



# National Security Law Report

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## Chief Arms Inspector Kay Addresses Breakfast

by Jackson R. Sharman III

David Kay, the International Atomic Energy Agency's former Chief Inspector in Iraq, addressed the Standing Committee's breakfast meeting at the International Club on Thursday, October 21. Mr. Kay told his listeners that the proliferation of weapons of mass destruction is a problem that has become ever more serious because the necessary technology is more and more available and because there are numerous providers of that technology. Mr. Kay added that advances in the power of computers have contributed to proliferation problems, as has the surprisingly large amount of information available in the open literature.

Addressing the problems that the international community faces in attempting to regulate the proliferation of nuclear weapons, Mr. Kay emphasized the problem of mirror imaging: that is, the belief that "unless you do it the way we did it, you can't do it." Mr. Kay illustrated this point by recounting how an American technician at an Iraqi facility initially concluded that nuclear weapons were not being produced because the facility did not adhere to the standards promulgated by the Occupational Safety and Health Act. According to Mr. Kay, there is a wide range of successful models for development of a nuclear program. He pointed to the example of South Africa, which he said created half-a-dozen crude nuclear weapons for a relatively trivial sum—no more than one percent of their defense expenditure.

On the subject of the breakup of the Soviet Union, Mr. Kay expressed great concern that the Russians do not know exactly how much nuclear material they possess. He said that this lack of a genuine inventory control poses immense problems for international regulators. Turning to the future, Mr. Kay argued that proliferation questions are not simply lesser-included questions of America's Cold War victory; for example, United States capabilities may not deter some actors. In general, he said, deterrence is a poorly understood concept.

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## Three New Members Named to Standing Committee

ABA President William Ide has appointed three very distinguished individuals to membership on the Standing Committee. They are Yale Law School Professor Harold H. Koh, outgoing ABA President J. Michael McWilliams, and CIA General Counsel Elizabeth Rindskopf. John Shenefield was reappointed as chairman.

Professor Koh is the author of *The National Security Constitution*, which was awarded the Richard E. Neustadt Award in 1991 by the American Political Science Association as the most outstanding book on the presidency published during 1990. He was singled out from among all American law professors to be profiled in a sidebar on law school faculty members in the most recent *U.S. News & World Report* survey of American Law Schools.

Few American practitioners have achieved more distinction as leaders of the legal profession than immediate past ABA President J. Michael McWilliams, who also served for two years as Chairman of the ABA House of Delegates and served earlier as President of the Maryland Bar Association. Readers of the June *Report* will recall that then-President McWilliams appeared unexpectedly at the "Anarchy in the Third World" conference and voiced strong praise for the Standing Committee and its work.

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## New Members . . .

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CIA General Counsel Elizabeth Rindskopf is an old friend of the Standing Committee, having formerly served on its Advisory Committee and spoken frequently at our conferences and other programs. She has also been an active participant at meetings and on tasks forces and working groups. Few practicing national security lawyers in government service can approach her distinguished level of experience, beginning as the General Counsel to the National Security Agency in 1984, followed by service as Principal Deputy Legal Adviser to the Department of State, and since 1990 serving as General Counsel at the Central Intelligence Agency under three Directors of Central Intelligence.

President Ide appointed as new Advisory Committee members Alison B. Brotman, Franz Oppenheimer, and James Chandler. Air Force Captain Timothy A. Guiden has been appointed liaison to the Standing Committee from the Young Lawyers Division, while Howard Handelman will continue as the Board of Governors' liaison and Robert Zeitler will continue representing the Law Student Division.

## Arms Inspector . . .

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Mr. Kay concluded by pointing out several areas where lawyers and others who work with legal regimes may contribute to proliferation issues. First, he said that it is vital to have open and dependable assurances of what other countries are doing with nuclear weapons. The United States cannot simply depend on intelligence alone and especially upon overhead reconnaissance alone, he said. Biological and radiological weapons have received less attention than they deserve, he said, and early detection of weapons programs is vital. Mr. Kay conceded that export controls have some benefits: they make weapons more costly, they slow some programs down, they force certain distortions in weapons development programs, and they encourage the sharing of information. Nevertheless, he concluded that export controls are largely a thing of the past and demonstrate a certain arrogance common to American thinking. There are simply too many suppliers for export controls to work effectively. The ultimate question, he concluded, is whether or not the United States can establish legal regimes to pinpoint the weapons proliferation activities of particular countries and particular groups.

## "National Security in a Changing World" Conference Held

On October 7-8 the Standing Committee joined with the Center for National Security Law at the University of Virginia School of Law in co-sponsoring the third annual "Morry Leibman Conference" reviewing the field of national security law. Entitled "National Security Law in a Changing World" and originally dedicated to former Army Secretary and Standing Committee Counselor John O. "Jack" Marsh, III, at Mr. Marsh's suggestion it was rededicated to his son, Army Major Rob Marsh, who was seriously wounded in Somalia on the day before the conference opened (see story on page 4).

The conference began with a panel discussion of "The Scope and Significance of National Security Law," moderated by Professor John Norton Moore and including as discussants Georgetown University Government Professor Anthony Arend, U.S. Court of Military Appeals Senior Judge Robinson O. Everett, former NSC Legal Adviser Nicholas Rostow, and former Defense Department General Counsel and Deputy Secretary, and subsequently U.S. Ambassador to NATO, William H. Taft, IV.

Standing Committee Chairman John Shenefield then moderated a panel examining "New Developments in National Security Law," featuring CIA Inspector General Frederick P. Hitz, Standing Committee member Lucinda A. Low, Principal Deputy State Department Legal Adviser Michael Matheson, and Deputy Department of Defense General Counsel John

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### **John H. Shenefield**

*Chairman, Standing Committee on Law and National Security*

### **Holly Stewart McMahon**

*Staff Director*

### **Robert F. Turner**

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### **Jackson R. Sharman III**

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## Conference Held ...

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H. McNeill. The question and answer period reflected considerable interest in Mr. Hitz's remarks, which addressed the interface between 18 U.S.C. § 371—a broad conspiracy against the United States statute—and ambiguous congressional mandates, some of which are simply contained in classified committee reports incorporated by reference into legislation. Concern was expressed by several of those present that this “criminalization of the foreign policy process” might have a chilling effect upon Executive branch employees with serious ramifications for the constitutional separation of powers.

The keynote speaker at lunch was Deputy U.S. Attorney General Philip B. Heymann, who addressed the changing interface between the roles of the intelligence community and the law enforcement community. Traditional understandings concerning the division of responsibilities—such as the statutory prohibition against CIA employees engaging in “law enforcement” activities—have been blurred by modern efforts to enhance the effectiveness of anti-drug programs, and these changes have raised issues which need to be seriously addressed.

Mr. Heymann was followed by a panel on “Operational Law” featuring senior military Judge Advocate General's Corps attorneys from the Army and Navy. Thursday's session closed with a panel on “Intelligence Law,” moderated by former CIA General Counsel and now Judge Stanley Sporkin. National Security Agency General Counsel Stewart A. Baker, Deputy Assistant Attorney General Mark M. Richard, and Senate Intelligence Committee General Counsel (and Standing Committee member) L. Britt Snider made up the panel.

Director of Central Intelligence R. James Woolsey spoke at Thursday evening's dinner, which also featured very poignant remarks by Jack Marsh, who left the room to a standing ovation as he returned home to await further reports on the condition of his wounded son.

Friday's program began with a special panel on “Women in the Military,” moderated by former Defense Department General Counsel (and Standing Committee Advisory Committee Chair) Kathleen Buck. Participants included Assistant Air Force General Counsel Florence W. Madden, former Assistant Navy Secretary Barbara Pope, retired Army Colonel Harry Summers, and Sergeant Patty Winebrenner of *Armed Forces Digest*.

A highlight of these annual “review of the field” conferences, which were originated at the suggestion of the late Morris I. “Morry” Leibman, is the annual

general counsels' panel on “Advising the Government on National Security Law,” which this year was moderated by former State Department Legal Adviser (and former Standing Committee member) Monroe Leigh and included Defense Department General Counsel Jamie S. Gorelick, State Department Legal Adviser Conrad K. Harper, National Security Counsel Legal Adviser Alan J. Kreczko, CIA General Counsel Elizabeth Rindskopf, and Legal Adviser to the Chairman of the Joint Chiefs of Staff Colonel James P. Terry.

Friday's luncheon was addressed by Professor Eugene V. Rostow, who formerly served as Dean of Yale Law School, Under Secretary of State for Political Affairs, and Director of the Arms Control and Disarmament Agency. He used the title of his most recent book, *Toward Managed Peace* (soon to be reviewed in the *Report*), as the theme for his remarks.

On Friday afternoon, former CIA Deputy Director for Intelligence Dr. Ray Cline moderated a “special topic” panel on “Strengthening Legal Constraints in the Control of Terrorism,” which included as participants George Washington University Professor Yonah Alexander, George Mason Law School Professor Alan Gerson, FBI counter-terrorism expert Ronald Klein, and Villanova University Law Professor (and former Standing Committee member) John F. Murphy.

The final panel of the conference addressed another “special topic,” entitled “National Security and the Environment.” Moderated by former Air Force Deputy General Counsel Myron H. Nordquist, it included Chief of the Justice Department's Environmental Enforcement Section John C. Cruden, Justice Department Special Environmental Litigation Counsel Charles J. Sheehan, and Pentagon environmental security expert Gary D. Vest.

## Conference Tapes Available



Audio and video tapes and an (unedited) verbatim transcript of this conference may be purchased by contacting Standing Committee Staff Director Holly Stewart McMahon (see box on page 5).

We hope to be able to provide a more detailed summary of the conference to readers in the near future in the form of a special conference supplement. A supplement of the June 3-4 conference on “Anarchy in the Third World” is also being prepared.

## Son Wounded in Somalia on Eve of Conference

### Marsh Affirms Commitment to Rule of Law at October Conference

*The Standing Committee's third annual "review of the field" conference, entitled "National Security Law in a Changing World: . . . A Tribute to John O. Marsh, Jr.," was intended to provide an opportunity for us to honor a distinguished member of the national security law community and Standing Committee Counselor. On the eve of the conference, however, Secretary Marsh learned that his eldest son, Major John O. "Rob" Marsh, III, had been seriously wounded while serving with the U.S. military in Somalia. At his request, the conference was rededicated to Rob and to the other American men and women who go into harms way for the cause of peace.*

*Because of the important role Jack Marsh has played with the Standing Committee and in our field over the years, and the many friends and admirers he has among our readership, we reprint below excerpts from the brief remarks he made after lunch on Thursday, October 7. Although he is expected to undergo a lengthy period of convalescence, we are pleased to report that Major Marsh is expected to fully recover from his wounds.*

Thank you for having dedicated this particular conference to me. As I suspect many of you know, our oldest son, Rob, was severely wounded yesterday in a mortar attack in Somalia. I can tell you that we have received word today that he has successfully come through surgery; and as I speak to you, he's being medevacked to Landstuhl, Germany. The prognosis seems to be good.

I really would like for the conference, instead of being dedicated to me, to be dedicated not just to my son, who bears my name, but also to all those Amer-

icans who serve this country in very difficult assignments in such far away places as Somalia. We have unfinished business there. I recognize that. I can also tell you for parents and families that instant news coverage is instant worry; because the moment those aircraft go down, you begin to worry.

My son is a medical doctor—a very superb, highly qualified, Special Forces doctor—assigned to the Task Force in Somalia. He has had a very difficult time and is undergoing a difficult time now. But I recognize the commitments that we have. When you look at the world situation, you must bring yourself to the conclusion that this country has an enormous leadership responsibility. However much we would like to withdraw from the world, we can't do that.

I do believe our policies must be more reflective of what our United States goals are as we must look through the right end of the telescope, I believe that we're getting out of perspective somewhat the role of the United Nations. We can't let the tail wag the dog. . . .

I am convinced that the ultimate solution for a peaceful world lies in the rule of law, and that must be our guiding principle. And I would remind you that the symbol of justice has scales in her left hand and in the right hand is a sword. . . . The application of force under the rule of law is sometimes necessary to preserve the values of a free society and to achieve our hoped

for better world. For these reasons, I would like to dedicate this conference not to me, but to our son—and to those who serve with him. Thank you very much.



*Former Army Secretary John O. "Jack" Marsh spoke briefly at the conference designed to honor him for his many contributions to the field of national security law.*

### Calendar of Events

**December 2-3—Conference—Capital Hilton**  
"Democracy and the Rule of Law in  
Foreign Policy: A Tribute to Ambassador  
Max M. Kampelman"

## Max Kampelman to Be Honored

# December Conference to Examine Democracy and the Rule of Law in Foreign Affairs



The next Standing Committee conference will take place on December 2-3, 1993, at the Capital Hilton Hotel in Washington, D.C., on the topic "Democracy and the Rule of Law in Foreign Policy: A Tribute to Ambassador Max M. Kampelman." Co-sponsored by the University of Virginia Center for National Security Law, the conference will address a variety of issues concerning the advantages of democratic governments to a world interested in such things as peace, human rights, economic development, and environmental protection.

Departing from the Standing Committee's traditional format of panel discussions, the December conference has been designed around major presentations on key issues, with distinguished panels of discussants charged with commenting upon each presentation.

Following a framing of the issues by Congressman Steny H. Hoyer, Co-chairman of the Commission on Security and Cooperation in Europe, there will be a series of seven major presentations. For example, University of Virginia Law Professor (and former Chairman of the Board of the U.S. Institute of Peace) John Norton Moore will address "Democratic Systems and War Avoidance," examining the question of whether democratic governments are less likely than other systems to engage in military aggression. University of Hawaii Profes-

or Rudy Rummel, author of a major forthcoming book on democracy and "demicide" (the practice of governments killing their own people), will be one of the discussants on Professor Moore's presentation.

National Endowment for Democracy President Carl Gershman will address "Democratic Systems and Human Rights," and University of Texas Professor Gerald W. Scully will examine "Democratic Systems and Economic Development." A special dinner honoring Ambassador Kampelman will feature remarks by His Excellency Itamar Rabinovich, the Ambassador of Israel to the United States.

Friday morning will begin with a look at "Democratic Systems and Environmental Protection," with a presentation by Professor Murray Feshbach of Georgetown University. In addition to luncheon remarks by Ambassador Richard Schifter, the rest of Friday's program will be devoted to presentations focusing upon specific countries or regions of the world. Presenters will include Librarian of Congress James H. Billington, University of Virginia Law Professor A. E. Dick Howard, and Deputy USIA Director Penn Kemble.

For further information or to make reservations for the conference, contact Standing Committee Staff Director Holly Stewart McMahon.

## **Standing Committee on Law and National Security**

*Chairman:* John H. Shenefield. *Members:* Richard E. Friedman, Edward Hidalgo, Harold H. Koh, Lucinda A. Low, J. Michael McWilliams, Elizabeth R. Rindskopf, L. Britt Snider, Paul Schott Stevens, Richard K. Willard, Diane P. Wood  
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## *The National Security Agenda . . . .*

**PFIAB Reorganized at White House**—On 30 September, President Clinton announced the appointment of eleven new members of the President's Foreign Intelligence Advisory Board (PFIAB). They will join the board's chairman, retired Chairman of the Joint Chiefs of Staff Admiral William J. Crowe, who was named in January. The new members are former Air Force Chief of Staff and National Security Agency (NSA) Director General Lew Allen, Jr., Aetna Life & Casualty Company General Counsel Zoe Baird, former NSA Deputy Director Ann Z. Caracristi, Stanford University Professor Sidney D. Drell, former U.S. Senator Thomas F. Eagleton, former Democratic National Committee General Counsel Anthony S. Harrington, former National Reconnaissance Office Director Robert J. Hermann, Philadelphia investment banker Harold W. Pote, Brookings Institution scholar Lois D. Rice, former U.S. Senator Warren B. Rudman, and industrial consultant Maurice Sonnenberg. On 13 September, President Clinton issued Executive Order 12863, establishing PFIAB at an authorized strength of not more than sixteen members to "assess the quality, quantity, and adequacy of intelligence collection, of analysis and estimates, and of counterintelligence and other intelligence activities." Section 2.1 of the new order establishes the Intelligence Oversight Board (IOB) as a standing committee of PFIAB consisting of "no more than four members appointed from among the membership of the PFIAB by the Chairman . . . ."

**Duke Law School Establishes Center on Law, Ethics and National Security**—Professor Robinson Everett, former Chief Judge of the U.S. Court of Military Appeals and a frequent participant in the work of the Standing Committee, has announced the establishment of the Center on Law, Ethics and National Security, to be housed in the new Duke Law School building set for opening next year. Colonel Scott Silliman, a retired Air Force JAG officer, has been named the Center's executive director. Funded by private gifts and foundation grants, the new center will promote teaching, research, conferences, and publications dealing with national security law. A similar think tank, the Center for National Security Law, was established at the University of Virginia School of Law in early 1981 and works closely with the Standing Committee in many areas.

**NSIC Report on Transnational Criminal Enterprises**—The National Strategy Information Center has released a report authored by NSIC President Roy Godson and former Deputy Assistant Secretary of State (International Narcotics Matters) William J. Olson which concludes that vast transnational criminal enterprises pose a new challenge to U.S. security interests. Colombian drug cartels, Asian "Triads," the Italian Mafia, and other such groups are a major influence behind drug-related violence and are challenging governments throughout the world. For further information, contact NSIC at (202) 429-0129.