



National Security Law Report

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National Security Issues in the 104th Congress

by L. Britt Snider

At roughly this time last year I was asked to discern what national security issues were likely to be joined during the second session of the 103d Congress. Thanks largely to the arrest of CIA spy Aldrich Ames, my predictions proved spectacularly off the mark. Apparently unfazed by my lack of success, the editor of the newsletter has asked that I try again this year to discern the congressional agenda in the national security area.

Clearly, after the Republican sweep in the November elections, there is no better place to start than the national security elements of the "Contract with America." In fact, these are contained in two bills, one introduced in the House and another in the Senate, which differ in significant respects. Both bills address certain issues raised by US participation in United Nations peacekeeping missions, e.g., the conditions under which the United States will participate, under what conditions US forces may respond to direction by foreign military commanders, and the extent of US financial participation in these operations. The House bill also contains provisions which limit US intelligence-sharing with the United Nations, which are not in the Senate bill. On the other hand, the Senate bill would repeal the War Powers Resolution and replace it with requirements for consultation between the two branches where the introduction of US military forces into hostile areas is imminent. While the outcome of the congressional deliberations regarding these proposals is yet to be determined,



Former Defense Secretary Les Aspin addresses Standing Committee breakfast meeting.

"We need your help"

Aspin Outlines Role of Intelligence Commission

Former Secretary of Defense and House Armed Services Committee Chairman Les Aspin addressed the Standing Committee's January 19 Breakfast at the International Club.

Recently appointed by President Clinton to head the bipartisan 17-member commission to study the role of the Intelligence Community in the post-Cold War world, he began his remarks by praising the Standing Committee for its long interest and expertise in the field of intelligence and soliciting its advice for the commission.

He began by tracing the idea for the new commission from proposals by columnists and editorial writers to a shared view by congressional leaders and the Administration that a study of the future role of intelligence would be helpful. At first, the President considered entrusting the study to the President's Foreign Intelligence Advisory Board (PFIAB), which Secretary Aspin had been named to

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their presence in the bills implementing the "Contract with America" will assure their consideration during this session.

In the intelligence area, there is likely to be legislation introduced in both Houses concerning organizational issues. Senator Arlen Specter, who now chairs the Senate intelligence committee, has already announced his intention to introduce legislation calling for a ten-year tenure for the Director of Central Intelligence and may introduce a revised version of his previous bill calling for a Director of National Intelligence, leaving the CIA under a separate agency head. Congressman Larry Combest, who now chairs the House Intelligence committee, has announced his intent to hold a series of hearings dealing with organizational issues, leading to the issuance of a report at the end of the year already entitled, "Intelligence Community 2000." The activities of both committees will be geared to receiving the report of the presidential commission created by last year's intelligence authorization bill to review the roles and capabilities of US intelligence in the post-Cold War era, which is due March 1, 1996. Reorganization legislation of some kind is likely to follow.

Legislation is also being developed by the Administration to improve the statutory framework for countering terrorist activities within the United States. This legislation will not only amend existing criminal statutes to improve the basis for federal jurisdiction over terrorist acts within the United States, but will deal with such things as regulating fundraising activities in the United States by organizations determined by the President to sponsor terrorist acts abroad. It would also institute new procedures to protect classified information involved in deportation proceedings of aliens believed to be engaged in terrorist activities. This legislation will be handled by the Judiciary committees in each house.

There are also two new Executive orders in the offing that could well prompt hearings or legislative responses. The first is the long awaited Executive order on security classification, which has been in the works for almost two years. The most significant aspect of the new order will be to establish a 25-year time line for the automatic declassification of "permanently valuable" records of the Government, unless such records fall into certain narrowly defined categories, in which case document-by-document review will be required prior to a declassification decision.

The second Executive order being drafted deals with personnel security and implements the requirement contained in last year's intelligence authorization bill that the President issue regulations establishing uniform minimum standards for access to classified information. The draft order also contains uniform minimum standards establishing due process procedures to govern the denial of a security clearance to a government employee or contractor.

Finally, the Export Administration Act is up for renewal this year and will likely renew the debate over the effectiveness of export controls generally, as well as the utility and desirability of maintaining the existing export controls over encryption equipment.

Standing Committee Member L. Britt Snider Named Staff Director of Intelligence Commission

Shortly after addressing the Standing Committee's January breakfast meeting—in which he repeatedly asked for the help of Committee members with the new Intelligence Commission he had been appointed by President Clinton to head—former Defense Secretary Les Aspin announced the selection of Standing Committee member L. Britt Snider to direct the Commission's staff.

Long one of the most highly regarded lawyers in the Intelligence field, Snider had been serving as Chief Counsel to the Senate Select Committee on Intelligence.

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BOOK REVIEW

by Robert F. Turner

WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH

By Professor John Hart Ely

Princeton, N.J.: Princeton University Press (1993)

Pages: 244. Price: \$24.95

I promised to review this book for the *Report* six months ago,¹ but what began as a short book review quickly grew beyond the available space. That version ultimately occupied more than seventy pages in the *Virginia Journal of International Law*.² Realizing that some readers might prefer a shorter version, the following is offered.

To begin with, former Stanford Law School Dean John Hart Ely is one of the most respected constitutional scholars in the nation. His first book, *Democracy and Distrust*, was honored by the Order of the Coif as the most outstanding law book published between 1980 and 1982. The dust jacket to his new volume includes powerful endorsements by some of the nation's most respected names in the field, including Alan Dershowitz, Laurence Tribe, and William Van Alstyne.

It is, without a doubt, an important contribution to the field. Unusually well written, *War and Responsibility* provides information and reaches conclusions that appear almost calculated to challenge every conventional perspective on the legality of United States involvement in Indochina between 1964 and 1975. Traditional "doves" will be shocked

by Ely's conclusion that the conflict in Vietnam was fully authorized by Congress by enactment of the August 1964 Gulf of Tonkin Resolution, and especially by his critique of the "disillusioning . . . performance of Senator J. William Fulbright"—who, he notes, "made a minor specialty of being misled"—and other Senate anti-war stalwarts. Many readers, anticipating a more politically correct volume, will likely be surprised by his defense of the 1970 incursion by U.S. and South Vietnamese forces against communist sanctuaries in Cambodia.

On the other hand, unrepentant "hawks" from the old campus debates may quarrel with his conclusions that the "secret war" in Laos and the "secret bombing" of Cambodia prior to the 1970 incursion were unconstitutional. In both instances, he acknowledges that the American bombing occurred either at the request or with the clear acquiescence of the government in power in those countries and was directed against North Vietnamese forces illegally occupying Laotian and Cambodian territory.

The crux of my own disagreement with Professor Ely involves his rather narrow interpretation of presidential power in this area. For example, he writes:

Article II grants the president but four powers bearing on foreign relations—the power to receive ambassadors (which is his alone), the powers to appoint ambassadors and make treaties (each of which must be exercised jointly, with the advice and consent of the Senate), and the power to act as commander in chief (which depends on Congress's having authorized a war . . .).³

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CNSL to Hold Fifth National Security Law Summer Institute June 4-17



The University of Virginia Center for National Security Law (CNSL) has announced that it will hold its Fifth National Security Law Summer Institute for Law Professors and Government Practitioners from 4-17 June 1995 at the Boar's Head Inn in Charlottesville, Virginia. This highly successful program includes an intensive schedule of lectures, panel discussions, and debates on issues of national security law featuring some of the world's leading authorities on topics ranging from the law governing the use of military force, intelligence, international peacekeeping, terrorism, export controls, and counter proliferation, to the roles of the lawyer and the press in military operations. The institute will include a three-day visit to Washington, DC, during which the group is scheduled to meet with senior lawyers and other officials at the White House, the CIA, the State Department, and the Defense Department. While primarily designed to promote the teaching of National Security Law and related courses at the law school and graduate school level, the institute also welcomes applications from national security lawyers within government agencies. For further information and application materials, contact Ms. Pat Humphrey at (804) 924-7442.

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chair, but when Senator John Warner amended the Intelligence Authorization Bill last year to authorize an independent commission the President elected to avoid duplication of efforts and simply appointed Secretary Aspin to chair the congressionally-mandated study.

The legislation provided that 8 of the 17 commission members were to be nominated by the key leaders of Congress and 9 were chosen by the President. The House Speaker and Minority Leader and Senate Majority and Minority Leaders were each authorized to select one sitting member of Congress and one private citizen for the commission. To guarantee a bipartisan approach, not more than five of the President's appointees could be from the same political party. The commission is charged with submitting a report by March 1996.

Turning to substantive issues, he summarized the mission of the commission as answering the question: "What happens to the Intelligence Community now that the Cold War is over and the Soviet Union has broken up?" The former Defense Secretary noted that "the Intelligence Community . . . began after World War II and was really focused very heavily on the Cold War."

Another contributing factor in the decision to establish the Central Intelligence Agency, he said, was the failure of the government to anticipate the Japanese attack on Pearl Harbor in December, 1941. Reviews of that failure revealed that there was important evidence spread around various parochial military intelligence and other governmental organizations, but no one saw the complete picture and thus no one had the necessary pieces to put the puzzle together.

But the only significant threat of "another Pearl Harbor" was the Soviet Union, and the focus of most US intelligence efforts over the nearly half-a-century that the CIA has been in existence has been on Cold War issues and the Soviet threat.

Secretary Aspin said it was "an easy sell" to convince the American taxpayers of the need for the major investment in intelligence made during the Cold War, but "everything is different" now. While we still want to track the location of nuclear weapons and follow political developments in the former Soviet Union, there is less sense of urgency, and less need for secrecy, than was formerly the case.

"Question number one, therefore, is: What is the Intelligence Community for? What is it that we are

trying to do? How is it different?" The commission will focus on that issue. Put somewhat differently, "What is the justification to the American taxpayer for having an intelligence apparatus in the post-Cold War world?"

Secretary Aspin noted that "There are some fundamental shifts going on in . . . communications technology that are so fundamental that they would probably cause a lot of rethinking about the intelligence apparatus of this country even if we didn't have the big changes in the Soviet Union." These alone would probably not be the focus of a big commission. The Commission will focus primarily on "what is going on in the world that has changed the situation that we were all looking at—the reasons why the intelligence apparatus was created in the first place."

As for methodology, he identified a set of first-, second-, and third-order questions that needed to be addressed by the Commission. The first-order questions, he said, are three: (1) targets, (2) organization, and (3) costs. Where should we focus our efforts? What is our Intelligence Community going to be tasked to do?

Related to this is "the Moynihan Question: Should the CIA be abolished?" While some commentators suggest that this ought to be the first question asked, Secretary Aspin disagreed. Only after targets are identified and the necessary organizational structure is agreed upon can one intelligently ask whether the existing structure needs reform or replacement. Also critical, he said, is the question of costs, and if the costs aren't "right" it is necessary to "go back and look at the targets."

The "targets" question is more complicated today—there are more targets, but not all of those targets are as difficult as was the old Soviet Union. Targets include "hostile" and "dangerous" countries like North Korea, Iran, and Iraq—which, like the old Soviet Union, are obsessively secret. There are also "activities" we need to follow, like terrorism and the proliferation of weapons of mass destruction. These targets are in some ways similar to traditional CIA missions.

A third set of potential targets involves areas like China, Russia, and Latin America—which he said raise a question of the mix of covert and open source collection. "What is it that a clandestine collection brings to the party?" A fourth set of "new agenda" targets also exists—such as economic, environmental, and health care issues. The primary sources for examining these issues will probably be unclassified. But is there something the Intelligence Community can "add to the mix?" A fifth set of targets involves a management issue. Should US

intelligence assets be involved in places like Haiti, Bosnia, Somalia, or Rwanda? "From an intelligence standpoint," what is difficult is that there are parts of the world which become "crises" temporarily; they "come up on the screen and they disappear from the screen." Until last January, Rwanda would not have been on the policy maker's "top 100 list" of problems, he said, but by August it was in the "top five" and then this month it falls out of the "top 100" again. When these issues arise, we need intelligence information—and it is going to be a "very great challenge" to respond effectively to this need. To keep a data base on all such potential problem areas would be a "horrendously expensive operation," Aspin said, and managing that problem under reasonable budget constraints will be one of the big challenges. These "on-again, off-again" types of targets, which involve protecting such important values as promoting democracy and preventing starvation and "ethnic cleansing," are especially difficult in an increasingly complex world.

Indeed, one aspect of the problem is helping policy makers find problem areas on the map. For years, the primary problem was the Soviet Union, and everyone came to the table with a general knowledge of the problem and an understanding of the background. In contrast, he said, many current policy makers knew "nothing about Rwanda." Before available intelligence can be meaningful, the policy makers must be brought up to speed on the background to the crisis.

A fundamental problem is going to be how the Intelligence Community should be organized to deal most effectively with the problems we may encounter in the future. Should we shutdown the CIA and simply start anew with a "clean sheet of paper" looking at likely targets? Whatever the approach, flexibility will be essential, as the target list may change dramatically in the years ahead.

He noted that major changes in organization "cause huge turmoil," and concluded that any such changes should be done "carefully" if at all, and only if there is a perceived "big reward in terms of improved efficiency" in the end product that will offset the chaos associated with "moving boxes around on a chart."

Another key problem will be "costs." Can we cut costs by removing duplication that may have been more justifiable in the Cold War era? Would it make sense to have the military do all military analysis and have the CIA and other civilian agencies stay away from that area? Can we cut costs by dividing up responsibilities and sharing information with some of our allies, as we now do to a degree with the British? Can we trust foreign intelligence agencies to do the work right? Can we learn from the recent "down-sizing" and re-engineering trends in American business? All of these questions, he contended, are worth considering.

Secretary Aspin said there is a "disconnect" in current intelligence policy, with the number of targets going up while the budget is going down. He suggested that the problem may not be dissimilar to that of the "hollow Army" in the late 1970s—when resource reductions led to decisions to cut operations and maintenance funding rather than cutting personnel or procurement. In the end, reduced training and a lack of spare parts left the Army incapable of effectively fulfilling some of its assigned missions. He said that something must be done to make certain this doesn't happen in the Intelligence Community. "You can't keep adding targets, and other things that you want information about, at the same time that you're bringing down the intelligence budgets."

There are a "whole host of other questions that the Commission needs to address," he said, but the

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first-order questions are "targets, organization, and costs." In addition, they will need to look at how much of intelligence collection should be based upon human intelligence and how much on technical intelligence? Should the analysts be close to the collectors or kept separated?

Still other issues which will need to be addressed, he said, are covert action and counter intelligence. Within the military, how should work be divided up between the Defense Intelligence Agency (DIA) and the military services? "The list is long."

Secretary Aspin concluded his remarks by reaffirming his interest in making use of the experience and expertise of the Standing Committee: "We need your help."

Ely on War . . .

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Professor Ely does not even acknowledge the existence of the "executive power" clause of Article II, section 1, which Founding Fathers like Thomas Jefferson, George Washington, Alexander Hamilton, John Jay, and John Marshall argued vested in the President the general control of the Nation's external intercourse. He dismisses two centuries of constitutional practice recognizing presidential power to use "force short of war" with a simple reference to the *Powell v. McCormack* observation: "That an unconstitutional action has been taken before surely does not render that same action any less unconstitutional at a later date." Nor, for that matter, does he ever tell the reader who gets to "act" as commander in chief during the time periods in which Congress has not "authorized a war . . ."

Dismissing respected constitutional scholars who reach different conclusions as "intemperate" or "apologists" for presidential power, Professor Ely concludes that the biggest problem with the War Powers Resolution is "its grant of sixty (actually ninety) free days to the president to fight any war he wants."⁴ This is a popular misconception within the Executive Branch, but the language of the Resolution is entirely inconsistent with such an interpretation.⁵

Professor Ely can't seem to decide whether or not the "legislative veto" in Section 5(c) of the Resolution is constitutional, arguing at one point that it is "probably unconstitutional,"⁶ fifty pages later saying "My personal opinion is that section 5(c) is not unconstitutional,"⁷ and concluding on the following page that there is "a strong likelihood that in the event section 5(c) ever got to court, it would be

invalidated."⁸ Given the fact that, in his dissent to the *Chadha* case, Justice White expressly mentioned this provision as among the nearly 200 provisions of law invalidated by that decision,⁹ that conclusion seems reasonable.

In an era during which even former Senate Majority Leader George Mitchell has denounced the War Powers Resolution as unduly restricting "the authority granted by the Constitution to the President as Commander in Chief" and threatening "the delicate balance of power established by the Constitution,"¹⁰ Professor Ely goes against the grain and concludes that the real problem with the statute is that it fails to go far enough in curtailing executive discretion.¹¹ In an appendix, he provides a proposed new statute to further enhance congressional control over decisions to deploy military forces into harms way.

On balance, despite some major weaknesses, *War and Responsibility* is an important and useful book. It provides an unusual perspective that is likely to promote useful reflection on both sides of the issue.

Professor Turner is editor of the Report. The views expressed are his own.

Notes

¹ See Turner, "Truman Didn't 'Ignore Congress' on Korean War," NATIONAL SECURITY LAW REPORT, vol. 16, no. 9, Sept. 1994, p. 6 n.2.

² Turner, *War and the Forgotten Executive Power Clause of the Constitution: A Review Essay of John Hart Ely's War and Responsibility*, 34 VA. J. INT'L L. 903 (1994).

³ JOHN HART ELY, *WAR AND RESPONSIBILITY* 139 n.3.

⁴ *Id.* at 62.

⁵ Section 8 deals with "Interpretation of Joint Resolution" and provides specifically: "(d) Nothing in this joint resolution—(1) is intended to alter the constitutional authority of the Congress or of the President, . . . ; or (2) shall be construed as granting any authority to the President with respect to the introduction of United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances which authority he would not have had in the absence of this joint resolution." Ironically, Professor Ely would repeal this provision on the theory that it might be used by a President to justify noncompliance with the statute.

⁶ ELY, *WAR AND RESPONSIBILITY* at 63.

⁷ *Id.* at 119.

⁸ *Id.* at 120.

⁹ *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983).

¹⁰ 134 CONG. REC. 6177-78 (daily ed., May 19, 1988).

¹¹ ELY, *WAR AND RESPONSIBILITY* at 122.

Calendar of Events

May 11—Breakfast Meeting, International Club
(Speaker: Judge Abner Mikva, Counsel to the President)