



# National Security Law Report

Volume 15, Number 3 STANDING COMMITTEE ON LAW AND NATIONAL SECURITY March 1993

## **New Missions for JAGs** **Promoting the Rule of Law** **in Militaries of Emerging** **Democracies**

by Major Jeffrey F. Addicott  
& Major Andrew M. Warner

*"Defense Secretary Aspin has decided to restructure the policy-making apparatus of the Pentagon to direct more attention to new national security concerns such as human rights and to give the department a forceful voice on these issues."*<sup>1</sup>

### **Introduction**

The collapse of the Soviet Union and the end of the Cold War have ignited the fires of democracy and freedom in many nations around the globe. Indeed, from the Steppes of Asia to the jungles of Central America, there exists an intense global interest in securing the blessings of peace and social prosperity that we as Americans have so long enjoyed.

In tandem with such changes, a number of armies and ministries of defense have turned to the United States military to assist them in defining how the law should properly function within their military establishments, and further, how the military itself should fit into a more democratic form of government that is serious about promoting human rights.

Recognizing that law is perhaps the most critical component of a military organization in a democratic state, the U.S. Army's Judge Advocate General's (JAG)

Corps is energetically encouraging the spread of the rule of law, with a primary emphasis on promoting respect for human rights, throughout the world's military organizations. The JAG Corps is answering specific calls for assistance, serving as a forward based resource capable of advising and responding to a variety of often enormous problems confronting emerging and struggling democracies.

The requests are arriving from countries as diverse as the new republics of the former Soviet Union and the longer-standing but troubled democracies of Central and South America. Thus, Army lawyers

*Continued on page 2*

## **Counterpoint**

### **Let's Keep Our Old-Fashioned** **"National Security"**

By Francis J. McNamara

Prof. Gregory D. Foster argues [*"Redefining National Security," Report, Jan. 1993*] that, in order to cope with a variety of potentially volatile world problems, President Clinton must lead the nation in junking an increasingly outmoded conception of national security which is a product of Cold War thinking; and he must persuade the nation to adopt in its place a new definition that reflects the prescience of our forbears and the changing contours of the new world order—thus bringing about more enlightened public comprehension and discussion of the great issues the United States now faces.

Regrettably, his arguments betray misconceptions about the beliefs of our forbears, constitutional objectives, and national security. He is correct, of course, in writing that America's Founding Fathers seem to have understood the essential nature of security well, but the evidence indicates that we do the same and our concept is not outmoded, as he claims.

James Madison, principal author of the Constitution and later two-term president, wrote in *The Federalist* No. 41:

*Continued on page 3*

### **Inside**

- 3** Small World
- 4** Intelligence Papers Available from NSIC
- 4** Calendar of Events
- 6** National Security Agenda

## New JAG Mission . . .

*Continued from page 1*

have expanded their traditional mission of providing legal advice and support to their own army<sup>2</sup> to providing legal assistance for the restructuring efforts of the militaries of emerging and struggling democracies. This support ranges from supplying basic information on how the U.S. military adheres to a rule of law to actually assisting host nation legal officers structure their own legal systems.

For example, in response to requests for assistance from the former Warsaw Pact countries, the European Command's (EUCOM) Legal Office organized a week-long conference with the theme of "the proper role of a military in a democratic society." Co-hosted by the German Ministry of Defense, EUCOM sponsored representatives from Albania, Bulgaria, Romania, Czechoslovakia, Poland, Hungary, Latvia, Estonia and Lithuania. The conference was a huge success, and many attendees asked for similar meetings in the future. With most countries, the primary concern for U.S. judge advocates rests with how, over the long-term, the host nation military can be encouraged to accept a reduced and more professional role appropriate to a democracy. Unfortunately, many of the militaries of non-democratic nations have been the chief abusers of human rights. Thus, a successful strategy to achieve this long-term goal must be based on two overall themes directed towards the host military and appropriate government officials<sup>3</sup>:

- (1) foster greater respect for, and an understanding of, the principle of civilian control of the military; and
- (2) improve the military justice systems and procedures to comport with internationally recognized standards of human rights.

Recognizing that the militaries in many of the emerging and struggling democracies have a limited frame of reference for properly handling human rights issues, a major focus of the Army JAG Corps is to promote, strengthen, and assist the host nation's armed forces in institutionalizing human rights training. This concern for human rights mirrors the overall U.S. national security policy of peacetime engagement by maintaining contacts with allies and friendly governments for the purpose of imparting values and ideals associated with democratic principles.

One of the major obstacles in imparting concepts relating to human rights and democratic principles, of course, is that many of these emerging and struggling democracies are typically faced with the social

and economic turmoil traditionally associated with low intensity conflict (LIC) environments, from economic chaos to actual armed insurgency. Thus, the effectiveness of any program of assistance must be measured against the realities associated with the specific LIC problems facing the host nation.

### A Case Study: The Effort in Peru

An extraordinary example of how the U.S. Army's JAG Corps has been able to assist the military of a nation that is plagued by virtually every symptom of LIC is the case of Peru. Confronted by organized terrorism, drug cartels, and economic hardships, the Peruvian military sought the assistance of the U.S. Army Southern Command. Foremost in their fight for survival was maintaining the legitimacy of the Peruvian Government, wherein true democracy would have a chance for survival. To remedy the legitimacy issue, they sought ways to inculcate human rights and law of armed conflict components into their armed forces training.

In August of 1992, at the request of the Peruvian Army, U.S. Army judge advocates traveled to Lima, Peru to discuss the situation with their Peruvian counterparts. While the Peruvians expressed a desire to receive human rights instruction, it was recognized there was little, if any, standardized methodology to teach human rights to their soldiers up and down the line. There existed no military legal facility designed and equipped to train Peruvian judge advocates and commanders in these specialized legal areas. In addition, it appeared that the investigative process for soldiers accused of human rights abuses was deficient.

*Continued on page 5*

**John H. Shenefield**  
*Chairman, Standing Committee on Law and National Security*

**Holly Stewart McMahon**  
*Staff Director*

**Robert F. Turner**  
*Editor*

**Jackson R. Sharman III**  
*Associate Editor*

The *National Security Law Report*, which is published monthly, contains articles concerning the law relating to the security of the Nation, and associated topics. The *National Security Law Report* is sponsored by the Standing Committee on Law and National Security. The views expressed in this publication are not necessarily those of the Standing Committee or the American Bar Association. Comments, or original articles, should be directed to Robert F. Turner, Center for National Security Law, School of Law, University of Virginia, Charlottesville, VA 22903, Tel. 804 924-4080, Fax 804 924-7362.

Copyright © 1993 American Bar Association, ISSN 0736-2773.

## "National Security" . . .

*Continued from page 1*

Security against foreign danger is one of the primitive objects of civil society . . . . The means of security can only be regulated by the means and danger of attack. They will, in fact, be ever determined by these rules, and by no others. It is in vain to oppose constitutional barriers to the impulse of self-preservation.

And he observed in essay no. 43:

A protection against invasion is due from every society to the parts composing it. . . . Protection against domestic violence is added with equal propriety.

John Jay and Alexander Hamilton, through their co-authorship of *The Federalist* with Madison, share with him primary credit for the Constitution's subsequent adoption. Jay, who served as Secretary of Foreign Affairs under the Articles of Confederation and as a member of our first intelligence directorate prior to the adoption of the Constitution—and was appointed first Chief Justice under it—said in essay No. 3:

Among the many objects to which a wise and free people find it necessary to direct their attention, that of providing for their safety seems to be the first.

And Alexander Hamilton, who had been General Washington's aide-de-camp and confidential secretary, in addition to serving with distinction as an artillery captain and infantry regiment commander during the Revolution—and was appointed the nation's first Secretary of the Treasury—declared in *Federalist* No. 23:

The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed. This power ought to be coextensive with all the possible combinations of such circumstances; and ought to be under the directorship of the same councils which are appointed to preside over the common defense.

He also wrote in that same paper that the (as yet unratified) Constitution had two principal purposes:

The common defense of the members; the preservation of the public peace, as well against internal convulsions as external attacks.

Thomas Jefferson, author of the Declaration of Independence and later Secretary of Foreign Affairs, Vice President, and President, shared the views of Madison, Jay, and Hamilton, placing the national security above all other interests. In his oft-quoted letter to his friend J. B. Colvin, he wrote:

A strict observance of the written law is doubtless one of the high duties of a good citizen but it is not the highest. The laws of necessity, of self-preservation, of saving our country when in danger are of higher obligation.

It would be absurd, Jefferson continued, to permit scrupulous adherence to written law to bring about the loss of our country, thus also losing the law itself, with life, liberty, property, and all those who are enjoying them with us.

If these quotations from the Founding Fathers demonstrate anything, it is that, contrary to the claim of Professor Foster, the prevailing conception of security in this country is most definitely not a product of Cold War thinking. If space permitted, numerous current court holdings and legislative and executive findings on what constitutes national security could be used to prove that, to a remarkable extent—as indicated by the above quotations—it reflects the wisdom and prescience of our forbears, having remained unchanged for some 200 years.

It is a distortion to assert, as the Professor does, that the Preamble to the Constitution is, in fact, nothing if not a security manifesto of the kind President Clinton must cajole the United States into accepting if he hopes to achieve *global security* by bold initiative and progressive change. This is so, he asserts, because our present concept of security breeds a chauvinistic intolerance and paranoia that subvert the enlightened democratic principles of the Constitution.

Putting aside for the moment the fact that a security concept taken from the Founding Fathers would hardly subvert a Constitution also inherited from them, the fact is that the Preamble is a security manifesto only in part; specifically in its objective of providing for the common defense and insuring domestic tranquillity. Beyond that it is no more than a broad statement of the general, all inclusive, non-security aims of the government envisioned by our

*Continued on page 4*

### Small World

Former Standing Committee Chairman and University of Virginia Law Professor John Norton Moore reports that while attending a conference on international negotiation in the Middle East last month he heard a news broadcast based upon former DCI Robert Gates's remarks to the February 18th Standing Committee breakfast. The full text of Dr. Gates' remarks appears in the February issue of the *Report*.

## "National Security" . . .

*Continued from page 3*

forbears, who were far too cultured to conceive of any satisfactory government having only security objectives, as important as they clearly believed them to be.

To make everything national security is to make nothing national security; it is to lose the value and very meaning of the term. If we were to include everything embraced by the Preamble in our concept of national security, we would be putting all governmental objectives and functions on an equal footing, denying to any one or several elements of any special significance or value from the standpoint of national survival. Presumably, federal tea tasters, the Health Care Financing Administration and the National Endowment for the Arts contribute to the general welfare, else they would not be funded. But to put them on an equal footing with the Army, Navy, and Air Force, from the viewpoint of national survival, is to stand logic on its head.

Professor Foster argues that 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. But that is not a universal truth. In some circumstances it would be; in others, not. What would have happened if George Washington had tried to enhance his security by those means at Valley Forge?

As for the Professor's dreamy "mays," i.e., defense reductions *may* relieve tensions and remove a major source of provocation, intimidation and insecurity, investing in national cohesion *may* provide a greater and more lasting payoff than investing in military capabilities, increased levels of defense *may* have the inadvertent effect of heightening tensions and precipitating countermeasures that actually weaken security, one can only say: "True. True. They 'may.'" But then again, they may *not*. And if they don't, where does that leave us? More importantly, where in history (Cold War or pre-Cold War) or in the wisdom and prescience of our forbears can support for these fanciful concepts be found?

Our present "outmoded" concept of national security has not only kept us free for over 200 years; it has just brought us victory over the greatest threat to democratic values and government the world has ever known. I would stand by it.

*Mr. McNamara served as executive secretary of the Subversive Activities Control Board and staff director of the House Committee on Un-American Activities (Internal Security). His military service included both combat and strategic intelligence.*

## Papers Available

### NSIC Sponsors Working Group on Intelligence Reform

The National Strategy Information Center's Consortium for the Study of Intelligence has been hosting a Working Group on Intelligence Reform for most of the past year. Chaired by Harvard Professor Ernest May and Georgetown Professor Roy Godson—and designed in part to examine and respond to proposed legislation to reorganize the intelligence community—the working group has produced a number of useful papers which are available to the public at a nominal charge of two dollars each. These include:

- "The FBI's Changing Mission in the 1990s," by Pat Watson, Deputy Assistant Director of the FBI's Intelligence Division;
- "What is Intelligence?," by Abram Shulsky and Jennifer Sims;
- "Thinking About Reorganization," by UCLA Professor James Q. Wilson; and
- "Covert Action in the 1990s," by Roy Godson with commentary by Richard Kerr and Ernest May.

Forthcoming titles in the series will include a paper on "The CIA's Evolving Analytical Program," by David Cohen, Associate Deputy Director for Intelligence at CIA, and "Intelligence and Technology in the Post-Cold War Era," by Dr. John Foster, Chairman of the Defense Science Board.

For further information, contact: Consortium for the Study of Intelligence, Suite 500, 1730 Rhode Island Avenue, N.W., Washington, D.C. 20036.

### Calendar of Events

**April 22**—Breakfast—International Club  
(Speaker: Senator Dennis DeConcini,  
Chairman, Senate Select Committee  
on Intelligence)

**June 3-4**—Conference—International Club  
"Anarchy in the Developing World"

## New JAG Mission . . .

*Continued from page 2*

Clearly, Peruvian soldiers in the field had to be given adequate and meaningful human rights training if they were to be held accountable and if they were expected to be better prepared to cope with the abuses of terrorists. Furthermore, this training had to be institutionalized into the very fabric of the Peruvian military system, so that human rights training would be a continuous requirement for all soldiers. Cultural, language and social barriers suggested the best chance for success would be for Peruvian instructors to deliver the actual subject matter presentations.

After extensive meetings with representatives from each of the Peruvian services, including The Judge Advocate General of the Peruvian Army, a joint concept plan was formulated. The goal of the plan was to teach Peruvian judge advocates "how to teach" human rights and then to assist those same individuals in developing lesson plans that they could use to present human rights classes throughout the Peruvian military.

As a final product of this effort, a human rights manual entitled "The Ten Commandments of Human Rights" was developed by a team of Peruvian and American attorneys. This manual is now being used as a primary text for training the armed forces of Peru. In short, human rights training is now being taught throughout the military by Peruvian instructors. As never before, human rights training is now institutionalized into the Peruvian military.

### Conclusion

The success story in Peru must be tempered by the fact that human rights training can only be effective to the degree that it is inculcated into the psyche of the military. At a minimum, the Peruvians now have a standardized human rights training program of instruction that is truly their own. It is now up to the Peruvians to continue the effort. In this regard, the strategy to keep the U.S. role as that of a "helper" and

not as an overseer has paid tremendous dividends.

In the larger picture, the end of the largest totalitarian system the world has ever known, the U.S.S.R. and the Warsaw Pact, offers a unique opportunity to advance the rule of law and respect for human rights. The world now looks to the United States to provide moral and political leadership, and the United States is stepping up to meet the challenge. As a part of that movement forward, we are using U.S. military attorneys as a vehicle to achieve goals and programs that are fundamental to our national security—promotion of the rule of law and human rights throughout the world.

---

*Major Addicott is assigned to the International and Operational Law Division of the Office of the Army Judge Advocate General. Major Warner is with the International Law Division at the Army JAG School.*

### Notes

<sup>1</sup> Jeffery Smith, "Defense Policy Post Restructured" *Washington Post*, Jan. 28, 1993, at A1, col. 4.

<sup>2</sup> See Jeffrey F. Addicott, "Operational Law Note: Proceedings of the First Center for Law and Military Operations Symposium," *The Army Lawyer*, Dec. 1990, at 47. To better support evolving missions associated with overseas deployments, the Judge Advocate General's Corps developed a new legal discipline in the late 1980's. Termed Operational Law, a working definition is: "That body of law, both domestic and international, impacting specifically upon legal issues associated with the planning for and deployment of U.S. forces in both peacetime and combat environments." In 1988, Secretary of the Army John Marsh (a three term member and current Counselor of the Standing Committee—*ed.*) established the Center for Law and Military Operations at the Army's Judge Advocate General's School in Charlottesville, VA. The Center is dedicated to examining the legal issues associated with military operations, and to making recommendations on how to improve the preparation, deployment, and conduct of military operations.

<sup>3</sup> See The Foreign Assistance Act of 1961, *as amended*, 22 U.S.C. 2347, which provides the authority for security assistance under the International Military Education and Training (IMET) program. These two goals are taken from Title II of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1991, Public Law 101-513; 104 Stat. 1997.

## Standing Committee on Law and National Security

*Chairman:* John H. Shenefield. *Members:* David R. Brink, Richard E. Friedman, Michael S. Greco, Edward Hidalgo, Lucinda A. Low, L. Britt Snider, Delbert L. Spurlock, Jr., Paul Schott Stevens, Richard K. Willard, Dianne P. Wood

*Staff Director:* Holly Stewart McMahan (202) 466-8463

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

**Army Report on Iraqi War Crimes Sent to Security Council**—On March 19 the United States submitted a detailed report on Iraqi war crimes during the Gulf War to the U.N. Security Council. According to press accounts, the report—prepared by a group of Army lawyers—concluded that at least 1,082 civilian deaths could be directly attributable to Iraqi criminal conduct, including 120 babies and another 153 children under the age of 14. Filled with grisly details of torture by electric drills and soaking people in acid, the report said that women prisoners were repeatedly raped and that some Kuwaiti civilians were executed by dismemberment. In August 1991 the American Bar Association approved a Standing Committee-sponsored resolution calling for the trial of Iraqi war criminals—a position also taken by both Houses of the U.S. Congress and the unanimous Foreign Ministers of the Council of Europe. The *Washington Post* (March 20) quoted State Department spokesman Joseph Snyder as saying “The question of an Iraqi war crimes tribunal is a matter that’s under consideration at the moment.” In an earlier development, on February 22 the Security Council approved the establishment of an international war crimes tribunal for the conflict in former Yugoslavia.

**DPRK-IAEA Clash Leads to NPT Withdrawal and Possible Security Council Action**—As suggested here last month, North Korea’s refusal to permit inspections of suspected nuclear weapons facilities by the International Atomic Energy Agency (IAEA) led to an unprecedented demand for a “special” inspection, which in turn led the Pyongyang regime on March 12 to withdraw from the Nuclear Nonproliferation Treaty (NPT). The IAEA then set a deadline of March 25 for compliance with its inspection demand, after which it has the option of reporting the problem to the U.N. Security Council for possible action. In that event, whether China would use its veto to protect its long-time friend and neighbor was uncertain. Reporting on the issue, the New China News Agency quoted a foreign ministry spokesman as saying the issue “should be settled properly through consultations in a manner conducive to the universality of the [NPT] treaty.” Yevgeny Primakov, director of the Russian Foreign Intelligence Service (FIS) counter-intelligence service, said during a press conference on January 29 that North Korea has increased its “capability” to produce nuclear weapons but does not yet have a device. On March 11, Japanese Foreign Ministry sources told the Kyodo news agency that North Korea appears to have produced between 35 and 50 pounds of weapons-grade plutonium from its nuclear facility at Yongbyon—enough to produce two or three nuclear devices. North Korea’s Ambassador to China, Chu Chang Jun, responded to the IAEA deadline by telling a press conference Pyongyang would take “strong defensive counter measures” in response to any international sanctions—suggesting to some the possibility of a renewal of international terrorism by the radical regime.

**FIS Says Pakistan has Four to Seven Nukes**—On January 28 Russia’s FIS released a report (*New Challenges After the Cold War*) saying that Pakistan now possesses four to seven nuclear devices.

**Iranian Weapons of Mass Destruction Programs Outlined**—According to the *London Financial Times* (March 9), retired DCI Robert Gates told a BBC Panorama program that Iran could have a nuclear weapon by the end of the decade and that there is evidence that Iran has from a few hundred tons to as much as 2,000 tons of stockpiled chemical weapons—including choking, blister, and blood agents. Iran is a signatory to the 1993 U.N. chemical weapons treaty. Other sources report a continuation of Iran’s military buildup—including the development of a domestic arms industry already turning out short-range ground-to-ground, air-to-air, and anti-tank missiles. Iran has purchased MiG-29 fighters, T-72 tanks, and even two submarines from Moscow, as well as Scud C missiles from North Korea and Silkworm missiles from China. (See, e.g., *Christian Science Monitor*, March 4.)