



# National Security Law Report

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## Point of View

### Redefining National Security: A Post-Cold War Imperative

by Gregory D. Foster

National security could prove to be the defining issue of the early Clinton presidency. Even as he embarks on the economic and domestic priorities he has rightly established, President Clinton will be forced to confront a range of potentially volatile situations around the world. In so doing, he will inherit an increasingly outmoded conception of national security that will limit his perceived range of action and affect the willingness of the American people to support him. One of the most challenging tasks before the new president, then, will be to redefine security in terms that both reflect the changing contours of the new world order and engender a more elevated level of public understanding and discourse on the great issues facing the United States today.

The prevailing conception of security in this country is, in its most pronounced and familiar form, a product of Cold War thinking. It is accepted and propounded in equal measure by idealists and realists, liberals and conservatives, Democrats and Republicans, purported experts and admitted novices alike. In its emphasis on the security of the nation, it breeds a chauvinistic intolerance and paranoia that subvert the enlightened democratic principles of the Constitution—denying, in the process, the legitimacy of a more inclusive notion of *global security*. In its implied emphasis on preserving and protecting the status quo against enemies foreign and democratic, it

sanctifies parochialism and inertia to the virtual exclusion of bold initiative and progressive change. In dichotomizing foreign and domestic affairs, it feeds the persistent misconception that social welfare (butter and beans) can be purchased only at the expense of military prowess (guns and bullets). And in equating security with defense, it perpetuates the distorted logic that more defense necessarily means more security, while less defense amount to being essentially defenseless.

Security is not, of course, just defense. It is much more. As we know all too well, increased levels of

*Continued on page 2*

## Moved to International Club

### Gates to Address February 18 Breakfast

Outgoing Director of Central Intelligence Robert M. Gates will address the Standing Committee's February 18th breakfast meeting, which will be moved to the International Club (Level B-1, 1800 K Street, N.W., Washington, D.C.) to accommodate the anticipated large audience.

A native of Kansas with a Ph.D. in Russian and Soviet History from Georgetown, Dr. Gates joined the Central Intelligence Agency in 1966 as an Assistant National Intelligence Officer for Strategic Programs and served in a variety of capacities for more than a quarter of a century. Prior to becoming Deputy Director for Intelligence (DDI) and Chairman of the National Intelligence Council in 1982, Dr. Gates was National Intelligence Officer for the Soviet Union. In 1974 he was assigned to the National Security Council, where he served for a total of nearly eight years under four Presidents, most recently as Assistant to the President and Deputy for National Security under President Bush prior to being named Director of Central Intelligence in late 1991.

Dr. Gates is expected to devote most of his formal remarks to the issue of congressional oversight of

*Continued on page 5*

#### Inside

- 3 Lonetree Appeal Denied
- 4 Calendar of Events
- 5 Book Review—Enhancing the United Nations Peace and Security System
- 6 National Security Agenda

## Redefining Security . . .

*Continued from page 1*

defense may have the inadvertent effect of heightening tensions and precipitating countermeasures that actually weaken security, while defense reductions may relieve tensions and remove a major source of provocation, intimidation, and insecurity.

Security also is not the special preserve of international relations. It is, rather, the cardinal measure of the seamlessness of domestic and foreign affairs. To be secure is, literally, to be free—from fear and doubt, from harm and danger, from threat and intimidation, from need and want—in all the many forms these sources of psychological dislocation may take. It is to feel safe, confident, independent, invulnerable, and comfortable.

Psychologist Abraham Maslow has told us that security is part of a hierarchy of human needs, exceeded in its potency only by the physiological needs for food, water, shelter, rest—and, yes, even sex. Only when these most basic needs are met do humans focus their attention on the higher order needs for social interaction, esteem, and self-fulfillment that enable them to realize their own potential and thereby advance the collective human condition.

To be hungry or homeless, to be illiterate or impoverished, to be chronically ill or addicted to drugs, to be constantly afraid of being robbed or attacked, to be unable to afford basic medical care, to be exposed to environmental hazards, is to be insecure. To counter these conditions—that is, to provide for health care or welfare or housing or education or crime prevention or drug treatment or economic development or environmental protection—is not to diminish or endanger security, but to enhance it.

Viewed otherwise, providing for security is the function of strategy. Security is achieved, in other words, not by chance, but by design. Strategy seeks to achieve this purpose through the effective exercise of power. National power is a product of both the capabilities or resources at the country's disposal and the will to use those capabilities. National will reflects the degree of cohesion—or the sense of community—that exists within the society. Whatever galvanizes the people in common cause, whatever produces a feeling of oneness, whatever provides unity of purpose and action, contributes to such cohesion. Conversely, whatever fosters apathy, alienation, despair, distrust, resentment, intolerance, powerlessness, or dependency produces the opposite of cohesion: fragmentation and disintegration.

As events in the erstwhile Soviet Union have shown all too clearly, economic, social, and political collapse from within is no less devastating and conclusive than

military attack from without. Absent a major crisis or catastrophe, absent a real or contrived threat to national survival, absent the persuasive power of a charismatic leader, the cohesion of society depends ultimately on government's ability and willingness to care for its people and to help them care for themselves. The resultant trust and confidence the people have in their government and in one another is the strongest and most enduring form of social glue. To the extent then that decreased military spending frees resources that enable government to care better for its people, less defense actually may produce more security. For a United States that has traditionally equated strength more with armaments than with morale, the lesson is this: investing in national cohesion may provide a greater and more lasting payoff than investing in military capabilities.

America's Founding Fathers seem to have understood the essential nature of security all too well—certainly better than we. The Preamble to the Constitution is, in fact, nothing if not a security manifesto. It speaks not simply of providing for the common defense but, as importantly, of forming a more perfect union, establishing justice, insuring domestic tranquillity, promoting the general welfare, and securing the blessings of liberty. Collectively, these things define what security really is.

Here, as in so many areas, we—both those in high office and those of lowly station—would do well to learn from the prescience of our forebearers, even if we can't approximate their wisdom. Our future could well depend on it.

*Dr. Foster is J. Carlton Ward Distinguished Professor at the Industrial College of the Armed Forces, National Defense University, Washington, D.C.*

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## Embassy Spy's Conviction Upheld

### Court Denies Lonetree Appeal

by Jackson R. Sharman III

In an exhaustive opinion, the United States Court of Military Appeals recently denied the appeal of Marine Corps embassy guard Sgt. Clayton Lonetree from Lonetree's espionage convictions. *United States v. Lonetree*, No. 65,642 (NMCM 88 2414) (United States Ct. Mil. App. Sept. 28, 1992). The court held that a statement obtained from a servicemember by United States intelligence agents is admissible evidence against that servicemember even in the absence of the military code's equivalent to a *Miranda* warning. The court also held that where United States government agents who are not acting in a law enforcement capacity falsely tell a suspect that his statements will be held in confidence, the resulting incriminating statements are not obtained involuntarily and are therefore admissible in evidence.<sup>1</sup>

Lonetree was a Marine Corps embassy guard on duty in Moscow when he met a Soviet agent, Violetta Seina, in a subway station. Lonetree began a romantic relationship with Seina and eventually passed along confidential information to a Soviet agent named Yefimov. Unaware of these contacts, the Marine Corps transferred Lonetree to duty at the United States embassy in Vienna. In Vienna, Lonetree continued his contact through an agent named Lissov. On December 14, 1986, Lonetree disclosed his involvement with the Soviet agents in the first of a number of meetings with two Vienna-stationed United States intelligence agents known as Big John and Little John (the Johns). The Naval Investigative Service (NIS) began questioning Lonetree on December 24, 1986 and obtained more detailed information. As a result of Lonetree's confessions to the Johns and the NIS, a court-martial found Lonetree guilty of several offenses including disclosing the identities of covert agents and committing espionage. Lonetree received a sentence of 30 years confinement, subsequently reduced to 25 years.

On appeal, Lonetree first argued that his confessions were unlawfully induced as a result of false promises of confidentiality that the Johns made him. The Johns violated these promises, Lonetree argued, when they shared his statements with the NIS. At his court-martial, Lonetree moved to suppress the confessions. The trial judge denied the motion. The Court of Military Appeals noted that a confession made in reliance on a promise not to use the information against a confessor can be found involuntary and

therefore inadmissible, Slip Opinion (Op.) at 7 (citation omitted), and that military criminal law incorporates the voluntariness inquiry. After reviewing a long line of military cases involving promises of confidentiality by law enforcement agents to suspects, Op. at 9, the court noted that when a superior, acting with the apparent approval of the chain of command, makes an assurance of confidentiality to a subordinate, any incriminating statements springing from that assurance may not be the product of a free and unconstrained choice. *Id.* at 8-9.

The court rejected Lonetree's false-inducement argument, however, because he could point to no military case holding a confession involuntary because a non-police agent made a false promise of confidentiality. *Id.* at 10. The court explained the absence of such cases in civilian criminal law as a result of the fact that courts have generally found that non-police agents do not exert the same coercive force or impose the same custodial constraints as do law enforcement agents. Thus, for a confession to be involuntary, the inducement must be offered by one who acts in a law-enforcement capacity or in a position superior to the person who ultimately makes the confession. Because Lonetree could not demonstrate that the Johns were acting in a law-enforcement capacity when they promised him confidentiality, the court rejected his claim that his confession was involuntary.<sup>2</sup>

Lonetree's next argument on appeal was that the Johns failed to give him the military code's equivalent of a *Miranda* warning (an Article 31 warning) before they questioned him. The Johns were civilian investigators, but the Court of Military Appeals recognized that civilian investigators must give Article 31 warnings in two types of situations: first, when the civilian and military "investigations merge . . . into an indivisible entity" and, second, when the civilian acts to further a "military investigation" or acts "in any sense as an instrument of the military." Op. at 12. Lonetree argued that the Johns' civilian intelligence damage-assessment investigation merged into an indivisible entity with the NIS's criminal investigation and that the Johns became instruments of the NIS, all by virtue of the authority granted intelligence agents under Executive Order No. 12,333 to cooperate with law-enforcement officials. Lonetree urged the court to adopt a bright-line rule that would prohibit the use in courts-martial of any statements obtained by intelligence agents in cases where those agents did not provide an Article 31 warning.

Based on its review of the record, the court concluded that the Johns' questions were concerned only with the issue of potential damage to the national

*Continued on page 4*

## Lonetree appeal . . .

Continued from page 3

security and were not designed to gather information for a criminal prosecution. The court noted that the Johns are prohibited by statute from conducting criminal investigations; that they did not coordinate their activities with military authorities; and that they never sought NIS guidance or control. Thus, the court concluded, the two investigations did not merge into an indivisible entity.

As to his separate but related claim that the Johns became an "instrument" of the military, Lonetree argued that Executive Order No. 12,333 required the Johns to work with military investigators. The court disagreed, noting that "[t]hrough Executive Order 12,333 authorized cooperation between the Johns and military law enforcement agents, cooperation in and of itself does not necessarily convert someone into an instrument of the military." Op. at 16. The court pointed out that the Johns never assumed a role subordinate to the NIS, they did not schedule a special meeting with Lonetree for his arrest, and they took no direction from the NIS on how to conduct that final meeting. The court concluded that although the bright-line rule urged by Lonetree, by definition, would provide some certainty as to when intelligence agents who "question the servicemember must give Article 31 warnings," the court concluded that outside the special circumstances establishing an agency relationship discussed above, Article 31 does not require a civilian investigator to give a rights warning. Op. at 17.

The Court of Military Appeals rested the voluntariness inquiry on a distinction between law enforcement or police agents and intelligence agents that may not always be as discernible as it was in *Lonetree*: the one often acts like the other, and the defendant will consider it a doctrinal nicety that his coerced confession may be admissible if the coercing government agent was not formally a law enforcement agent. Voluntariness inquiries are difficult and fact-intensive, and the court understandably hewed to the caselaw bright-line distinction between law enforcement agents and other government actors. On the facts of *Lonetree*, the issue was not compelling because Lonetree's meeting with and statements to the Johns were voluntary in both the legal and pedestrian senses of the word. On other facts, however, the intelligence/law enforcement distinction may prove to be troubling.

On the other hand, the *Lonetree* opinion is squarely within military and civilian caselaw establishing the voluntariness inquiry in confession cases. In addition to legal rationales there are functional, policy reasons

why an intelligence inquiry differs in substance and kind from a law enforcement investigation: after the fact of a security breach, intelligence investigators like the Johns care less about punishing the culprit than they do about assessing the security damage. Indeed, intelligence personnel and law enforcement investigators can often work at cross purposes, and there is little reason to think—for better or worse—that the one is the arm of the other. The Court of Military Appeals was certainly correct in concluding that the operation of Executive Order 12,333 does not engender such a situation.

In all likelihood, *Lonetree* will not be the last word on the subject. According to Lt. Gen. Vadim Kirpichenko, a senior adviser to Yevgeny Primakov, the Director of the reconstituted Russian Intelligence Service (SVR), Russian agents will continue to collect information in the United States and to recruit Americans.<sup>3</sup> Thus, American military courts may have further opportunities to apply the *Lonetree* standards in a variety of situations.

*Mr. Sharman is Associate Editor of the Report.*

### Notes

1 The court also held that Lonetree was not denied his Sixth Amendment Confrontation Clause rights by the government's refusal to release information on an informant; that Lonetree had no constitutional right to a public oral argument; and that Lonetree's civilian attorney, William Kunstler, had given Lonetree advice concerning acceptance of a plea that was so contrary to Lonetree's interests as to be ineffective assistance of counsel, and that therefore a new hearing was required on Lonetree's sentence.

2 The court explained that the Johns did not engage in any custodial or coercive discussions with Lonetree; they made it clear that they did not represent either command or law enforcement entities; and they never attempted to restrict Lonetree's movements or suggest that they had the power to do so.

3 Gertz, "Russians Discard Tactics of KGB," *Wash. Times*, January 12, 1993, at A3.

## Calendar of Events

Please mark your calendar for the following dates. Details will be announced later.

February 18—Gates breakfast (see page 1)

March 18—Breakfast

April 15—Breakfast

## Book Review

by David E. McGiffert

### **To Unite Our Strength: Enhancing the United Nations Peace and Security System**

by Vice Admiral John M. Lee (Ret.), Prof. Robert von Pagenhardt, and Dr. Timothy W. Stanley, Esq.  
University Press of America, 1992

In this small but ambitious book the three authors (who combine a century of experience in U.S., U.N. and NATO international security positions) outline what they think has to be done to make the United Nations an effective agent of international peace and security. The book, with a foreword by Robert McNamara, is a product of the International Economic Studies Institute headed by Dr. Stanley. It was funded, in part, by a grant from the U.S. Institute of Peace.

The authors propose that the U.N. Charter's flexibility be used to establish several new structures, including a more broadly based Security Council, a Chief of Staff and International Military Staff (leaving the existing Military Staff Committee with primarily an arms control surveillance mission) and, most importantly, three tiers of U.N. military forces: Standing, Quick Reaction, and Contingency, mostly provided under Article 43 agreements.

Legal scholars may be disappointed that more attention is not devoted to the International legal questions inherent in humanitarian and other interventions by or in the name of the United Nations. But the book is well written, and most timely in suggesting a comprehensive system which could be politically feasible, militarily effective, and financially affordable.

One innovative proposal is a United Nations Legion, initially an experimental combat brigade composed of individual volunteers from U.N. Member

armed forces. This legion would be the nucleus of a trip wire or small scale intervention force responsive directly to the U.N. Secretary-General and the Security Council, rather than to national governments. Had such a force existed, it might have intervened earlier in Somalia. (See Ambassador Schifter's remarks in the December *NSL Report*.) Whether such a scheme could work in practice remains to be seen; but in theory it might well avoid cession-of-command problems of U.S. or other national units.

*Mr. McGiffert is a partner at a Washington law firm and a former Assistant Secretary of Defense for International Security Affairs and Under Secretary of the Army.*

## Gates to address breakfast . . .

*Continued from page 1*

intelligence, but the question period is likely to include other topics as well. In his final months as DCI he made a number of public statements concerning the proliferation of weapons of mass destruction—another issue of great interest to the Standing Committee—including disclosing that illegal Russian military biological weapons programs may have been carried out without the knowledge or control of civilian leaders and warning about dangerous nuclear weapons programs in North Korea and Iraq.

Dr. Gates has a distinguished record of public service. He has been awarded the Presidential Citizens Medal, the National Intelligence Distinguished Service Medal, the Intelligence Medal of Merit, and the Arthur S. Flemming Award—presented annually to the ten most outstanding young men and women in the Federal Service. He has twice received the CIA's highest decoration, the Distinguished Intelligence Medal.

Information about attending the breakfast may be obtained from Holly Stewart McMahon by calling (202) 466-8463.

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## ***The National Security Agenda . . . .***

**Scowcroft Admits Covert Effort to Oust Saddam**—According to the *Washington Post* (20 Jan.), outgoing national security adviser Brent Scowcroft acknowledged that the Bush Administration had conducted a covert action plan to oust Saddam Hussein from power, but was careful not to violate the prohibition against “assassination” continued in Executive Order 12,333. *Newsweek* reported that public support for using military force to remove Saddam from power increased from 65%-30% favorable in August to 82%-15% five months later.

**START II Endorsed by Russian Military**—The START II treaty signed by Presidents Bush and Yeltsin on 3 January was supported by senior Russian military leaders in statements at the start of the new session of Parliament on 11 January. Deputy Chief of Staff Lt. Gen. Andrei Nikolayev told a Russian television audience a day earlier that the agreement would not leave Russia vulnerable to nuclear attack. While parliamentary chairman Ruslan Khasbulatov said the treaty would not be ratified automatically “just because it was signed,” most experts are optimistic about ultimate approval.

**START I Awaits Ukraine Ratification**—1,656 of the more than 11,000 nuclear warheads belonging to the former Soviet Union are currently located on 176 missiles and 30 bombers in the Ukraine, which as a part of the July 1991 Lisbon protocols agreed to give up all nuclear weapons and to ratify both the START I and NPT treaties. Some members of the parliament in Kiev reportedly believe the weapons should not be given up without something of value in return, especially since the process of de-nuclearization is likely to be an expensive one. A few weeks ago President Bush reportedly offered \$175 million in U.S. aid in a letter to Ukraine President Leonid Kravchuk, but a high level delegation which met with President Bush on 6 January reportedly sought \$1.5 billion plus U.S. security guarantees against Russia and assurances the weapons will be controlled by the Commonwealth of Independent States (which includes Ukraine) rather than by Russia. President Bush reportedly rejected the demand for more money, with administration officials saying the United States would not be “blackmailed” on the issue.

**House Panel Rejects “October Surprise” Charges**—Following the lead of a more limited Senate investigation (see last month’s *Report*), the committee established by the House of Representatives to investigate allegations that William Casey or others involved in the 1980 Reagan for President campaign met secretly with Iranian representatives in an effort to delay release of American hostages in Tehran has concluded that the charges are unsupported by the evidence. Transcripts of sworn testimony by several alleged witnesses believed by the panel to have committed perjury have been referred to the Justice Department for possible action.

**Senate MIA Committee finds “No Compelling Evidence” American POWs are Now Alive in S.E. Asia**—After an extensive inquiry involving public and secret hearings in Washington and field investigations in Indochina, the Senate’s MIA Committee has concluded its work with a report asserting that some Americans may have been left behind in 1973 when U.S. combat forces withdrew, but that there is “no compelling evidence” that any are still alive and being held in Indochina against their will.