Shenefield Testifies on Terrorism Bill

Emphasizing that he was appearing in his individual capacity and not on behalf of the American Bar Association or the Standing Committee, Chairman John H. Shenefield testified before the House Judiciary Committee on June 13th on proposed new counterterrorism legislation. The Standing Committee is grateful to the diverse group of experts who on very short notice contributed ideas to his prepared statement, which follows.

Mr. Chairman and Members of the Committee, I am pleased to testify in connection with the Comprehensive Antiterrorism Act of 1995, H.R. 1710.

I serve as Chairman of the American Bar Association’s Standing Committee on Law and National Security, which is composed of eleven senior lawyers with expertise and experience in dealing with the legal aspects of national security issues. The Standing Committee sees its role as educating America’s lawyers on the importance of the rule of law in the national security arena. This testimony, however, is not delivered on behalf of the American Bar Association and does not purport to represent its official policy or position. Nor can it represent in any official way the position of the Standing Committee. Instead the testimony does reflect a rough informal consensus of members of the Standing Committee, which has been analyzing several legal issues related to terrorism in recent years, and seeks to make available to the Congress some of the lessons distilled from that analysis.

In general, I support the Comprehensive Antiterrorism Act of 1995. I believe it strikes an appropriate balance between the prevention of terrorism and the efficient apprehension and conviction of...
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terrorists, on the one hand, and the protection of
civil liberties on the other. The bill undertakes to
resolve some extremely vexing issues, and it does
so in an admittedly aggressive way. I applaud the
determination of the Executive Branch and the
Congress to bring the full weight of federal law
enforcement, within constitutional limitations, to
bear on terrorism.

At the outset, let me suggest the appropriate
analytical context within which to consider the pro-
posals contained in H.R. 1710, or indeed any other
proposals. First and foremost, as Americans we live
in an open society undergirded by the rule of law. In
seeking to combat terrorism, we are defending that
way of life — it is what we are fighting for.

Therefore, in seeking to deal effectively with the
problems of terrorism, domestic and international,
we must be vigilant to preserve and maintain the
openness of our society and the legality of our
counterterrorism policies and practices. Our citi-
zens must be clear on this essential point; so also
our security officials.

How then to deal with the immense variation in
terrorist activity? How best to develop a sufficiently
flexible response so that truly serious threats can
be investigated without impinging unduly on civil
liberties? To these questions, there are no simple
answers.

The key concepts are balance and proportion.
Not all terrorists are created equal. Not all terrorist
acts are equally threatening. Yet some terrorism
can strike at the very heart of an open society.
Government must therefore have at hand capabili-
ties to deal with conspiracies of the most dreadful
import, where loss of time or investigative effective-
ness risks catastrophe. At the same time, not all
investigative powers need to be used in every case.
Certain of the most intrusive techniques should be
thought of, and regulated within the government,
as techniques of last resort.

In part, the judgment of balance and proportion-
ality is a legislative one. Powers that can never be
used in our society should never be legislated into
existence. That is not, to state the obvious, a justi-
fication for failing to provide society — and its gov-
ernment — with the ability to use powers in times of
emergency or need. The investigative tool, kept in
reserve, is nevertheless available for use when needed.
To put it beyond use, even when needed, would
be both unwise and immoral.

But the judgment on balance and proportionality
is also a question for the Executive Branch, for the
implementers of the policy, for the security offi-
cials. It is not common in Washington in these days
to be reassured by such a statement, and yet it must
be the case. Our government, and especially our
law enforcement agencies, and most especially the
Department of Justice, are operated by men and
women of great competence and dedication who
work long hours, mostly without recognition, to
protect and defend our open society under the rule
of law. Until the contrary is demonstrated as to any
individual, I strongly believe that a presumption of
integrity and legality should be accorded our law
enforcement community. And it is that presump-
tion that must ultimately guide the members of
Congress in assessing the proposals in this bill.

That is not to say that mistakes will not be made.
Of course they will — that is the price we pay for
living in the real world. But they will certainly be
infrequent, and when they are made, they are more
often than not failures of the system rather than
examples of the system gone bad.

The overheated rhetoric about government con-
spiracies to deprive citizens of their rights is wrong.
The notion of investigative agencies straining at the
leash to break the law is wrong. The fear that
government officials, when given great power, will
always or sometimes or ever abuse that power is
mostly wrong. We must always be alert to that
possibility; we cannot be immobilized by it.

And so, the question to ask of any proposal in H.R.
1710 is whether on balance it is proportional to the
danger that it targets — flexible enough to be avail-
able when necessary, under appropriate safeguards
and regulation. And what are the ways to ensure
that these great powers are actually used only in the
appropriate cases?

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BOOK REVIEWS

Nicaragua and the World Court

The World Court: What It Is and How It Works
Fifth Completely Revised Edition
by Shabtai Rosenne

Justice in International Law: Selected Writings of Stephen M. Schwebel

These are two excellent volumes by preeminent scholar/practitioners that deserve wide readerships among those interested in the role of the International Court of Justice—and, indeed, international law itself—in promoting national and international security.

Shabtai Rosenne must surely be ranked as the dean of international legal scholars on the topic of the world court, and this latest edition of his more than thirty-year-old classic is guaranteed to remain the standard reference work on the subject. A foreword by ICJ President Mohammed Bedjaoui appropriately notes the existence of a wealth of fine literature about the Court, but observes that Ambassador Rosenne occupies “a quite distinct place” as “the quintessential author, the reference and the standard of value, the jetty to which all studies on the Court are secured.” This is unusual praise from an international public servant, but it is fully warranted and is unlikely to be seriously challenged in this instance.

The World Court should be of interest to readers of the Report on two levels. First of all, it provides an excellent and authoritative overview of “what the court is,” examining its predecessors, its relationship with the United Nations, its judges; and it then looks at “how the Court works,” with chapters on jurisdiction, and on the procedural and substantive work of the Court. The controversial Paramilitary Activities Case (Nicaragua v. United States) is used by Professor Rosenne to illustrate the workings of the Court, which makes the volume all the more interesting to Americans interested in national security law. The author explains that the case was selected because “it raised almost every conceivable issue likely to be encountered in modern international litigation before the International Court.” However, he adds in his Preface: “While this book was in preparation, evidence came to light demonstrating that the applicant government (the Sandanista [sic] Government of Nicaragua) had been deceitful in its presentations to the Court—a very rare instance of this kind of behavior.” The evidence is discussed in a postscript to chapter 5.

An explosion in a car repair shop in Managua on 23 May 1983 led to the discovery of a weapons cache containing, among other things, a number of surface-to-air missiles, large quantities of ammunition and military weapons, and plastic and other explosives. Many documents were also found, including 300 passports of different nationalities. This was established as belonging to the Salvadoran guerrillas, material assistance to whom had been denied before the Court by Nicaragua. . . . This cannot be reconciled with statements made in Court on behalf of Nicaragua.

The revelations (sic) that followed this explosion led to a grave crisis of confidence between the Secretary-General of the United Nations and the Salvadoran guerrillas, who later acknowledged their deception of the Secretary-General . . . and apologised to the Secretary-General (sic) . . .

To a very large extent these revelations (sic) brought to light a situation closely resembling that which had been described by the State Department . . ., and confirmed facts elucidated by Judge Schwebel in his questioning from the Bench.

This is not the first time that an international tribunal has been misled by one of the parties in its appreciation of the facts. It remains to be seen how far these later revelations . . . will affect the different assessments that have been made of this case and its value as a precedent . . .

If one were seeking to find something critical to say about the Rosenne volume, other than the obvious lament that both books being reviewed are incredibly expensive, it would probably be that there are several annoying typographical errors—perhaps attributable to copy editors working in a second language (apparently without a “spell check” program for English)—which ought not be present in a book of such high substantive caliber (or price). These are minor distractions, however, and do not seriously detract from the excellent intellectual content provided by this otherwise excellent volume. It is highly recommended.

The most vociferous dissent in the Paramilitary Activities Case came from Judge Steven Schwebel of the United States. He wrote with considerable passion about numerous substantive and procedural errors of his colleagues on the Court, and he

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was denounced by more than one observer at the time as merely an apologist for his native United States.

Apparently, his fellow judges have forgiven him, as Judge Schwebel was elected Vice President of the Court in 1994. Any lingering suspicion in other quarters that Judge Schwebel's legal analysis of the case was influenced by his national affiliation with one of the parties will not survive a reading of Justice in International Law, which brings together thirty-six of his more than 100 articles, commentaries, and reviews extending back nearly fifty years. (It does not include any of his judicial opinions, writings as Special Rapporteur of the International Law Commission, or—with one exception—his work as a State Department legal officer.)

The writings are collected under five headings, including "International Court of Justice," "International Arbitration," "United Nations," and "International Contracts and Expropriation." The final section is entitled "Aggression under Compliance with, and Development of International Law," and includes several chapters of particular value to the national security lawyer. Chapter 33, for example, entitled "Aggression, Intervention, and Self-Defense in Modern International Law," reprints a lecture given at the Hague Academy of International Law in 1973—more than a decade before he was called upon to render judgment as an ICJ judge in the Paramilitary Activities Case. The 1973 lecture is fully in accord with Judge Schwebel's subsequent ICJ dissent in rejecting definitions of "aggression" that failed to include indirect uses of force—an approach which he declared in 1973 had "scant basis in the United Nations Charter, in customary international law, in the practice of States, and in the expectations of States." He reasoned: "There is simply no provision in the Charter, from start to finish, which suggests that a State can in any way escape or ameliorate the Charter's condemnation of illegal acts of force against another State by a judicious selection of means to its illegal ends."

As Ambassador Rosenne suggests, the May 1993 Managua explosion provides strong support for the factual arguments proffered by the U.S. State Department and embraced by Judge Schwebel in his World Court dissent. For both legal and factual analysis, the Schwebel Paramilitary Activities dissent deserves to be recognized as one of the truly great contributions of World Court jurisprudence of modern times. It deserves careful attention by students and scholars today. While the opinion itself is not reprinted in this volume, much of the underlying reasoning is captured in a much shorter address to an American Society of International Law audience at the Carnegie Endowment for International Peace in 1990 that is reprinted as chapter 8. Entitled "Indirect Aggression in the International Court," the address is very highly recommended.

In summary, both Rosenne's The World Court and Schwebel's Justice in International Law are major works of tremendous value to the national security lawyer. They are both recommended with great enthusiasm.

The reviewer is editor of the Report and worked on the Paramilitary Activities Case as a consultant to the Department of State. His book, Nicaragua v. United States: A Look at the Facts, was cited in manuscript form in Judge Schwebel's opinion in the case.

"Review of the Field" Conference Set for October


While the list of participants was still being finalized as we went to press, it was confirmed that Thursday morning's "Survey of New Developments in National Security Law" would include presentations by NSC Legal Adviser Alan Kreczko and CIA General Counsel Jeffrey Smith. A panel on "Reinventing the Intelligence Community" Thursday afternoon will include former DCI William Colby and former FBI Director William Sessions, followed by a dinner honoring Standing Committee Counselor Eugene V. Rostow. Oklahoma Governor Frank Keating is scheduled to address Friday's luncheon. For further information, contact Holly McMahon at the Standing Committee's office (see box on page 7).
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I. Substantive Criminal Law Enhancements (Title I)

The purpose of this title is to provide a surer and more comprehensive basis for the response of federal law enforcement to acts of international terrorism both within the United States and overseas. It establishes, really for the first time, a coherent statutory framework that would permit the federal government to attack complicity in acts of international terrorism across a broad front of jurisdictional rationales, regardless of the situs of the terrorist acts or the nationality of the offender. It also enhances our ability to deal with extraterritorial terrorist acts.

Section 102 prohibits the provision of support and resources to terrorist organizations so designated by the President of the United States, pursuant to an amendment to the Immigration and Nationality Act found in proposed section 611. Unlike some earlier versions (e.g., H.R. 896, H.R. 1710) makes no exception for funding intended exclusively for religious, charitable, literary or educational purposes. No doubt the problems of policing and enforcement inherent in any such licensing regime persuaded the drafters that it was essentially unworkable. Nevertheless, the Committee might be well advised to consider whether inclusion of some such exception and regulation, which might bear some resemblance to that of the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-06, together with certain legislative findings to undergird the reach of the prohibition, would improve the ability of the statute to withstand constitutional challenge without detracting from its effectiveness. If the Committee were so minded, we would suggest a number of technical changes to the versions incorporated in earlier statutes, and would be happy to work with the Committee’s staff to produce the optimal statutory language. I am confident that any such provision will be upheld by the courts on national security grounds and as within the foreign affairs powers of the Executive Branch. See, e.g., Dames & Moore v. Regan, 453 U.S. 654 (1981).

Section 104 creates a new violation of federal law, “Acts of Terrorism Transcending National Boundaries.” It is important that the law contain the most complete exercise of federal jurisdiction possible in connection with terrorist acts within the United States, as well as establish stringent penalties. Subsection (b) contains a catalog of jurisdictional bases currently approved by federal courts.

Subsection (d) provides an important limitation on prosecution, and requires the critical exercise of judgment as to balance and proportionality. Under this provision, no indictment or information may be sought unless the Attorney General, or the highest ranking subordinate of the Attorney General with responsibility for criminal prosecutions, has made a written certification that the offense, or any act of preparation or concealment, is terrorism as defined in proposed section 315. The fixing of individual responsibility for the certification, as is true in other statutory contexts, is an effective method of ensuring the integrity of the implementation of the statute’s clear intention that section 104 is used only to prosecute terrorism. This is quintessentially the kind of judgment we expect our highest federal law enforcement officials to make. The certification process and retrospective congressional oversight can combine to ensure that such judgments are carefully and correctly made.

Proposed section 105 (“Conspiracy to Harm People and Property Overseas”) would substantially expand the very limited federal jurisdiction that now exists in section 956 of Title 18 to prosecute conspiracies carried out in part within the United States to commit terrorist acts overseas. Section 105 complements section 104, dealing with international terrorist acts within the United States, so that federal prosecutors have the flexibility and scope to investigate and prosecute those who conspire to commit, as well as those who actually commit, terrorist acts both within the United States and around the world. The technical amendments of §§ 106-111 are wholly appropriate, as are the increased penalties provided for in Title II.

II. Investigative Tools (Title III)

Title III contains a number of enhancements to the capability of federal law enforcement to investigate terrorism or engage in foreign counterintelligence investigations. Each of these provisions seems a sensible but limited expansion of current authority. Each also employs an implicit balance between the government’s investigative needs and the individual’s right of privacy. Running throughout is the requirement that responsible officials exercise the critical judgment as to balance and proportionality.

Section 301 expands the federal authority to seek court-ordered electronic surveillance in connection with terrorism-related offenses. This section

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engages not just the panoply of internal Justice Department regulation, but also requires a 15-day report to the appropriate federal judge. Wiretaps should of course be available in connection with the most serious crimes, and there can be little doubt that those added to 18 U.S.C. § 2516, which would include protection of U.S. officers and employees, murder of foreign officials, presidential assassination, terrorist acts abroad and within the United States, fall within that category. It is hardly persuasive to argue that existing authority is used infrequently; indeed, that should be a basis of reassurance that electronic surveillance is an investigative technique to be used as a last resort.

Section 308 sensibly expands the authority for temporary emergency wiretaps in connection with crimes of terrorism. Objection to this provision has been raised on the ground that existing law, permitting emergency wiretaps where the emergency involves immediate danger of death or serious physical injury to any person, conspiratorial activities threatening the national security interest, or conspiratorial activities characteristic of organized crime, already provides sufficient legal basis. But international and domestic terrorism can take unforeseen forms with unpredictable consequences, and may not easily fit existing legal categories. The provision assumes that the Attorney General has made a reasonable determination that an intercept must be made before an order can be obtained in the ordinary course, even with due diligence. This provision, giving federal law enforcement flexibility in exigent circumstances, seems particularly wise.

Section 309 provides for expanded authority for multi-point, or roving, wiretaps. Under current law, roving wiretaps are permissible only upon a showing that the subject’s use of different telephones is intended to thwart law enforcement investigations. The new provision removes that inefficient requirement, and substitutes instead the more practical requirement that senior law enforcement officials and the judge to whom the application is made find that specification of the telephone to be tapped is impractical, the same standard that exists in current law for multi-point listening devices.

The fourth amendment requires that in its request for a search warrant the government particularly describe the premises to be searched. In the case of wiretaps, traditionally the fourth amendment’s particularity provision has been construed to require the government to specify the location of the telephone to be tapped, unless the special finding of an attempt to evade can be made.

In theory, removal of the special finding for oral communications has the potential for giving inadequate emphasis to the constitutional particularity requirement, which is designed to avoid the surreptitious interception of the telephone calls of wholly innocent people. As a matter of practice, constant physical surveillance guarantees that the subject of the investigation — and no one else — is actually using the telephone to be tapped. As a practical matter, therefore, the provision is constitutionally sound. Nevertheless, to avoid any doubt and to align the statutory provision more completely with actual practice, we suggest the insertion of a standard requiring a very high degree of probability that the subject is at the time using the telephone to be tapped. As part of the legislative history, we would suggest that the current practice of confirmation be cited as an example of adequate probability.

Title III also includes a variety of provisions relating to foreign counterintelligence investigations. There seems to be little reason why tools such as pen register and trap and trace devices available to criminal law enforcement should not be equally available to foreign counterintelligence investigations. In addition, access to certain consumer information, under proper safeguards, should be eased. Section 303 and section 304 relating to common carriers, public accommodation facilities, vehicle rental facilities and the like seem to be sensible and constructive expansions of foreign counterintelligence authority.

Much has been made of section 312’s provision for military assistance with respect to offenses involving weapons of mass destruction. The controversy is largely baseless, inasmuch as the assistance provided is of a purely technical and logistical nature in circumstances where the absence of such assistance could be catastrophic. To wall off technical expertise possessed by one arm of the United States government from its employment in a law enforcement context by another branch of the United States government seems perverse, particularly where the results of such compartmentalization could be so dire.

### Calendar of Events

**Sept. 26** — Breakfast Meeting, International Club (Speaker: Frank C. Carlucci, former Secretary of Defense)

**Oct. 19-20** — Conference (see box on page 4)
III. Immigration Law Improvements  
(Title VI)

Title VI creates procedures for dealing with alien terrorists under the immigration laws.

Section 601 establishes special removal procedures for alien terrorists. The provision is an eminently sensible effort to deal with the problem of the need of the federal government both to avail itself of sensitive classified information in connection with alien terrorist removal procedures and to avoid disclosing such information where that would pose a risk to the national security of the United States. The proposal utilizes a special court similar to that recognized in the Foreign Intelligence Surveillance Act context, and entrusts a specially appointed federal district judge with the authority to police the process and make the ultimate decision as to removal. Section 601 likewise provides for representation by counsel, who may introduce evidence, examine witnesses, and procure the attendance at the hearing of witnesses or the production of documents.

Classified information can be used, either in connection with the application for the special removal hearing or in connection with the substantive removal decision itself. Section 601 in these circumstances establishes special procedures to be employed to safeguard especially sensitive classified information. Such information is to be presented to the court ex parte and in camera. In connection with the actual hearing, written summaries of such classified information that do not pose a risk to national security are to be made. If no such summary is possible without revealing enough to cause serious and irreparable harm to the national security or death or serious bodily injury to any person, the judge can permit the special removal hearing to continue and can consider the classified information in camera and ex parte even though it is not supplied to the alien.

H.R. 1710 improves on earlier versions in cases involving lawful permanent aliens with a provision in section 506(c) establishing special procedures for access to classified information and challenges to the use of such information by special attorneys with security clearances retained precisely for such purposes. I suggest that a useful addition to the procedure for removal proceedings in other cases would be to establish a similar guardian ad litem feature, pursuant to which a government lawyer, separated from the hearing staff, would be statutorily assigned the responsibility of assessing the items of confidential information, helping the court to test their sufficiency, and making appropriate arguments on behalf of the alien.

Sections 611, 612 and 613 that provide for special treatment of alien terrorists are also commendable. In general, the law should protect the United States from having to open its borders to those who are members of terrorist organizations that threaten the national security of the United States.

Conclusion

The Comprehensive Antiterrorism Act of 1995 is a measured step to provide the federal government, and in particular the investigative and law enforcement agencies, with adequate tools to deal with terrorist conduct. The provisions are not excessive; they particularly do not deserve the hysterical reaction of some critics that see in them the destruction of civil liberties. In fact, the bill is carefully designed to protect civil liberties as a substantive matter. Internal departmental regulation and congressional oversight can ensure that our society is served by effective law enforcement and by the protection of vital civil liberties.
Terrorism Bill Update ... Continued from page 1

prehensive Terrorism Prevention Act" (S. 735), which more closely reflects the Clinton Administration's proposal and was overwhelmingly approved by the Senate on June 7 by a vote of 91 to 8.

Acknowledging that there were many similarities between the two bills, he focused his remarks primarily upon the differences noting that some problems remain in both versions that may ultimately need to be resolved in a conference committee. One of the major provisions of the Administration's bill that was not fully incorporated in H.R. 1710, for example, was the prohibition against the manufacture of explosive materials without tracer elements or "taggants." H.R. 1710 calls for a study of the feasibility of such a ban, he explained, because "the last reliable study" of such a ban was conducted in 1980, and technology in the explosive industry has advanced significantly within the last fifteen years. If the results of the study warrant a prohibition, Mr. Murray confirmed that Chairman Hyde would remain open to future legislation incorporating such a provision.

Mr. Murray discussed the two areas of the bill that have drawn the most criticism during consideration by the Judiciary Committee: the provisions for the "special deportation proceedings for aliens" and the "wiretap" provisions. Similar to the Administration's bill, H.R. 1710 would establish a "special deportation proceeding for aliens in the United States who are believed, based on classified evidence, to be engaging in or having engaged in terrorist activity while in the United States." This provision would create a special court of five District Court Article III judges to preside over such deportation hearings. This provision also would permit the Government to use classified information in these trials without "disclosing the classified evidence" or its source.

Mr. Murray conceded that this provision raises "due process" concerns, yet he felt confident that H.R. 1710 provides adequate safeguards. Among other things, the defendant in such a proceeding would be entitled to a "declassified summary" of the classified evidence upon approval by the presiding Judge. The alien is also entitled to legal representation and must be given "adequate notice" of any allegations to be brought in such a case. Mr. Murray elaborated: "The judge must first find that there is probable cause to believe that this person is engaging in terrorist activity in the United States," in order to allow the procedure to go forward. Furthermore, an extra precaution was taken on behalf of foreign nationals permanently residing in the United States. A panel of attorneys would be appointed who have been cleared for classified materials and would be able to review the classified evidence in the deportation trial and would have a chance to "challenge on behalf of the alien, the veracity and credibility of the evidence." He said that Chairman Hyde feels that these safeguards comply "more than adequately" with the Supreme Court's definition of "due process" owed to a foreign national—keeping in mind that a deportation proceeding is a civil rather than a criminal hearing.

The "enhanced wiretap" provisions have raised concern among the Republican members of the Committee. Two wiretap provisions in particular have been the most troublesome: "the roving wiretap provisions" and "the emergency wiretap provision." There is currently a roving wiretap statute in effect which permits a District Court judge to approve a roving wiretap provided that the government can prove that the target of the wiretap has the "intent to thwart" the wiretap. H.R. 1710 would do away with this provision and would only require the government to provide a District Court judge probable cause that a "particular person" was committing a "particular crime" under the statute and was using "telephones... in furtherance of criminal activity." Mr. Murray reiterated that it is "impractical" to identify "a particular telephone" used by the criminal, and that this proposed new provision would satisfy the requirements of the Fourth Amendment. The "emergency wiretap provision" just adds one more situation to the current emergency wiretap statute which allows the government to start a wiretap without a court order on the condition that the government file an affidavit with a District Court judge showing probable cause for the wiretap within forty-eight hours of placing the wiretap. Currently, this can be done in only three circumstances: to prevent "death or bodily harm" and in "conspiratorial activities involving national security or organized crime." The proposed new statute would merely add "conspiratorial activities involving terrorism" to this list.

Summarizing his thoughts on H.R. 1710, Mr. Murray stressed the comprehensive nature of the bill. In the markup phase, he observed that there were fifty proposed amendments, thirty of which were included in the bill as reported out of Committee. He emphasized that this is a "major piece of legislation" which warrants "bipartisan support" in the House.

Mr. Lauch is a Junior at Duke University. He has been working as an ABA summer intern in the Standing Committee's office.