



National Security Law Report

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Leibman Conference Draws Record Audience

John Norton Moore

On October 29-30 the Standing Committee and the University of Virginia Center for National Security Law co-sponsored the second annual "review of the field" conference on national security law. Held at the International Club in Washington, D.C., the conference was dedicated to the memory of Morris I. "Morry" Leibman, a former six-term chairman of the Standing Committee and winner of the Presidential Medal of Freedom—the nation's highest decoration for civilian service. An audience of 250 attorneys, academicians, government officials, and other interested people took part in the various conference programs, making it the largest Standing Committee conference in memory.

Sponsoring an annual conference to provide an overview of the field and examine recent developments in national security law was one of many of Morry Leibman's ideas, and he took an active part in the initial conference in 1991. His passing earlier this year was a great loss to the Standing Committee and the nation, and appropriate tributes were paid at Thursday evening's dinner during the conference. Supreme Court Justice Antonin Scalia, arms control negotiator Ambassador Max M. Kampelman, U.S. Institute of Peace President Ambassador Samuel Lewis, and National Strategy Information Center President Frank Barnett each acknowledged some of Morry's many contributions and the legacies he has left behind.

A panel on teaching national security law noted that more than seventy-five law schools and graduate

schools now offer courses dealing with national security law. A panel on "New Developments in National Security Law," chaired by Standing Committee chairman John Shenefield, presented a lively discussion of the *Alvarez-Machain* forceful rendition case and of the relationship between government agencies in sharing information in criminal prosecutions.

Two panels dealing with "operational law" in the military discussed the extraordinary process now in place through the military services for systematically incorporating national security law into military op-

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Breakfast Speaker

Holbrooke Report Calls for Restructured White House

The December Standing Committee breakfast speaker, former Assistant Secretary of State Richard C. Holbrooke, recently chaired a Carnegie Endowment commission that called for a major restructuring of the White House.

Since 1985, Mr. Holbrooke has served as Managing Director of Lehman Brothers. A former foreign service officer, he served on the White House staff in the Johnson Administration and as Peace Corps Director in Morocco in the early 1970s. His extensive experience in Vietnam included authoring portions of the *Pentagon Papers* and service at the Paris Peace talks in 1968-69, prior to being named Assistant Secretary of State for East Asia and Pacific Affairs during the Carter Administration. From 1972 until 1976 he edited *Foreign Policy* magazine.

Mr. Holbrooke recently chaired a bipartisan commission under the auspices of the Carnegie Endowment for International Peace and the Institute for International Economics, entitled: "Memorandum to the President Elect, *Subject* Harnessing Process to Purpose." Other prominent individuals on the thirty-member commission included former Defense Secretary Frank C. Carlucci, former JCS Chairman Admiral William J. Crowe, Jr., former White House Chief

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of Staff Kenneth M. Duberstein, former NSA Director and Deputy DCI Admiral Bobby Inman, and a range of other experts from the ranks of former executive and legislative branch leaders and the business world.

Summarized briefly, the commission has recommended that President Clinton delay making major political appointments until key organizational issues are resolved—ideally including a decision to beef up the White House as the center for strategic planning and policy formulation. At the center of the new structure would be the National Security Council and two comparable, co-equal bodies, The Economic Council and the Domestic Council. The Arms Control and Disarmament Agency (ACDA) would be abolished and its functions largely turned over to a new Under Secretary of State for International Security Affairs. A Department of the Environment would be established, and new Under Secretary positions would be created at both State and Defense to address United Nations and other peacekeeping functions. A new military command, headed by a three- or four-star general, would be designed to support U.N. military operations; and one or two U.S.-based brigades would be designated for support of U.N. operations.

The commission identified several other key issues—such as the future role of the intelligence community and changes in U.S. foreign aid policy and structure—as appropriate topics for high-level bipartisan commissions.

Given the blue ribbon nature of most of the participants on the panel, this memorandum is likely to be read carefully by President-elect Clinton and his inner circle of advisers. The issues addressed by the report are important. Copies of the report may be obtained from the Carnegie Endowment by calling (202) 862-7900 or from the Institute for International Economics at (202) 328-9000.

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erations. The participants included Colonel Raymond C. Ruppert, who served as General Norman Schwartzkopf's lawyer during Operation Desert Storm—a campaign involving nearly 700 lawyers in one aspect or another of the operation. The growth of operational law and its success throughout the military services has been a landmark accomplishment of national security law during the past decade. It has greatly strengthened the ability of the United States to respond effectively against armed aggression.

The conference also included blue ribbon panels on the special topics of "Humanitarian Intervention

and the New World Order," "Advising the Government on National Security Law" (featuring senior legal officers from various national security departments and agencies), "Democracy and Deterrence: Toward a New Central Paradigm in International Law and Relations," and "The Independent Counsel, Separation of Powers and National Security Law." This last panel reflected the increasing concern and controversy surrounding the independent counsel provisions of the Ethics in Government Act. Although the American Bar Association supports reenactment of the statute, several panelists at the conference expressed the view that the process was unfair and that the act should be allowed to expire in December. Alternatively, several panelists suggested that if the act were extended it ought to include Members of Congress within its coverage.

Given the great success of the first two annual "review of the field" conferences, it is to be anticipated that the Standing Committee will sponsor a similar program next year.

John Norton Moore is a former four-term chairman of the Standing Committee and now serves as Director of the Center for National Security Law at the University of Virginia School of Law, which co-sponsored this program.

Upcoming Breakfast Dates

January 28, 1993 (tentative)

February 18, 1993

March 18, 1993

April 15, 1993

Details will be announced later.

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Point of View

Bipartisanship, the Rule of Law, and Constitutional Vigilance

Robert F. Turner

The voters have spoken, and the coming political transition in Washington presents both opportunities and dangers to an optimum legislative-executive relationship in the national security realm. Among other things, the transition will provide an opportunity to promote a return to bipartisan traditions and to reconsider certain constraints on the executive's conduct of the nation's external relations.

Sixteen years ago, I was serving as national security adviser to the *heir apparent* to the job as Senate Minority Leader. On November 3, 1976, I wrote the senator a memo which said in part:

The voters have selected Jimmy Carter. . . . As [Senator Arthur] Vandenberg once noted, "in the final analysis, the congressional opposition decides whether there shall be cooperation." . . . So long as Carter's policies are reasonable—even though they might not conform to our own views on how best to get the job done—I think you should try hard to restore the Vandenberg tradition.

I offered to draft a major speech for delivery early in the new congressional session; but my goals were largely undermined by Howard Baker's surprise, one-vote margin, victory in the minority leader race—and by my senator's subsequent decision not to seek re-election.

Sadly, in the years ahead I watched prominent Republicans who had often quoted Senator Vandenberg during the Nixon-Ford years seek partisan gain from President Carter's foreign policy difficulties. The old adage "where you stand depends upon where you sit" was affirmed once again. For many senators, it seemed, "bipartisanship" was little more than a shorthand expression for the party in control of the White House to use to intimidate its critics into silence.

This impression was reinforced in 1985, when, as chairman of the Committee on Executive-Congressional Relations of the ABA Section of International Law and Practice, I organized a conference—co-sponsored by the Standing Committee on Law and National Security—to bring together top officials of both political branches of the Government to discuss restoring bipartisanship. Secretary of State George

Shultz, House Foreign Affairs Chairman Dante Fascell, House Intelligence Committee Chairman Lee Hamilton, and a wide range of other key players readily took part—but the ultimate message that came through, at least to me, was that the congressional opposition viewed "bipartisanship" as largely a "gimmick" to silence their legitimate concerns about administration policy.

This was not Vandenberg's view. He once explained:

"[B]ipartisan foreign policy" means a mutual effort . . . to unite our official voice at the water's edge so that America speaks with maximum authority against those who would divide and conquer us and the free world. It does not involve the remotest surrender of free debate in determining our position. On the contrary, frank cooperation and free debate are indispensable to ultimate unity. In a word, it simply seeks national security ahead of partisan advantage.¹

The real essence of bipartisanship was expressed in a Lincoln Day address in Detroit in February, 1949, when Senator Vandenberg explained:

It will be a sad hour for the Republic if we ever desert the fundamental concept that politics shall stop at the water's edge. It will be a triumphant day for those who would divide and conquer us if we abandon the quest for a united voice when America demands peace with honor in the world. In my view, nothing has happened to absolve either Democrats or Republicans from continuing to put their country first. Those who don't will serve neither their party nor themselves.²

At least in a military sense, the United States is probably more secure today than at any time since the start of World War II. But the reduced strategic threat resulting from the demise of the Soviet empire has brought with it a far less stable international environment and a growing risk of the proliferation of weapons of mass destruction into the hands of radical regimes around the world. America's ability to contribute effectively to maintaining world peace and cherished values will depend, in no small part, upon the perceptions potential aggressors hold of our national will. The want of bipartisan cooperation has played a major role during the past decade in undermining American credibility, and I have argued elsewhere that congressional partisanship played a major role in the deaths of 241 Marines in Beirut in October 1983³ and quite possibly in Saddam Hussein's decision to hold firm against the threats of Operation Desert Shield.⁴ It is time to bring such unfortunate conduct to a halt and to return to the bipartisan principles which governed U.S. foreign policy in the years following World War II.

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If this is going to work, congressional Republicans are going to have to cooperate. To be sure, there are many steps the new administration could initiate that would enhance congressional understanding, including substituting genuine "consultation"—where legislative views are sought out and considered in the decision-making process—for the all-too-common practice of "notifying" Congress of major policy decisions already made.

It is to be hoped that the arrival of a chief executive chosen from the same party that is dominant in both Houses of Congress will facilitate yet another change—an end to the micromanagement and even usurpation by Congress of national security powers vested by the Constitution in the president. Congress might, for example, demonstrate a desire for a new relationship with the Executive by repealing the 1973 War Powers Resolution, which many Members have admitted is unconstitutional. Senate Majority Leader George Mitchell, for example, has said:

[T]he War Powers Resolution . . . oversteps the constitutional bounds on Congress' power to control the Armed Forces in situations short of war . . . [T]he resolution unduly restricts the authority granted by the Constitution to the President as Commander in Chief. . . . [and] thereby threatens . . . the delicate balance of power established by the Constitution.⁵

Nearly everyone seems to agree that, in the words of Senate Armed Services Committee Chairman Sam Nunn, "the War Powers Resolution is broke . . ." Nunn argued in 1988 that the statute "encourages confrontation rather than consultation between the President and the Congress . . . [and] raises questions about the U.S. staying power in [the] midst of a crisis, thus making it harder for the United States to secure the cooperation of our friends abroad." Judiciary Chairman Joseph Biden has taken the position that "the war powers act is not practically functional," and has said it was "an academic exercise to debate" whether it was being complied with during Operation Desert Shield.⁶

But the constitutional flaws of the War Powers Resolution are dwarfed by some of the more recent practices of Congress, such as ordering the President to engage in specific diplomatic negotiations⁷ and even attempting by law to condition appropriations on the inclusion of legislators as presidential negotiators at international conferences.⁸ Such interference into the process of negotiation is flagrantly unconstitutional, and the Supreme Court has said so in clear language.⁹ But, of course, the Supreme Court

has also held the "legislative veto"—a mechanism at the heart of the War Powers Resolution¹⁰—to be an unconstitutional infringement of the President's powers, and in the nine years since that case was decided Congress has enacted another 200 such unconstitutional provisions. The time has come for Congress to return to the constitutional reservation, and the election of a president from the party in control of both Houses of Congress provides an excellent opportunity for returning to the proper constitutional balance of powers.

True to the aforementioned maxim that "where one stands depends upon where one sits," commentators not infrequently embrace separation of powers theories on the basis of their policy outcome preferences—a form of "forum shopping" not unlike that routinely seen in the legal profession. James Madison initially¹¹ interpreted the Constitution as vesting in the President all powers of an "Executive" nature not clearly vested elsewhere by the supreme law; but when Washington's neutrality proclamation threatened his beloved France Madison articulated a radically different theory in his *Helvidius* letters.¹² More recently, historian Arthur Schlesinger—who in 1950 denounced Republican critics of President Truman's commitment of forces to Korea without specific legislative sanction as "demonstrably irresponsible," noting that "American Presidents have repeatedly committed American armed forces abroad without prior Congressional consultation or approval"—made a quite similar transformation, asserting four decades later that "no one can doubt that the original intent of the Framers was to assure Congress the major role in the formulation of foreign policy," and concluding: "This theory of presidential supremacy has only crystallized in recent times."¹³ One possible benefit of having a president from the same party that controls Congress is that the attractions of such "forum shopping" will be less obvious. Members may be able to return to the original constitutional balance of power without clearly prejudicing their policy preferences.

There is, however, a clear down side to the coming change at the White House. President-elect Clinton enters the Washington arena as an outsider, an apparent stranger to these confrontations, and he has already demonstrated a generally commendable desire to "go-along-to-get-along" with Congress.¹⁴ If he seeks to fill the political appointments of the Executive Branch with members of his own party with recent experience in the federal government, most of his choices are presumably going to have to come from the ranks of Congress and congressional staffs or from former Members. Honed on the Legislative-Executive battles of the post-Vietnam era, many of

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these individuals may reasonably be expected to bring a legislative perspective on separation of powers issues.

In many respects, of course, a more cooperative relationship between the two political branches can only be welcomed; but, for the past decade, the primary check against congressional abuses has come from the Republican-controlled Executive Branch. It is important for President Clinton to remember that he has a solemn constitutional *duty* to protect all of the powers of his office, and that he include on his staff able legal counsel knowledgeable on such issues and dedicated, above all else, to preserving the constitutional balance. As the late Professor Charles Warren, of Harvard Law School, once wrote: "In maintaining his rights against a trespassing Congress, the President defends not himself, but popular government; he represents not himself, but the people."¹⁵

January 20th will bring a new team to Washington, and with it new opportunities to depart from the partisan confrontations which have too often characterized post-Vietnam legislative-executive relations. But it will also bring risks that accommodations will come at the expense of constitutional principles. More than two centuries ago, John Philpot Curran warned us that "The condition upon which God hath given liberty to man is eternal vigilance."¹⁶ As we welcome and wish President Clinton a successful administration, we should encourage the opposition party in the Senate and House to return to the Vandenberg tradition. But we must also keep a watchful eye upon the constitutional balance of power in the national security area and call to task anyone, for whatever reason, who seeks to alter it without the consent of the governed properly expressed through the constitutional process.

Mr. Turner served for five years as national security adviser to a member of the Senate Foreign Relations Committee, and subsequently was Principal Deputy Assistant Secretary of State for Legislative Affairs. The views expressed are entirely his own.

Notes:

¹ Arthur Vandenberg, Jr., ed., *The Private Papers of Senator Vandenberg* 552-53 (1952).

² Quoted in Robert F. Turner, *The War Powers Resolution: Its Implementation in Theory and Practice* 118 (1983).

³ See, e.g., Robert F. Turner, *Repealing the War Powers Resolution: Restoring the Rule of Law in U.S. Foreign Policy* 138-44 (1990).

⁴ See, e.g., Robert F. Turner, "Legal and Policy Considerations of Senate Joint Resolution 325: The Collective Security Participation Resolution," prepared statement presented to the United States Senate Committee on Foreign Relations, 24 September 1992, at 49-51 (copy available from the Center for National Security Law).

⁵ Quoted in Turner, *supra* note 3, at 162-63.

⁶ *Id.* at 163-64.

⁷ One of several examples of this occurred as an amendment to the Energy and Water Development Appropriations Act. See 138 *Cong. Rec.* S 11171 (daily ed., Aug. 3, 1992).

⁸ See, e.g., section 102 of the "Foreign Relations Authorization Act for FY 1990-91," Pub. L. 101-246. Discussing such "unconstitutional conditions," Professor Louis Henkin has written: "Even when Congress is free not to appropriate, it ought not be able to regulate Presidential action by conditions on the appropriation of funds to carry it out, if it could not regulate the action directly. So, should Congress provide that appropriated funds shall not be used to pay the salaries of State Department officials who promote a particular policy or treaty, the President would no doubt feel free to disregard the limitation, as he has 'riders' purporting to instruct delegations to international conferences. Louis Henkin, *Foreign Affairs and the Constitution* 113 (1972).

⁹ "In this vast external realm . . . the President alone has the power to speak or listen as a representative of the nation. 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).

¹⁰ War Powers Resolution, Sec. 5(c).

¹¹ See, Robert F. Turner, "The Constitutional Framework for the Division of National Security Powers between Congress, the President, and the Courts," in John Norton Moore *et al.*, *National Security Law* 749, 758-59 (1990).

¹² *Id.* at 762-64.

¹³ Quoted in Turner, *supra* note 3, at 36 n.21, 49.

¹⁴ See, e.g., examples mentioned in "Congress whips Clinton," *Washington Times*, Nov. 19, 1992, at G2.

¹⁵ Quoted in Turner, *supra* note 2, at 133.

¹⁶ Speech Upon the Right of Election (1790). The more popular version of the maxim, "Eternal vigilance is the price of liberty," has been variously attributed to Jefferson, Patrick Henry, and others. It was a common theme of the Founding Fathers. See "Editorial Notes: Who Said It First?," in *The Great Quotations: The Wit and Wisdom of the Age* xlvii (George Seldes, compiler, 1967).

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The National Security Agenda

Iranian Arms Buildup Continues—Weapons from Russia, China, and North Korea continue to arrive in Iran according to various press reports. A North Korean ship reportedly carrying as many as 100 of the latest models of Scud missiles was expected to arrive in Bandar Abbas in late November, with half of the missiles scheduled for transshipment to Syria. Shortly before the first of two Russian Kilo-class submarines was scheduled to arrive in the Gulf, the United States Navy deployed the *USS Topeka*, a nuclear attack sub, into the Gulf for “maintenance.” Because of its shallow waters (generally less than 100 feet), the Gulf is generally viewed as unsuited for submarine warfare. However, the narrowness of the strategic chokepoint and the volume of oil and other valuable cargoes using the waterway make the addition of submarines to the regional military balance a cause for serious concern. (Various press sources.)

G-7 Considers Export Controls to Limit Shipments to Radical States—Representatives of the Group of Seven met on 20 November to discuss export controls on weapons to Iran, Iraq, North Korea, and Libya. The need for such measures was reinforced by U.S. charges that Libyan leader Muammar Kadafi continued to funnel arms to Charles Taylor’s National Patriotic Front of Liberia, and by statements by chief U.N. weapons inspector Rolf Ekeus that Saddam Hussein was playing “hide-and-seeK” with Scud missiles and refusing to cooperate with U.N. monitors as required by Security Council directives. Western intelligence sources were reported to have confirmed the arrival of two more shipments of arms and spare parts for Iraq from China via Jordan. Saddam charged that continuing the U.N. sanctions against Iraq “means the commission of genocide against the people of Iraq.” (Various press sources.)

Russia Seeks Funds to Destroy Chemical Weapons—Anatoly Kuntsevich, former Soviet general and now adviser on the destruction of chemical weapons to President Boris Yeltsin, made a strong plea in November for U.S. money and expertise to help destroy 40,000 tons of chemical weapons currently stockpiled in Russia. Congress has to date appropriated \$25 million for such a project, but the total bill could run \$1.5 billion. In related areas, the U.N. General Assembly’s disarmament committee approved a draft treaty on 12 November that would ban chemical weapons worldwide, and on 11 November President Bush extended a 1990 emergency order prohibiting exports that would help foreign chemical and biological weapons programs. (Various press sources.)

Russia Ratifies START Pact, but Ukraine Asks for Guarantees and Aid—On 4 November the Russian Parliament voted 157 to 1 (with 26 abstentions) to consent to the ratification of the Strategic Arms Reduction Talks pact signed by Presidents Bush and Gorbachev in July of last year. The treaty would reduce the number of strategic nuclear warheads on both sides by about one-third, from about 23,000 to about 16,000, on both sides over a seven year period. The debate suggested that a more comprehensive treaty, signed in June by President Bush and Russian President Boris Yeltsin, which would reduce nuclear weapons by another 50%, might face significant opposition in parliament. Actual ratification of the START treaty can not take place until Belarus, Kazakhstan and Ukraine join the NPT treaty and reach agreements on former Soviet Union nuclear forces on their territory. Ukrainian Vice Prime Minister Igor Yukhnovsky alarmed many when he announced in Kiev on 5 November that “We can sell these nuclear warheads to the highest bidder.” Most observers interpreted such remarks as an effort to extract compensation—either in the form of security guarantees or aid—from the West rather than as evidence the treaty may be rejected—a view reinforced on 10 November when Ukrainian President Leonid Kravchuk said that “Ukraine . . . must have some material benefit and fixed guarantees for its security” if the START agreement is to be certain of approval. Kazakhstan and the U.S. Senate approved the treaty last month. (*Washington Post*, 5-6, 11 November, and other sources)