer 1991

**Conference Examines "Congressional
Activism" in Foreign Policy**

Current White House Counsel C. Boyden Gray, President Gerald Ford's White House Counsel Philip W. Buchen, and Representatives Jim Leach (R-IA) and Henry Hyde (R-IL) were among the distinguished speakers at the standing committee's conference on May 29-30, 1991, on "Preserving the Separation of Powers in Foreign Policy: Checks and Balances and the New Congressional Activism."

Co-sponsored with the Center for National Security Law of the University of Virginia School of Law, the conference took place in Washington, D.C., at the International Club. It was the latest in a series of committee-sponsored conferences in recent years on the separation of powers.

One panel examined the use and misuse of conditional appropriations to constrain executive discretion in foreign affairs. At issue was the extent to which the Constitution permits Congress to use "riders" or "conditional" appropriations to fetter the President's discretion in national security affairs. May Congress lawfully accompany an appropriation for the Army with a provision limiting (or, for that matter, mandating) troop deployments to certain areas of the world, or are these decisions vested exclusively in the Commander-in-Chief by the Constitution? There was considerable agreement among the experts that at least some such "conditions" are unconstitutional; but it was also clear that this is an area of some uncertainty.

Another panel addressed the growing practice of direct involvement by Congress, its members and staff in the conduct of foreign policy. In an earlier era there appeared to be a widespread consensus that members of Congress had no authority to engage personally in negotiations with foreign leaders (at least without the approval of the President). Even many legislators who denied

*Continued on page 2***Judge Webster to Be Honored
At September Breakfast**

The standing committee's 1991-92 monthly Washington breakfast series will begin on September 26 at the International Club with a special program honoring retiring Director of Central Intelligence William H. Webster, a special friend of the committee. The program will include remarks by Judge Webster.

A native of St. Louis, Judge Webster was educated at Amherst and Washington University School of Law prior to entering private law practice. In 1960 he was appointed United States Attorney for the Eastern District of Missouri, and in 1971 he became a federal district judge. Two years later, he was appointed to the U.S. Court of Appeals for the Eighth Circuit, and in 1978 he was chosen by President Carter to be Director of the FBI.

In 1987, following the death of William J. Casey and in the wake of the Iran-Contra affair, Judge Webster was selected by President Reagan to serve as DCI. Judge Webster has announced his resignation after four years of distinguished performance.

Individuals wishing more information about the breakfast are invited to contact the standing committee office at 703-242-0629.

**Right to Abduct
Drug Terrorists Overturned**

One of the most controversial contemporary issues of national security law is whether the United States may seize a fugitive on foreign soil for trial in the United States without the consent of the foreign sovereign. Officially referred to as "rendition," the practice pits the desire to bring notorious terrorists and drug kingpins to justice against the nation's traditional strong commitment to the rule of law.

Continued on page 7

Congressional Activism

Continued from front page

that the President was a "senior partner" in the foreign policy field tended to recognize that, in the words of the Supreme Court: "[T]he President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it." *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936). In the post-Vietnam War years, however, members of Congress have increasingly injected themselves (or their unelected staff members) into highly sensitive international diplomatic situations. There have even been cases where representatives of the American Embassy in critically important countries have been excluded from meetings between members of Congress and foreign officials.

Still another panel examined the modern practice of presenting the President at the end of the fiscal year with a massive "continuing resolution"—which combines the annual appropriations legislation for most government agencies, often including hundreds of specific restrictions on the President's foreign policy powers—which he must either accept in full or veto. A decision to reject the hundreds of pages of legislation will almost certainly result in shutting down much of the federal government until negotiations can take place. And yet, in the hurried atmosphere in which these "CRs" are enacted, virtually no one at either end of Pennsylvania Avenue has time to read the entire package.

Almost everyone agreed that this is an unfortunate and undesirable practice as a matter of sound policy, but conference speakers considered a more interesting question: does this practice violate the Constitution? Article I, Section 7, of the Constitution guarantees the President a right to veto "every bill . . . Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary . . ." But these enormous CRs have enabled Congress virtually to compel the President to sign into law such controversial legislation as the Boland Amendment prohibiting U.S. assistance to the Nicaraguan Contras. Had that amendment—which set the stage for much of the Iran-Contra controversy—been submitted to the President in a normal intelligence authorization bill, it might well have been vetoed. Some constitutional scholars believe that the practice of combining complex appropriations bills for numerous different departments of government and then compelling the President either to accept the

entire package or to take responsibility for shutting down the government is inconsistent with the spirit of the presentment clause of the Constitution.

Several conference speakers were critical of the fact that Congress has exempted itself from a wide range of "rules" that govern the conduct of members of the executive and judicial branches. These include such things as civil rights, freedom of information, occupational safety and health, and ethics in government. Indeed, it was suggested that the President might decide to veto any reenactment of the Ethics in Government Act (which, *inter alia*, creates the entity of an "Independent Counsel") until Congress agrees to apply the same rules and procedures to its own members and staff.

Presidential Counsel C. Boyden Gray gave the luncheon address on the first day of the program. While commending Congress for ultimately rallying behind the President in the recent Persian Gulf crisis, the President's lawyer identified a number of ways in which he felt Congress was attempting to usurp the President's constitutional authority. He was one of several speakers to note that the proliferation of committees and subcommittees and the increased size of their staffs had contributed to difficulties in legislative-executive relations. According to Mr. Gray, shortly after the end of World War II there were about 300 staff members in the entire Congress; today there are that many committees and subcommittees and the number of staff members has risen 100-fold to 30,000. "What do all these people do?" Mr. Gray's view was these staff members "basically want to run the executive branch."

The second day's luncheon was addressed by Representative Jim Leach (R-IA), a member of the House Finance Committee. He argued that the President was intended by the Founding Fathers to have "the primary leadership role" in foreign affairs. Congress, too, was given important powers in this realm, and there are many "grey areas." He acknowledged the dramatic growth of congressional committees and staffs in the modern era, but argued that they provided Congress with substantive expertise and an institutional memory which made the legislative branch far more competent to deal seriously with these issues than was historically the case. He also took note of the substantial increase over the years in the power of the House of Representatives to take part in foreign policy decisions *vis-a-vis* the Senate.

The two-day conference produced a wide range of viewpoints and more than one spirited debate. Several conference panels were taped by the C-SPAN cable television network and were broadcast several times during the following week.

The Congressional Role In Presidential Decision-Making

Philip W. Buchen

[*Editor's Note:* The following is a revision by Mr. Buchen of remarks he made at the standing committee's "Separation of Powers" conference on May 30, 1991 (see story on page 1). Mr. Buchen served as White House Counsel to President Gerald Ford, and he is now Of Counsel to the firm of Dewey Ballentine in its Washington, D.C. office.]

Like all of Gaul in Julius Caesar's time, government decision-making is divided into three parts. One is *substance*; another, *symbolism*; and the third, *procedure*.

Substance covers official decisions on what government is to do or rule. *Symbolism* covers official plans for what the public is to be induced to think about decisions that their government makes. *Procedure* is about official determinations of how to go about making substantive decisions. Each of these is an important part of governing, and together they make up nearly the whole process of public administration.

In this discussion, the concern is with *procedure* and how Congress has tried using legislation on procedure as a way to improve upon the *substance* of decision-making within the executive branch. Its most significant effort in that respect has been the Administrative Procedure Act of 1946 (APA), designed to keep substantive actions of departments and agencies from turning out to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" (5 U.S.C. §§ 551-9 and §§ 701-6, quoting from § 706). (*Caprice* is harmless in many contexts, even a delight in some; but as the statute declares, never in government decision-making.)

In the area of domestic affairs, the APA has had a large and salutary impact over the years of its existence on the quality of administrative decision-making. But it has had no effect at all on decisions in the areas of military and foreign affairs. In fact, the procedures required of an agency in prescribing a regulation or a policy do not by the terms of the APA apply to any "military or foreign affairs function" (§ 553(a)(1)).

A reason for this blanket exemption is the emphasis in the APA on public notice and opportunity for comment by interested parties before a final decision is made. These are requirements that decision-making on military matters and foreign affairs, in most cases, could meet only at the sacrifice of timeliness and necessary secrecy. Also, decision-making for the military and foreign affairs functions of the executive branch is ultimately a duty of the President, whose near-plenary

Continued on page 4

Verdugo II Reconsidered: The Law and Policy of Rendition

Robert F. Turner

*United States v. Verdugo*¹ (see article on page 1) is an important case in national security law, and it deserves careful attention.

To begin with, it is widely recognized that the defendant, Rene Martin Verdugo-Urquidez, is a world-class thug—a drug kingpin who was personally involved in the torture and murder of American drug enforcement agent Enrique Camarena. A grand jury indicted him on five felony counts, and following a two-month-long trial he was found guilty and sentenced to a total of 240 years in prison. Justice demands that Verdugo—whose name, ironically, means "executioner" in Spanish—be punished. The Ninth Circuit's decision puts that in doubt.

For the record, even if the case is affirmed on appeal or certiorari is denied, the Ninth Circuit has not resolved Verdugo's fate. The evidentiary hearing to be held by the district court may well disclose that Mexican authorities in fact *consented* to the seizure and removal of the accused to the United States. There appears to be at least circumstantial evidence in support of such a conclusion, despite the subsequent Mexican protest. But, irrespective of Verdugo's ultimate fate, the principles established by the Ninth Circuit deserve further review.

For example, much of the court's decision rests on the assumption that the abduction of Verdugo was a clear violation of the U.S.-Mexico extradition treaty.² While acknowledging that the text of the treaty with Mexico is silent with respect to the precise question of rendition,³ the court finds that "[t]he requirements extradition treaties impose constitute a means of safeguarding the sovereignty of the signatory nations"⁴ and concludes that "extradition treaties proscribe government-sponsored kidnappings . . ."⁵

As a general statement, international law permits that which it does not forbid.⁶ Treaties are to be interpreted in accordance with the ordinary meaning of their terms, and restrictions on sovereignty are not lightly to be implied. While States remain free to enter into extradition treaties which specify that alternative procedures are prohibited, that is clearly not the case with the treaty between the United States and Mexico. Indeed, Judge Reinhardt in his majority opinion expressly recognizes that "a nation may consent to the removal of an individual from its territory outside of the formal extradition process."⁷

The treaty in question creates mutual obligations to extradite certain categories of individuals following de-

Continued on page 5

Role in Decision-Making

Continued from page 3

powers in that respect come from the Constitution. Thus, congressional attempts to control procedures by which a President makes his decisions in these areas face the risk of unresolvable disputes, on constitutional grounds, between the branches.

Nevertheless, Congress in the past has ventured to tell Presidents not what the foreign policy of the nation should be (though this too has often happened) but how they should go about deciding military and foreign affairs issues. Laws on the procedure of presidential decision-making have been generally of two types. One prescribes particular advisers and kinds of advice to which a President is to look in reaching his decisions. The other type aims at enhancing the study and thinking that goes into the process of executive decision-making on matters of national security, at the same time as it aims better to inform Congress.

Examples of legislation designating sources and kinds of advice for the President to use are:

- The National Security Act of 1947 establishing a high-level National Security Council to advise the President on "integration of domestic, foreign and military policies relating to the national security" and on the whole range of national security issues (5 U.S.C. §402);
- The Arms Control and Disarmament Act in 1961 establishing a new agency to advise the President on the subject (22 U.S.C. §2551);
- The War Powers Resolution of 1973 on consultation with Congress before the President introduces U.S. Armed Forces into hostilities, extant or imminent (50 U.S.C. § 1542);
- The Department of Defense Reorganization Act of 1986 assigning the Chairman and Members of the Joint Chiefs of Staff to be military advisers to the President—presumably as a precaution against his acting as his own general and admiral (10 U.S.C. §151).

As a solution to congressional concern that Presidents make crucial national security decisions without adequate deliberation and advice, these statutes have proven less than effective. Even with such statutes on the books, Presidents—sometimes with exceedingly unfortunate consequences—often have avoided formal advisory procedures and taken informal *ad hoc* approaches to military and foreign affairs decision-making. Not so in the case of President Eisenhower who even without such statutes would probably have installed and followed systematized advisory procedures within his administration. (See Professor Philip Henderson's *Managing the Presidency*, Boulder: 1988, in which he compares the Eisenhower approach to decision-making with practices of later administrations.) Also, since 1973

every President has raised objections to the War Powers Resolution, partly for the impracticality in crisis situations of truly "consulting" with Congress but mostly on account of its other provisions.

Examples of legislation to enhance the study and thinking involved in the process of executive decision-making are:

- The Hughes-Ryan Amendment of 1974 making it a prerequisite to a covert intelligence operation that the President find it "important to the national security" and that he report the operation "in timely fashion" to appropriate committees of Congress (22 U.S.C. §2422);
- The Arms Control and Disarmament Act as amended in 1975 requiring from each agency that makes a legislative or budget proposal on development or procurement of major military armaments or equipment the provision of an arms control impact statement (22 U.S.C. §2576);
- A statute requiring an annual report from the President in which he is to analyze the foreign policy implications and benefits and dangers of the government's international scientific and technological programs and agreements (22 U.S.C. §2656c);
- The Department of Defense Reorganization Act of 1986 in part requiring from the President an annual *National Security Strategy Report*, in both classified and unclassified versions, to set forth such a strategy and include "a comprehensive description and discussion" of the whole range of worldwide interests and goals vital to United States national security, the nation's worldwide commitments and its national defense capabilities, proposed short-term and long-term uses of its political, economic, military and other elements of national power, and the adequacy of U.S. capabilities to carry out the strategy (50 U.S.C. §404a).

In practice, the responses of Presidents to these requirements have sometimes been nil, often superficial, and generally not conscientious enough to have raised congressional and public confidence in the quality of military and foreign policy decision-making within the White House. Investigations of the Iran-Contra affair exposed one administration's disdain for required procedures in connection with covert intelligence activities. And neither that administration nor the current one has respected the well-intentioned call of Congress for formulation and expression of a comprehensive and detailed national security strategy.

For the years 1987, 1988 and 1990, but not 1989, documents appeared from the White House that were published over the then-President's signature, each labeled as an annual *National Security Strategy Report*, and each in unclassified version only. These publications attracted virtually no public or congressional

notice and for good reason. They reflect no fresh and original thinking whatsoever, and all fall far short of being responsive to the statute. They focus almost entirely on current politico-military activities and completely neglect the larger aspects of "national security" such as America's technological and industrial capacity and its economic strength relative to demands arising from both our domestic needs and our foreign policy commitments and goals.

Congress has a problem, no doubt, in getting respect and responsiveness from the executive branch for its efforts to improve decision-making procedures in the areas of military and foreign affairs. But the problem is in large part of its making because of the ways Congress has overloaded its relations to the President and to the Departments of Defense and State with excessive legislative and oversight interventions into the military and foreign affairs functions.

On the other hand, the President could do much to dispel the distrust of Congress (and the public) in executive branch decision-making that has contributed to congressional excesses. Surely significant advancement is possible from unfeigning adoption and verifiable observance of procedures for reaching key policy decisions only after optimum measures of reliable intelligence and authoritative advice; *and* from devising and implementing a coherent national security strategy.

Verdugo II

Continued from page 3

tailed procedures when specific conditions are met. It goes no further. It does not prohibit Mexico from emptying its prisons and mental hospitals and herding its most destructive elements across the Rio Grande into the United States, and it does not prohibit the United States from launching a nuclear attack against Mexican prisons. That doesn't mean that such acts would be legal, as they are already clearly prohibited by other treaties and by customary law.

The Ninth Circuit's error was not in concluding that non-consensual rendition is illegal under international law (it clearly is); the court simply relied upon the wrong legal authority for its holding. The government was probably correct in its view that the extradition treaty was essentially irrelevant to the *Verdugo* case, but it does not follow that the abduction (if, in fact, that is what occurred) was lawful.

Article 2(4) of the United Nations Charter provides that "Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state. . . ." That provision is clearly violated when one State, without consent, sends its agents into the territory of another and forcibly removes any individual. Similar guarantees of territorial integrity are provided in the Revised Charter of the Organization of American States and in

customary international law. Thus, if Verdugo's statement of the facts is accurate, the United States flagrantly violated its international duty to Mexico.

While the result—that the United States may be an international lawbreaker—may be the same, the different analytical approaches under international law may produce a far different result on appeal. International conventions are contracts between sovereign States and do not normally create private rights by implication, and—whatever may be the case for granting Verdugo standing under an extradition treaty—the Supreme Court is highly unlikely to grant standing for private parties (not to mention foreign nationals) to allege violations of Article 2(4) of the Charter. In *Verdugo I*, the Supreme Court relied in part upon the obvious disruptive effect that extending the fourth amendment in such circumstances would have on the ability of our government to function effectively in the real world; and the far greater disruptive consequences of permitting foreign nationals to bring suit in U.S. courts under the use of force provisions of the U.N. Charter would appear obvious.

As a policy matter, a practice of sending American agents onto foreign territory to abduct foreign citizens and bring them to the United States—even contemptible drug terrorists and murderers like Rene Verdugo—must be viewed with great alarm by anyone attached to the rule of law in international relations. Self-interest also is at issue: the doctrine of "reciprocity" is among the most fundamental principles of international relations. If the United States claims a legal "right" to kidnap

Continued on page 6

New Intelligence College At Wright-Patterson AFB

In September, the Foreign Technology Division at Wright-Patterson Air Force Base (AFB), Ohio, will inaugurate a Master of Science of Strategic Intelligence (MSSI) program. It is modeled after the MSSI program at the Defense Intelligence College (DIC) in Washington, D.C. Although funded and staffed by FTD, the program will essentially be a satellite of the DIC, with forms, procedures and accreditation identical to those in Washington. A significant difference, though, is that the FTD program will be a part-time program, with students attending two classes per quarter for three years. Currently the new program is only available to FTD employees and at no cost to them. All courses will be classified Top Secret/SCI.

Eight core courses will focus on: National and International Environment; Sources of Soviet Conduct; National Security Policy Process; Military Strategy; Defense and Intelligence Resource Management; Historical Development of Science and Technology (S&T) Intelligence; Joint Intelligence Collection and Indications and Warning; and, Joint Intelligence Analysis.

Continued on page 7

foreigners and drag them back to this country, it is difficult to see why Saddam Hussein does not have a similar right to send his agents to the United States to seize our citizens who have violated "laws" he decides to promulgate. As an international practice, rendition without the consent of the host State seems unacceptable, and not at all consistent with the establishment of a "new world order" under the rule of law.

Nevertheless, a case can be made that neither the courts nor the Congress should deny the executive branch flexibility in this area. Occasionally a foreign government may privately give its consent to a rendition of an especially nefarious terrorist, drug lord, assassin or the like, but for a variety of reasons (*e.g.*, domestic politics or fear of reprisal) it may insist that its consent be kept secret. Indeed, the political situation might be such that the government authorizing—or even *requesting*—the removal of a fugitive might even go through the motions of an angry public protest. That rendition would be permissible under international law, assuming that the government official involved had legal capacity to consent to such conduct.⁸

Even the *appearance* of acting illegally may well have substantially harmful consequences for the United States; but there may, on occasion, be circumstances in which the benefits of apprehending the fugitive outweigh the "political" costs of being perceived as a lawbreaker. These are not judgments for which courts are well suited. Since countries do, in reality, occasionally denounce conduct which in private they have actually encouraged, a declaration by the courts or Congress that—as a matter of U.S. constitutional or statutory law—such seizures are illegal and constitute a bar to jurisdiction would have serious implications for the war on drugs and international terrorism.

Even if Congress were to limit its actions to prohibiting renditions in the absence of the consent of the host State, the effect could be harmful, because the policy would virtually guarantee that a foreign government's "secret" consent would be compromised as the court sought publicly to establish the facts. Thus, foreign States might only decide to cooperate with the United States in the war on narco-terrorism when the actions carried no serious domestic or international risks. A State might well wish to see a prominent international terrorist removed from its cities, but not at the price of being implicated in the "snatch" and becoming a target for retaliation.

Under our system of government, the President is given a great deal of independent power with respect to the external world.⁹ That power may occasionally be abused. Our primary guard against such abuse is political—public vigilance in the selection of individuals of character and wisdom for that office. Efforts by the other branches of government to limit the Presi-

dent's flexibility as a guard against risks of abuse tend to be productive of far more evil than good, particularly in the national security field, where executive flexibility has long been viewed as an essential element for success.

The temptation to strike down the rule of law in order to get at the Devil may be strong, but Thomas More was certainly right in recognizing its folly. The United States ought not be in the business of undermining fundamental principles of law in order to apprehend suspected lawbreakers. But—given the fact that consent to some important international renditions might well be concealed by a foreign government, perhaps for quite legitimate political or national security reasons—proscription by the courts or Congress of all such operations in an effort to guard against the possibility of a rare abuse may give inadequate weight to the benefits of bringing prominent international terrorists, drug kingpins and similar criminals to justice.

Whatever the ultimate policy choice, when the rendition involves a foreign national, the decision ought properly be left to the political branches of government.¹⁰ *Verdugo II* ought to be reversed.

1. Nos. 88-5462, 89-50028, 9th Cir. July 22, 1991, 1991 U.S. App. LEXIS 15568.
2. Extradition Treaty Between the United States of America and the United Mexican States, 31 U.S.T. 5059, T.I.A.S. No. 9656.
3. *Verdugo* at 40.
4. *Id.* at 26.
5. *Id.* at 32.
6. *S.S. Lotus Case*, P.C.I.J., ser. A, No. 10, 2 Hudson, World Ct. Rep. 20 (1927).
7. *Verdugo* at 35.
8. Some countries, such as Panama at the time of the seizure of Manuel Noriega, have constitutional prohibitions against the extradition of nationals. Article 9 of the 1980 U.S.-Mexico extradition treaty reserves to "the executive authority" of each State the decision to extradite its own nationals.
9. Indeed, several articles of the extradition treaty in question expressly vest interpretative authority or other discretion in "the Executive authority" of each State. Article 5 empowers the Executive to determine whether an alleged offense is "political" (and thus not subject to extradition), Article 9 gives similar authority with respect to nationals of each State (see *supra*, note 8), Article 10 provides that extradition requests "shall be made through the diplomatic channel" and provides that the Department of State is empowered to authenticate a request, and Article 12 empowers the "Executive authority" to determine whether evidence in support of an extradition request is sufficient to justify a trial. The Ninth Circuit's suggestion (at 62-63) that "[a]t the time of the evidentiary hearing the Mexican government is free to inform the district court directly. . . of any change with respect to the status of its protest" is not only at odds with the spirit of the extradition treaty, but it also conflicts with fundamental standards of international practice and the separation of powers doctrine of our Constitution.
10. See, *e.g.*, *Baker v. Carr*, 369 U.S. 186, 210-14, 217 (1962).

The writer was recently appointed to his third term as chairman of the standing committee. The views expressed are personal and should not be attributed to the standing committee, the American Bar Association, or any other group or organization.

New College

Continued from page 5

There will be 11 elective courses, with some available only to students with the necessary technical background: Statistical Methods in Intelligence Analysis; Principles of Measurement and Signature Intelligence (MASINT) Exploitation; Principles of Signals Intelligence (SIGINT) Exploitation; Foreign Weapon Systems Analysis; Cognitive Psychology and Intelligence Analysis; Survey of Written Word Information: Collection, Processing and Analysis; Survey of Sensor Data: Collection, Processing and Analysis; Principles of Technical Reconnaissance; Principles of Imagery Exploitation; Technology Transfer; and, Methodology for Forecasting Future Threat Weapons Systems.

The faculty of DIC/FTD will consist of two full-time faculty along with 25 adjunct faculty (primarily FTD engineers and scientists volunteering their services). For more information, contact Dr. Don Nease, Director, Defense Intelligence College/FTD Graduate Center, FTD/CSM, Wright-Patterson AFB, OH 45433-6508.

Right to Abduct

Continued from front page

Two developments in late July brought the issue again to public attention. On July 22, the Ninth Circuit Court of Appeals remanded the case of *United States v. Ver-*

dugo ("Verdugo II") for an evidentiary hearing, and in the process held that United States courts lacked personal jurisdiction over a criminal defendant who had been brought to this country in violation of an extradition treaty.

Three days later, the House of Representatives' Judiciary Subcommittee on Economic and Commercial Law issued a subpoena demanding a copy of a 1989 legal opinion prepared by the Justice Department's Office of Legal Counsel, which reportedly reversed a position taken earlier by the Carter Administration and decided that it would be constitutional for the FBI to seize fugitives in a foreign country without the consent of the foreign sovereign government.

The *Verdugo* case is an emotional one. The defendant, Rene Martin Verdugo-Urquidez, has already been convicted by a jury in California of torturing and murdering Drug Enforcement Administration Special Agent Enrique Camarena. This and other counts netted him a 240-year prison sentence. Verdugo challenged the court's jurisdiction on the grounds that individuals in the pay of the U.S. Government had abducted him from his home in Mexico without the permission of the Mexican government and had transported him across the American border where he was officially arrested by U.S. authorities. This, he alleged, was in violation of the 1980 U.S.-Mexico extradition treaty.

Historically, U.S. courts have generally not inquired into the circumstances by which a defendant came with-

Calendar of Events

September 26	Breakfast Meeting, International Club, Washington, D.C.
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. Note: The conference on "Strengthening Regional Security and the Rule of Law in Latin America and the Caribbean," previously scheduled for October 1991, has been postponed.

in their jurisdiction. The issue has been governed by the "Ker-Frisbie" rule—a broad principle extracted from two venerable U.S. Supreme Court opinions.

In *Ker v. Illinois*,² an American agent was sent to Peru to present extradition papers and bring back an American fugitive for trial. Rather than bothering with the formal extradition process, the agent simply abducted Ker and returned him to Illinois. The Peruvian government did not object, and Ker was ultimately sent to prison. In *Frisbie v. Collins*,³ a fugitive was forcibly seized in Illinois and returned to Michigan for trial. Citing *Ker*, the Supreme Court held that "the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a 'forcible abduction.'"⁴

Verdugo II raises several important legal and policy considerations, and it is almost certain to be appealed. Some of these considerations are examined on page 3. Even if the case is ultimately reversed, however, the strong expression of interest by some members of the House may be important. In reversing *Verdugo I* early last year, Chief Justice Rehnquist recognized that restrictions on such operations *could* be imposed by legislation.

The Justice Department justified its refusal to provide the Office of Legal Counsel memorandum to the subcommittee on the grounds its disclosure could undermine four ongoing criminal prosecutions, including that of former Panamanian strongman Manuel Antonio Noriega. In late July, a constitutional battle over separation of powers appears to have been averted by an agreement allowing subcommittee members to review the subpoenaed documents. Subcommittee chairman Jack Brooks (D-TX), who also chairs the full Judiciary Committee, announced that enforcement of the subpoena would be suspended until September 11 to provide time to work out all of the details of the access agreement.

1. In an earlier case involving the same defendant—*United States v. Verdugo*, ___ U.S. ___, 110 S. Ct. 1056 (1990) ("*Verdugo I*"), the Supreme Court overturned a Ninth Circuit decision suppressing evidence seized during a search of Verdugo's Mexican home on fourth amendment grounds. Speaking for the Court in the 6-3 decision, Chief Justice Rehnquist held that the fourth amendment did not apply to a search by U.S. agents of the residence of a foreign national with no "voluntary attachment to the United States."

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

3. 342 U.S. 519 (1952).

4. *Id.* at 522.

New Name, New Format Planned for Newsletter

This has been an important transitional year for the standing committee. Our staff director of ten years service, Mary Lee, retired in March, and was succeeded by Dr. Jim Miller. At the same time, we lost the valuable assistance of David Martin—who has played an instrumental role in assisting with the preparation of the monthly newsletter for many years. And earlier this summer we lost the services of our editor, former Judge Advocate General of the Navy Admiral Bill Mott (who will soon celebrate his eightieth birthday). The national security legal community owes a great debt to Bill Mott and the fine people who assisted him with the *Intelligence Report* during the past decade.

In anticipation of this transition, the standing committee established a publications committee to review and make recommendations concerning the newsletter and other committee publications. We also included a questionnaire with a recent issue of the *Intelligence Report* soliciting thoughts from our readers, and we are grateful for all of the responses.

As a result of these efforts, we will soon be sending out a re-designed newsletter. Among the cosmetic changes, the committee has decided to change the name to *National Security Law Report*. This does not reflect any decreased emphasis on intelligence matters—which will remain a major focus of the committee's attention—but it does reflect the committee's broader mandate.

Our new editor will be John H. Shenefield, a highly respected Washington, D.C. attorney. John served early during the Carter Administration as Assistant Attorney General in charge of the Antitrust Division, and was subsequently named to the Department's number three position, Associate Attorney General. He was selected last year for a rare third three-year term on the standing committee. John has had considerable experience as an editor. He will receive the able assistance of our new staff director, Jim Miller, and other members of the committee.

To facilitate the transition, we decided to publish just one issue this summer. The September issue will appear on schedule. We hope you will bear with us—and we hope you will find the new format to your liking. Comments and suggestions are always welcome.

—Robert F. Turner

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 John H. Shenefield, Editor, 1501 Trombone Court, Vienna, VA 22182, Tel. 703-242-0629, Fax. 703-938-1727.