



# National Security Law Report

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## September Breakfast Remarks

### Carlucci Offers Five Rules for Effective Policy

*Former Defense Secretary and White House National Security Adviser Frank Carlucci addressed the Committee's first breakfast program of the new season on Tuesday, September 26, at the University Club. Excerpts from his remarks follow.*

I have been working with this committee since the days of Morry Leibman, and I have always admired the contribution that you have made. . . . I know that under Paul's leadership you will continue to . . . contribute mightily to our national security.

[The person standing before you today is probably the ultimate product of the Cold War. I came out of college at the time of Korea right into uniform. . . . I was sent as Ambassador to Portugal when the Communists were in control trying to pry Portugal loose from NATO. I was in the Agency at the time of the so-called "spy wars," and I was point man on the budget under Cap Weinberger during the Reagan buildup. The KGB has put out books on me. I've been arrested. I've been declared *persona non grata*. By the time I got to be Secretary of Defense, you can bet I knew who the enemy was.

Hence my bewilderment when I was faced with a strange and important decision. The Soviets—Shevardnadze to be specific—had suggested that we establish military-to-military contacts, and my predecessor, Cap Weinberger, had rejected that—partly because he was distressed, appropriately so, at the brutal murder of Major Nickelson . . . on a legitimate mission into East Germany, but partly because he didn't trust the Soviets and thought nothing would come of the process.



*Former Defense Secretary Frank Carlucci spoke at the September Standing Committee breakfast.*

I decided to change that decision, and told the Soviets I would negotiate with them if we got a formal apology for the murder of Major Nickelson. I ended up in the first meeting virtually dictating that letter of apology to Marshal Yazov, the Soviet Defense Minister, and we went ahead and structured military-to-military relationships.

I found myself to be the first non-Soviet military person to climb through the Blackjack bomber, I gave a lecture to 200 of the top Soviet generals and admirals at the Voroshilov military academy on what was wrong with their doctrine; Bill Crowe set up a personal relationship with Marshal Akhromeyev, and we set up ship visits and contacts all the way down.

That had a remarkable effect. I have been told this time and time again by people in the former Soviet Union. The Soviet military was able to see at first hand our strength, but they came to learn too that our intentions were not hostile. And I think it is a very good use of the military as a tool of diplomacy—certainly it helped to unravel the then-Soviet Union. It has come unraveled, no doubt about that—Communism as a philosophy is dead forever and we have been spared Armageddon in our lifetime—but it is not, as somebody said, the end of history. What we are seeing are regional wars,

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irredentism, ethnic disputes, and—above all—weapons of mass destruction, not just nuclear weapons but biological and chemical weapons. It is very scary to see how close Saddam Hussein came, and one of the most under-reported phenomena of our day . . . has been the leakage of nuclear material and technology from the former Soviet Union. The thought of weapons of mass destruction in the hands of terrorists is a very troubling thought indeed.

It is somewhat of a bewildering situation. We have lost our guide posts. A monolithic threat, as massive as it was, was really in many ways easier to deal with. We now have to decide how much attention and resources to devote to each and every problem, and in certain cases we have to make that crucial decision whether or not to intervene. Were we right to intervene in Somalia, or was it just mishandled? Was Haiti really a “national security” issue, or have we helped to install a new dictatorship? Could we have saved lives had we entered earlier in Rwanda? And then there is the case of Bosnia, about which more later.

The point is that there is no common thread that runs through these situations. Everybody says we intervene when our “vital interests” are at stake. Okay, you’re all lawyers—define “vital.” One person’s “vital interest” is not another’s. I think we could all pretty much agree in this room that we did the right thing in Desert Storm, but think back to how close the vote was in Congress. There is no automatic trip-wire any more, just a series of tough decisions—decisions that are being made tougher by some of the xenophobia that we are seeing in the current campaign. Pat Buchanan wants to build a wall around the United States, Pete Wilson attacks immigration in the shadow of the Statute of Liberty, and Bob Dole has discovered that we shouldn’t be a multi-tongue society after all. Dick Gephardt pursues a siren call for protectionism, and even Clinton, although I think he would probably prefer to forget this, ran as the “domestic” president.

Are we going isolationist? Rudy Giuliani accused the Congress of this the other day, Clinton accuses the Republicans of being isolationists, the Republicans at the time of NAFTA accused the Democrats of being isolationists. It’s really used more as a epithet. I don’t think the American people are buying in to any kind of isolationist

philosophy—if for no other reason than they realize that their jobs are at stake. Companies on whose boards I serve . . . in almost every case, the fastest growing area, is the international area. In 1994, one-third of our growth came through exports. People realize that their future livelihood depends on world growth and stability.

But there is another trend that I find perhaps even more disturbing than the possibility of isolationism, and it was identified in a brilliant speech the other day by Jim Schlesinger. That is to look at foreign policy as a pure extension of domestic policy or, if you will, domestic politics. To do what is “popular” and not what is “necessary.” If we do that, then foreign policy becomes driven by the media, which, of course, is unaccountable. As Jim points out in his speech, we inherited a European tradition

where foreign policy had primacy. It has to have primacy in countries like Germany and France, because their very survival is at stake—and in the UK, because the survival of the Empire is at stake. Even we, in two world wars, learned the value of a bipartisan approach, but that seems to have broken down.

The other day, a senior White House person was quoted as saying: “Nobody gets to the right of us on Iran.” There was the Gerry Adams visit, and Newt Gingrich’s throwaway statement that maybe we ought to look at two Chinas.

This kind of foreign policy by domestic compass, of course, leads to inconsistencies. Just to cite a couple, we are castigating the Russians for selling a light-water reactor to Iran—and we want to *give* the same kind of reactor to North Korea. We embargo

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### **Paul Schott Stevens**

*Chairman, Standing Committee on Law and National Security*

### **Holly Stewart McMahon**

*Staff Director*

### **Robert F. Turner**

*Editor*

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## October Conference Remarks

# Congressional Interference with Constitutional Powers of the Executive

by Alan Kreczko

*The following article is excerpted from remarks made by NSC Legal Adviser Alan Kreczko to the Standing Committee's 5th Annual Review of the Field Conference in Washington, DC, on October 19, 1995.*

For those who thought that election results of last November might result in fewer challenges to presidential prerogatives carefully guarded during the Bush and Reagan Administrations, that hasn't happened. In fact, it may have increased. I'll give several examples.

### Negotiation

I think nearly all commentators would agree that the President determines whether to negotiate and what to say in negotiations. The courts don't seem to have any difficulty reaching that conclusion. For example, courts in *East Island v. Christopher* recently said that a statute that "orders the Executive to negotiate and enter into treaties with foreign nations impinges on power exclusively granted to the Executive Branch under the Constitution." Yet we continue to see legislation purporting to direct the President to pursue certain negotiations with foreign countries.

### Recognition

The Supreme Court in *Sabattino* said that "political recognition is exclusively a function of the Executive." Ronald Reagan took the position that a bill purporting to require him to move the U.S. embassy in Israel to Jerusalem was "so closely connected with the President's exclusive constitutional power and responsibility to recognize, and to conduct ongoing relations with foreign governments as to be beyond the proper scope of legislative action." And he took the position that he would construe provisions in the

1989 Foreign Relations Authorization Act that forbade the closing of any consulates to avoid unconstitutional interference in his constitutional authorities. And, President Grant rejected back in 1876 any right in the legislative branch to direct the closing or discontinuing of any of the diplomatic or consular offices of the Government because "doing so would invade the constitutional rights of the Executive."

Nonetheless, Congress has recently considered legislation that would tell the President he can't open offices in Vietnam or Laos, that he must open an office in Tibet, and he must move our embassy in Israel to Jerusalem, and he can't give entry visas to Burmese officials and that he must permit entry of the President of Taiwan. These are not exercises of congressional authorities based on money concerns or immigration, areas where they clearly have constitutional authority. These are provisions clearly, and some times explicitly, aimed at the issue of recognition and whether the United States maintains diplomatic relations with a country.



*National Security Council Legal Adviser Alan Kreczko spoke at the 5th Annual Review of the Field Conference.*

### Treaty Interpretation

I would have thought it clearly accepted that the President is entrusted with execution of law and that includes interpretation of the law. Yet, we are seeing legislation that would purport to direct the President in the interpretation of a treaty, like the ABM treaty.

### Intelligence Sharing

Intelligence sharing is part of the conduct of foreign affairs. The Supreme Court has said the President is the voice of the United States in diplomatic relations and separately that the Constitution vests in the President control of state secrets. Yet we are seeing legislative efforts to control the extent to which and the conditions under which the President can share intelligence with foreign governments or international organizations.

### Commander in Chief

The Constitution is explicit in designating the President as Commander-in-Chief. We have an

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*Georgian Ambassador Tedo Japaridze (center) stands with Standing Committee member Richard Friedman (left) and Chairman Paul Schott Stevens after addressing a recent Committee dinner at the Cosmos Club in Washington.*

## Kreczko on Congress . . .

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ongoing debate with Congress about who decides when to deploy U.S. troops, but I did not think there was any real room for argument about how they are commanded once they are deployed. Courts have emphasized that this is exclusively presidential authority. No President has relinquished ultimate command of U.S. forces, but the text of the Constitution and 200 years of precedent unequivocally supports the right of the President to place U.S. forces under temporary operational command of foreign commanders. This was the case in World War II, in Korea and in Desert Storm. Yet some in Congress would purport to legislate restrictions on this.

Gene Rostow [who was being honored by the Conference] has written that the Framers intended to ensure that the President would not be in "the humble posture of George Washington during the Revolution, when he functioned as commander-in-chief, but the creature of the Continental Congress or its committees in every respect."

However, I don't want to be one-sided. There has been a development which is quite positive in this area. Representative Henry Hyde last spring introduced an amendment which would have removed the 60-day withdrawal provision from the War Powers Resolution. It did not pass, but the debate was very interesting. There was widespread recognition that the War Powers Resolution has failed as a vehicle for Executive-Congressional relations on these issues, and that the 60-day clock was part of the problem. It was a useful debate, which I hope will continue.

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Iran, yet we look the other way when they ship arms to Bosnia. The Chinese must be puzzled over our strong reaction to Tibet and Tiennamien and our mild reaction to Chechnya.

And then, of course, there is Bosnia. Let me say at the beginning that in my judgment there were clear mistakes made by the Bush Administration, and Bill Clinton came into office with the right instincts—the so-called "lift and strike" philosophy. Warren Christopher went over to Europe to try and sell that approach, and he was rebuffed. Instead of insisting, we in effect abdicated and the situation got worse.

What we have done is deprive a nation of its right under Article 51 of the UN Charter to self-defense. We said: "Don't worry, we will defend you if you put your people in safe havens." Then, we failed to defend them. The result, of course, is Genocide and an enormous erosion of credibility. Our policy evolved into a policy of noninvolvement, and you can't solve problems through noninvolvement. We offered the Serbs one concession after another, all of which they rejected because they knew that the next concession would be better.

Finally, thanks to France and the Croats, and the move in Congress to lift the embargo, the Clinton Administration moved and orchestrated military power and diplomacy together. I have only words of praise for the way Dick Holbrooke has handled that. This approach is long overdue. But I wonder if we are pursuing the right diplomatic solution. Our avowed goal has always been a multi-ethnic democracy. But if you look at what seems to be coming out of these negotiations, they're talking about two federations—the Muslim-Croat Federation and a Serb Federation with a weak Muslim government which could lead almost immediately to partition and the creation of a Greater Serbia. Have we in fact blessed the results of ethnic cleansing? A lot of the world thinks so, and that of course has wider ramifications, particularly in the Muslim world.

## Calendar of Events

**January 22**—Breakfast Meeting, University Club (Speaker: General Charles Krulak, Commandant, U.S. Marine Corps)

**February 15**—Breakfast Meeting, University Club (Speaker: The Honorable Larry Combest, Chairman, House Intelligence Committee; Vice Chairman, Commission on Protecting and Reducing Government Secrecy)

The Muslims . . . are wondering if there isn't a double standard. Nobody defends Saddam Hussein, but they do contrast the way in which we dealt with Saddam Hussein and the slowness with which we came to deal with the Serbs, and the blind eye we cast in the case of Chechnya. Add to that, the constant portrayal of terrorists as Muslims, the anti-immigration feeling in Europe and the United States, and a view of our Middle East policy that we are only interested in the peace process (and here, by the way, we are doing well) and selling goods to the Arab world, not in the broader security interests of the region, and you have a kind of estrangement setting in.

Now, I don't believe in Sam Huntington's theory of the clash of civilizations. The Muslim world will only be our enemy if we make it our enemy. But we in this country have a very inadequate understanding of the Muslim world. It is not monolithic, as our press portrays it. "Fundamentalism" isn't bad. Zia was a fundamentalist, and the King of Saudi Arabia, who is our friend, is a fundamentalist. What we have to worry about are what are called the "Islamicists," the so-called "radical fundamentalists," but I don't view them as religious. This is a political movement, exploiting social unrest in the name of religion, and we have to be very careful that we don't play into its hands at the expense of our many friends in the Muslim world.

Well, you may say, "Frank, if you're so smart, how would you put together a consistent foreign policy in today's world?" Well, of course, there is no magic formula; but I would suggest to you that we take a look at five tried-and-true fundamentals:

One, of course, is leadership. Now, that's a much abused word these days, but by "leadership" I mean the ability to rise above domestic interests; because unless we can rise above domestic interests the rest of the world is not going to follow. We must be able

to do the unpopular thing. It is up to our presidents to help shape public opinion in the national security area when necessary, and it is up to our Congress to allow the President the flexibility to conduct foreign policy.

We need to set a policy, and we need to follow it. That's been part of the problem in Bosnia. We had a policy of a multi-ethnic democracy, and we moved off of that to a policy almost of "peace at any price." The result was we were unwilling to put resources and will behind our policy, and we ended up with a good deal of confusion.

Third, let's maintain our foreign policy tools. Under the current State Department budget that is being passed, Warren Christopher says that he will have to close some 50 consulates and embassies—at the very time that we ought to be expanding our diplomatic presence. Foreign aid has been slashed by 10%. Now, I agree with the Republicans that we need to take a good hard look at the AID bureaucracy; but we need to maintain aid as a tool—Mitch McConnell has said that—because it is the one thing we have between diplomacy and sending in the Marines.

In the Defense area, my own view is that we have cut too far, too fast. The overall budget has been cut by some 40-some percent, and since its peak in 1987 procurement has been cut close to 70 percent. The GAO has observed that the Pentagon funding shortfall, in terms of its own strategy, its own program, is about \$150 billion over a five year period. Nevertheless, I think Bill Perry is a terrific Secretary of Defense, who is doing the very best he can with totally inadequate resources.

Fourth, we have to focus on our key relationships. If you can manage those key relationships, the others are much easier to deal with. If I could just briefly run down some of them, our relationships

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

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*Advisory Committee Chair:* Richard E. Friedman

*Staff Director:* Holly Stewart McMahon

740 15th St., NW

Washington, D.C. 20005-1009

(202) 662-1035

fax (202) 662-1032

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with Europe have been in some disarray. The most frequent comment you hear in Europe is "What is your policy today?" "Are you becoming risk-averse?" "You're willing to put in your airplanes, risking our soldiers on the ground in Bosnia." In the UK, they are still smarting over the Gerry Adams affair. And then there are serious issues, serious differences, such as NATO expansion. Overall, I would say that relations, particularly in the last couple of weeks, are improving with our European friends, but they have a way to go.

In Japan, the perception of course, is that our policy is driven by confrontational trade—that which is domestically popular—and that we are willing to sacrifice our national security interests in Japan on the altar of trade. Let's be very clear about one thing: if we're going to maintain a security presence in the Pacific, we have to have a close security relationship with Japan. And unless we maintain that security presence in the Pacific, we're not going to participate as fully as we might otherwise in the region's enormous economic growth.

China—we have a strategy, but we don't seem to be capable of implementing it. The strategy is constructive engagement, but one day we are talking about cutting off MFN, and then we switch on that and say "Oh, will you help us on North Korea?" and "We're going to send over a trade mission"—and the next day we tell them that President Li Teng-hui of Taiwan is not going to be allowed to visit the United States. One day later our Secretary is overruled and Li comes to the United States. Now, the Chinese are behaving very badly—rattling their sabers in the Straits of Formosa, abusing human rights, and making threats toward Hong Kong. But we need to recognize that there is a leadership vacuum in China, and the only way to deal with that country is not—as some of our Republican friends are saying—through containment or confrontation, but through engagement. This is a major foreign policy problem, and will be as long as we are around.

In Russia, we may be over engaged. The question is whether we are supporting the man or the process. This was, by the way, a failing of both the Reagan and the Bush Administrations. Yeltsin has clearly become more isolated as a result of Chechnya, and despite some progress on the privatization front, there is rising nationalism—and right now it looks like General Lebed may be the strongest contender to succeed Yeltsin. As a nation, we're used to dealing in black and white; and we can't quite make up our mind whether Russia is an emerging democracy or a resurgent empire.

## JNSL Solicits Papers

The newly-established *Journal of National Security Law* is seeking original papers, case commentaries, reviews, and other materials of interest to the national security law academic community for possible publication.

For further information, contact Professor Robert N. Davis, faculty Editor-in-Chief, *Journal of National Security Law*, University of Mississippi School of Law, University, MS 38677, or telephone him at (601) 232-5560.

Finally, I think we need to think ahead. We miss Herman Khan. The Pentagon has done a study, called *Revolution in Military Affairs*—a very good study. . . . It's looked in to the weapons development in between wars through history, whether you are talking about the tank, the carrier, the airplane, the machine gun—and they drew an interesting conclusion. The conclusion is that it is not so much the technology that counts, but it is how the technology is used, what are the operational concepts. The classic case was the tank, which was introduced into warfare in 1917 but wasn't used effectively until the blitzkrieg, when the German's used the tank to defeat, practically overnight, a superior French force.

The point is that we shouldn't take too much pride in the technology that we have—long range, stealthy, precision strike, and information dominance are the revolutionary technologies that have come out of our time; but we have to worry about the future—how they are used, and how other people may be thinking about using that technology. Military capability takes time to build up. The other day, a man came up to me . . . and said "You don't know me, but I fought in Desert Storm, and I just want to thank you, and those who worked with you, for what you did to get the equipment out there. Because we know that it took ten-to-fifteen years to get that equipment in the field. This is a lesson that cost us dearly in World War II and Korea. What we don't devote today in resources, we may end up paying in blood.

The Cold War has, of course, been our greatest victory; because there was very little bloodshed. This is due to the fact that we had a bipartisan policy, we stuck with it, we put resources along side of it, and we did the appropriate planning. We seem to have managed the confrontation and crisis well. Now we have to learn to manage success—and that may turn out to be a lot harder to do.