Dellinger Discusses "Executive Branch Lawmaking"

On October 30, 1996, Acting Solicitor General of the United States Walter Dellinger addressed a Standing Committee breakfast. A graduate of Yale Law School and Clerk to Justice Hugo Black, Mr. Dellinger taught for many years at Duke Law School. Prior to assuming his current position, Mr. Dellinger served from 1993 to 1996 as Assistant Attorney General for the Office of Legal Counsel (OLC), a critically important office which provides legal advice to the President and the Executive Branch of the Government on important constitutional issues.

In introducing Mr. Dellinger, Standing Committee Chairman Paul Schott Stevens noted that a recent issue of U.S. News & World Report had characterized him as "one of the most qualified Solicitor Generals ever." Excerpts from Mr. Dellinger's remarks follow.

On September the sixth, 1787, at the Constitutional Convention in Philadelphia, there was a singular moment when James Wilson of Pennsylvania addressed the convention in some disgust. There were eleven days remaining in the Constitutional Convention, and they were debating what was almost the final draft of the Constitution. Wilson said, according to Madison's Notes, "According to the plan as it now stands, the President will not be the man of the people as he ought to be, but the minion of the Senate. He cannot even appoint a tide-waiter without the Senate."

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Representative Porter Goss Responds to CIA Critics

One of the highlights of the sixth annual Review of the Field Conference was the dinner address by the Honorable Porter J. Goss, fifth-term Republican Member of Congress from the fourteenth district of Florida, in the Members' Old Dining Room of the Cosmos Club in Washington, DC. Mr. Goss is a Yale graduate and former CIA clandestine services officer (1962-71). He is widely expected to be named Chairman of the House Permanent Select Committee on Intelligence in the new Congress.

Excerpts from his remarks follow.

I want to talk about three "pet peeves" tonight. The first one is press criticism of intelligence. I think the Intelligence Community is under relentless attack by the media. I can't explain why it is, I don't know the motives, I can just read—like every other American. I think the impression most Amer-

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I raise that because the point I wish to discuss with you this morning concerns the President’s role in the constitutional system, particularly the President’s role as an interpreter of the Constitution and of the laws of the United States. We often think of constitutional decision making by the Court, but the President and the President’s offices in the Executive Branch play a significant role in defining and interpreting the laws of the United States and the Constitution. In carrying out that role, it is critical that there is some sense that they are doing so in a manner that has some integrity. So what I wish to talk about is, first, how we came to have an independent Executive Branch in the last eleven days of the Constitutional Convention and how the creation of that independent Executive Branch was essential, in my view, to the development of the American nation; and how the creation of that independent Executive Branch gave forth the possibility of independent legal decision making authority by the President and the President’s offices. Finally, I want to ruminate a bit about how one can insure that that obligation is carried out with some sense of responsibility and integrity.

To that end, let me begin where I will end, by quoting from my colleague Jefferson Powell, who as some of you know was Deputy Assistant Attorney General in the Office of Legal Counsel. Jeff spoke at Notre Dame recently where there was a symposium on his most recent book, The Moral Tradition of American Constitutionalism, to a convocation of philosophers, lawyers, and theologians. He said “I want to talk about a concept that I am going to call ‘loyalty to the law.’ What does it mean to be committed to the law, to bear it allegiance, to reach legal conclusions faithfully? Indeed, is any of this possible? If it is possible, is it desirable? Should any of us wish to be the sort of person who is loyal to the law?”

I’m going to come back at the end and talk about why that is so critically important in the process of Executive Branch lawmaking, but before we had Executive Branch lawmaking we needed an independent Executive Branch. And if you go back to the sixth of September 1787, and were to pick up a copy of the draft of the Constitution as it was in its virtually finished form, you would find it very familiar—all of the language had then been rewritten by Gouverneur Morris in the wonderful terms we know. The President, Congress, House, Senate—all had been incorporated into the document. It had its basic structure of articles I, II, and III. But you would be stunned on reading it to see that, as the Convention was about to adjourn, it had essentially a one-branch government. It was even more of a one-branch government than we have come to think of in parliamentary systems, because the whole list of Article I, Section 8 powers of Congress read verbatim as it reads today, and the judicial function was defined in precisely the same way, but Congress chose the President and the Senate chose all the judges—giving total Legislative control.

Congress chose the President, who had a term of four years; but the Impeachment Clause, late in the Convention’s process, was that the President could be removed for maladministration or neglect of duty, so that essentially the President served at the pleasure of Congress. The Senate appointed all judges, without any involvement whatsoever by the President; the Senate appointed all ambassadors, without any involvement by the President; and the Senate made the treaties.

Now, in the last eleven days, a very dramatic debate took place. A few of the Framers who had voiced concerns from the beginning that everything was being “drawn into the Legislative vortex” began even more insistently to argue that some method needed to be found to make the Executive Branch independent; and that could not be done unless there was some method of choosing the President independent of selection by the Legislature. The difficulties and quandaries of finding a way to do that perplexed the Convention more than any other single issue.

It is worth noting how that came about. At the beginning of the Convention, the Virginia Plan quite simply saw this as a Legislative government. There would be somebody to manage things for them at their direction. You get a sense of the original conception of a diminished managerial minion president from the earliest debates. The Convention

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BOOK REVIEW

Executive Privilege: The Dilemma of Secrecy and Democratic Accountability
by Mark J. Rozell
Baltimore: Johns Hopkins University Press, 1994
Pages: 197 Price: $45 cloth; $14.95 paper
Reviewed by Robert F. Turner

Professor Mark Rozell’s Executive Privilege is one of the most important short books in recent years concerning the separation of constitutional powers in the national security realm. It is well researched, admirably balanced, temperate in both tone and judgments, and so contrary to the prevailing conventional wisdom of the last two decades as to be all the more important reading.

The volume consists of only six short chapters. Professor Rozell begins with an admirably fair summary of the arguments against executive privilege, quoting Raoul Berger, Harold Hongju Koh, Morton Halperin, David Gray Adler, J. William Fulbright, Edward M. Kennedy, and various other writers and politicians who in the post-Vietnam era have contributed to the crediting of this constitutional doctrine. Quoting Halperin and Daniel Hoffman, for example, he notes that “One constitutional argument against executive privilege is that the framers assigned to Congress either coequal or ‘senior status in a partnership with the executive for the purpose of conducting foreign policy.’”

Scholars can study the Records of the Federal Convention, read the Federalist Papers and Elliot’s Debates, and be uncertain about the relative role of the President, the Senate, and the Congress in the formulation of American foreign policy. But the suggestion that Congress was to be “senior partner” in the conduct of foreign policy suggests a remarkable ignorance of constitutional history.5

Professor Rozell writes:

According to Raoul Berger and Alan C. Swan, the framers did recognize the need for secrecy in government, and constitutionally placed that power in the hands of Congress. The evidence for this argument is found in Article I, Section 5(3) of the Constitution: “Each House shall keep a Journal of its proceedings, and from time to time, publish the same excepting such parts as may in their judgment require secrecy.”

Because no such mention of the right of secrecy is made in the executive articles, Morton Halperin and Daniel N. Hoffman concluded that “the Framers gave the President no privilege to withhold information from Congress.” Berger adds that “in the Constitution the framers provided for limited secrecy by Congress alone, thereby excluding executive secrecy from the public.”

Chapter two presents “The Arguments in Favor of Executive Privilege” and is perhaps the most valuable contribution of this excellent volume. Professor Rozell notes that the Founding Fathers were greatly influenced by the writings of Locke and Montesquieu—both of whom viewed the control of foreign affairs as an executive responsibility—as well as by the inability of the government under the Articles of Confederation to function effectively. Professor Rozell argues: “It cannot be emphasized enough that the Framers sought to preserve both liberty and power in devising our constitutional scheme. . . . The argument that the Framers sought to devise a regime characterized by liberty and weak executive power neglects the true point of reference for these Constitution-makers: the governing experiences under the Articles of Confederation.”

To those who argue that the Founding Fathers viewed secrecy as incompatible with democratic government, Rozell notes that the Constitutional Convention itself was conducted under strict rules of secrecy behind boarded windows, and that Madison himself later argued that “no Constitution would ever have been adopted by the Convention if the debates had been public.”

Executive Privilege provides a brief but very useful early history of constitutional practice regarding congressional demands for Executive Branch documents, noting that Washington’s cabinet unanimously concluded in early 1792 that such a power existed and that Congress generally embraced that view. For example, at Jefferson’s suggestion, a House resolution directing the Secretary of War to provide all documents related to the St. Clair expedition against the Miami Indians was replaced with a “request” directed to the President and requesting the documents “if not incompatible with the public interest.” This approach was followed routinely for more than a century and a half, and as the Supreme Court noted in 1936: “A statement that to furnish the information is not compatible with the public interest rarely, if ever, is questioned.”

Rozell quotes President Washington’s message refusing to provide documents relating to the negotiation of the Jay Treaty to the House of Representatives, and notes that even James Madison—who had initiated the request for the information—conceded during the debate that “the Executive had a right . . . to withhold information, when of a nature that did not permit a disclosure of it at the time.”

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Although not mentioned by Professor Rozell, a careful reading of the lengthy House debate on this matter reveals that only a single member of the House argued that the Congress had an absolute right to Executive branch documents.

Because of its brevity, Executive Privilege does not make the full historical case for Executive branch secrecy. For example, Professor Rozell does not mention that to assist in the management of the business of foreign affairs the Continental Congress in 1775 established a Committee of Secret Correspondence, and when the French Government offered covert military assistance to the colonies the following year, Benjamin Franklin and his four colleagues on the Committee wrote in a confidential memorandum that "we agree in opinion, that it is our indispensable duty to keep it a secret, even from Congress. We find, by fatal experience, the Congress consists of too many members to keep secrets."9

John Jay, who served as Secretary of Foreign Affairs under the Articles of Confederation from 1784 until Washington took office under the new Constitution in 1789, and turned down the same job in the new government before it was offered to Thomas Jefferson, complained frequently about congressional demands for diplomatic correspondence. Constitutional historian Richard Morris quotes Jay as lamenting at one point to Washington: "There is as much intrigue in this State House as in the Vatican, but as little secrecy as in a boarding school."10

As Professor Rozell notes, in explaining the Constitution to the American people in Federalist number 64, Jay wrote:

There are cases where the most useful intelligence may be obtained, if the persons possessing it can be relieved from apprehensions of discovery. Those apprehensions will operate on those persons whether they are actuated by mercenary or friendly motives, and there doubtless are many of both descriptions, who would rely on the secrecy of the president, but who would not confide in that of the senate, and still less in that of a large popular assembly.11

Regrettably, Professor Rozell does not quote the next sentence in Jay's landmark essay:

The convention has done well therefore in so disposing of the power of making treaties, that although the president must in forming them act by the advice and consent of the senate, yet he will be able to manage the business of intelligence in such manner as prudence may suggest.

Discussing this essay two decades ago in a law review article, Professor Gordon Baldwin concluded: "John Jay, an experienced attorney and diplomat, suggested that intelligence gathering arrangements are within the sole power of the President. In his view, they are a purely executive function linked to the treaty negotiation process, and the information so gained need not be reported to Congress."12

Professor Rozell also fails to mention the first foreign affairs appropriations bill, signed into law on July 1, 1790. The statute provided funds "for the support of such persons as he [the President] shall commission to serve the United States in foreign parts," including as a restriction only that no minister shall receive a salary in excess of $9,000 per year.13 Far more importantly—and this is particularly remarkable in view of the Constitution's requirement that "a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time"14—the statute provided that:

(The President shall account specifically for all such expenditures of the said money as in his judgment may be made public, and also for the amount of such expenditures as he may think it advisable not to specify, and cause a regular statement and account thereof to be laid before Congress annually...15

There was no requirement for submitting a classified report to Congress, because from long experience it was understood that Congress could not be relied upon to keep secrets. This point is reinforced by this entry from Secretary of State Jefferson's diary (later published as his Anas).

April the 9th, 1792. The President had wished to redeem our captives at Algiers, and to make peace with them on paying an annual tribute. The Senate was willing to approve this, but unwilling to have the lower House applied to previously to furnish the money; they wished the President to take the money from the treasury, or open a loan for it. . . . They said . . . that if the particular sum was voted by the Representatives, it would not be a secret. The President had no confidence in the secrecy of the Senate . . . . 16

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Calendar of Events

March 21—Breakfast Meeting, International Center (Speaker: Walter Slocombe, Under Secretary of Defense for Policy)
April 4—Breakfast Meeting, University Club (Speaker: Judge Royce C. Lamberth, Presiding Judge, Foreign Intelligence Surveillance Court)
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opens on May 25th, 1787, and early on, Roger Sherman of Connecticut says on the first of June that he considers the Executive magistracy as "nothing more than an institution for carrying the will of the Legislature into effect," and that the person or persons ought to be appointed by and accountable to the Legislature only—the Legislature being the depository of the supreme will of the society. As they were the best judges of the business which ought to be done by the Executive Department, and consequently of the number necessary from time to time for doing it, he wished that the number—whether it be one President or a committee—ought not be fixed in the Constitution, but that "the Legislature should be at liberty to appoint one or more as experience might dictate." This same view indicated that there would be no term for a president, because he would be appointed by and removable by the Legislature.

Early on there were a few counter voices, even in the earliest part of the Convention, on that same June first. Wilson of Pennsylvania, I think the most unheralded of the Constitutional Framers, said that he preferred a single magistrate as giving most energy, dispatch, and responsibility to that office.

What happens to create that growing concern that blossomed late in the Convention about the absence of independent Executive authority? I think one of the things that happens, first of all, is that the Framers of the Constitution are stunned by their own audacity over the months of June, July and August, as they far exceed their mandate. As Randolph put it, there are great seasons when persons of limited power are justified in exceeding them and a person would be contemptible not to risk it. They proposed not just some additions to the Articles of Confederation, but a sweeping new Constitution. They created a truly national government rather than a mere confederation.

The coming together of the American colonies was more difficult than we can easily now imagine. Abigail Adams received a letter from her husband at the time of the Continental Congress in which he spoke of fifty gentlemen meeting together, all strangers, not acquainted with each other's ideas, views, designs; and he said we are therefore jealous of each other, fearful, timid, skittish. Having fought the Revolution as allies rather than as a union—the various militia did not even have uniform uniforms—only the single commanding figure of Washington gave any sense of unity at all. They broke into fratious disputes following the war. As Washington said in his own Farewell Address "We are fast verging to anarchy and chaos." As they limped through those eleven years from the beginning of the Revolutionary War until the time they met in Philadelphia they were unable even to control their own territorial integrity. The Spanish were claiming chunks of Florida, the French were in the north and west.

States would not submit their requested requisitions. Delaware would say "We’re not paying, because we understand New Jersey hasn’t paid." They had not paid the money that was owed to the troops that had fought the Revolutionary War. So that is the setting upon which they gathered in Philadelphia to see how they might shore up this Articles Congress so much in disrepute.

By the end of the summer, the national vision has emerged triumphant in Philadelphia and they had given to this government the authority to regulate all of the foreign commerce of the nation, a not inconsiderable portion of its internal commerce, and given it the sweeping authority over all of the western lands running to the Pacific Ocean. This government also had the power to operate directly on individuals, the power to tax. Then, having created a truly national government resting directly upon the people, they perceived two concerns about the state of their work as they entered the final ten days of the Convention with everything drawn into the Legislative vortex.

Madison mentioned the Liberty concerns of having a single branch government, where one branch gets not only to make the laws but to decide to whom they ought to be applied because they controlled

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those who were to enforce them. Madison certainly expressed that concern. "It is a fundamental principle of free government that the legislative, executive and judiciary powers should be separately exercised. It is equally so that they should be independently exercised. It is the same and perhaps greater reason that the Executive should be independent of the Legislature. A coalition of the two former powers would be more immediately and certainly dangerous to public liberty. It is therefore essential that the appointment of the Executive should be drawn from some source or held by some tenure that will give him a free agency with regard to the Legislature, and this could not be if he was to be appointable from time to time by the Legislature."

That is the great crisis, and we have seen in our own time—in my own first two years, before we were really up and running—congressional committees that wrote criminal laws, particularly in the corporate area, trying to influence who gets prosecuted under those laws—breaking down the great double-blind system. The Congress gets to write the laws but doesn't know who the parties are. The Executive branch and the judges know who the parties are, but they don't get to set the rules of law. That great double system is a great protection of liberty which is lost if one branch controls the others.

But the other aspect of it that people like Rufus King of Massachusetts and Gouverneur Morris saw was not just that an independent President was needed for the protection of liberty, but that a strong President, with his own legitimacy, was needed to give energy, dispatch, and responsibility to the great task at hand. How could a couple of hundred people have the vision to deal with the great crises the continental nation would face without Executive leadership?

But here is the problem. Understanding the difficulty of legislative selection of the President, what is the alternative? Well, there were a couple of radical voices that said how about selection by the people—a strange idea, you might think, but it grew with favor. Wilson urged consistently that the President should be chosen by the People. But there were insuperable practical barriers it seemed to many of the Framers from doing that. The first being that the state of communications and transportation was such that having a single national popular election in areas as remote from one another as Georgia from New Hampshire—it was easier to get to London from Georgia than to go over-

to Delaware or New Hampshire—seemed to be difficult. In addition, rights of suffrage varied so dramatically. New York allowed free men of color as well as free white persons with no property qualifications whatsoever to vote; South Carolina, which thought itself as having the same clout, allowed hardly anybody to vote except General Pinckney and his relatives. Yet they would have equal clout in Congress.

The extraordinary breakthrough was to think of the electoral system as a way over this impasse. Among the most misunderstood part of at least my history lessons, back in the public schools of North Carolina, nothing stands out more than the misunderstanding about what is called the quote "electoral college"—a phrase which appears nowhere in the Constitution.

Here is actually the dramatic truth, as we stand on the eve of one of our quadrennial exercises of this power. There may be no area of the Constitution that works more nearly as the Framers anticipated than the manner by which we select the President of the United States of America. They never intended that the electors would be an elite group that would meet and choose their choice for the President. Indeed, they took careful steps to insure that no such thing would happen by making the electors cast their actual ballots in each state capital on a uniform day, so that they could never meet and consult with one another.

In any event, they clearly anticipated that they would be the voice of popular sentiment. Indeed, the first proposal put forward as the alternative to legislative selection was that the electors would be chosen by the people of each state. They would have only one responsibility, to vote for a President. That lost six states to five as they were uncertain about whether the states would want to dictate the exact manner—and there may have been some concern in the states where the "curse of heaven," as Gouverneur Morris called slavery, reigned, about what the ambiguities of the phrase "chosen by the people" might mean. Would that mean all of the people—male as well as female, white as well as persons of color—that may have been a factor. They moved instead to the phrase "chosen in such manner as each state shall direct," which gave some flexibility. But they assumed that the legislatures would—as they all did—by the third or fourth election provide for direct election of the Electors, all of whom ran pledged to presidential candidates.

The brilliance of this is that it overcame all of those logistical problems—in many ways it was one of the master strokes of the Convention—and it provided not merely a different mechanism for
choosing the President independent of the Legislature, but more critically a mechanism that gave the President legitimacy in a constitutional democracy. It made him in effect a separate branch of the government.

I think that critically important, because I think we would not be the nation we are today if we had been a legislative assembly with a minon to carry out the conflicting wishes of conflicting and shifting legislative majorities from time to time. I think that does place great responsibility, to turn now to our concern as lawyers who have been interested in national security, because it does place a great burden on us to see that this powerful office headed by a single individual and not a parliamentary cabinet operates in conformity with the law. In an era of so much political partisanship and public cynicism it is hard to persuade some people that there can be such a thing as integrity in Executive Branch lawmaking.

When I have spoken to lawyers about this, I often refer to decisions made by predecessors in previous administrations—for example, the decision under former Assistant Attorney General for the Office of Legal Counsel Charles Cooper, and others, that it was not in fact legally possible for the President to order the Treasury Department to index capital gains to inflation on his own authority, where there was enormous pressure to do that; and a similar ruling by the Office of Legal Counsel saying no to the idea that the President had an inherent line-item veto authority. These lengthy opinions are written with great care and intensity to make the principled case despite the pressures that were applied; so, rather than being mere self-serving statements about what policy makers wished to do, they have lasting value. I really look back to them.

Really, it is not surprising, when you move from the White House to the Justice Department, it may be seven blocks away, but one is situated in a profession of lawyers. You are surrounded by career people. I would think that not more than one or two percent of all the lawyers in the Justice Department, counting all of the U.S. Attorneys, change with the turnover of an administration. That means that you are situated in a system of professional criticism where if you put out an opinion that is circulated among your colleagues and the reasoning is not persuasive, you are not surrounded by bolstering of policy makers, you are surrounded by lawyers. The fact that there is an institutional memory is critically important.

The best day I spent on national security issues, by far, was the day that I asked my predecessors in the Office of Legal Counsel to come back and spend a day with me. Everyone came who could, including Bill Barr, Ted Olsen, Chuck Cooper, Tim Flannigan. Two others, Justices Rehnquist and Scalia, I could not invite because some of the matters we were discussing could have come before them. We met in the DoJ command center and discussed the reoccurring issues of how you assess the legality of covert operations, the whole area of national security law and their own experiences of trying to deal with those issues over time. Their advice was enormously helpful to me. I simply do not believe that this is an impossible and elusive goal, and when I talked to my predecessors, I got a sense of their striving to achieve this goal.

In my own time, the chance that I have had to deal with those in other departments who are their legal officers—with Elizabeth Rindskopf at the Central Intelligence Agency and Jeff Smith who has ably succeeded her, with Alan Krezcko and Jamie Baker at the National Security Council, with Howard Shapiro at the FBI—I get a sense that they are doing the very best that they can. When I think of those people, and of those who worked first with Jamie Gorelick and then with Judy Miller at the Defense Department, of course no one comes to mind that embodies this more than Jack McNell. Jack represents the very best of what career lawyers do and how they have been there in this administration, and the next administration, and the one after that. They have that sense of continuity over time.

I remember Jack calling me on a cellular phone late on a Saturday afternoon as he was flying over the Andes as we were dealing with the issue of the issue of the legality, or the lack of legality, of our assisting in the shooting down of civilian aircraft over Peru and Colombia. Jack McNell called me to tell me what his discussions had been in Peru as he was on his way to Colombia. When you have people like Jack, you get a sense that we can all strive to achieve that ever elusive goal which people like Jack symbolize.

I think it is important, finally, because unless we had some assurance that there were those who would try to maintain a sense of legality in Executive Branch operations, I think we would be unwilling to have the power we do have entrusted to a President of the United States. And that, itself, has been important.

At the Constitutional Convention, near the end, George Mason asked rhetorically, can any of us imagine that 150 years hence, this vast country, including the western lands, would still be a single nation? Well, we are. And the independent Executive has served us well to help fulfill what one, perhaps romanticized, Framer hoped would be the grandeur and importance of America until time should be no more.
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cians have about our Intelligence Community these days is not positive, it’s not good. The Community is not trusted, it’s not something that they think happily about. I think that’s wrong because we’ve got some wonderful people, men and women, who are working very hard for the national security. It annoys me that we have not been able to get the message out that, while nobody is perfect in this world, those people are sure trying hard to do the right thing.

I’d be the first one to admit that there is a lot of criticism of the Intelligence Community that is justified. But there is an awful lot of criticism that is not. I went through an unscientific survey of positive newspaper headlines about the Intelligence Community—I save every article about the Agency and the Community that appears in the major papers in a drawer in my desk—and I couldn’t find very many. The common denominator of most of the articles was that they were pejorative. Most of them were suggestive that things were bad, even if the facts didn’t support it. I wonder why this is happening?

I notice that when a story starts, it seems to take on a life of its own, whether there are facts to support it or not. Consider the Los Angeles crack cocaine story that we are all witnessing in the press—it is a good example. It is pretty clear that the original allegations were knocked down as baseless, but every time those allegations are knocked down there is another round of proliferation of very wild conspiracy theories that are being advanced. And nobody wants to get up and say, “This is baloney, this is not true.” Why isn’t there a national leader out there saying “there is no support for this at all?”

The problem is, we are almost in the position in the Intelligence Community of not only trying to prove a negative to say there is nothing there, but we are in the position of trying to prove logically what is an illogical negative. There is no conspiracynary, there never was one. It is disturbing to me when I see supposedly responsible and informed members of the press act with what I consider real disregard for the facts.

Let me turn to another example, an article which was written by Richard Reeves, which shows that the Agency, in some ways, is like the FBI. When I was in the Agency, we used to laugh at the FBI. We learned real quick that if you asked the FBI for something, they sent you a piece of paper—and it was very professional. If you went back two weeks later and asked them for something more on it, they sent you the same paper and something more. And then, four weeks later, if you asked them for more information, they sent you the original paper, and the second paper, and a new paper. After a while, you learned not to go to the FBI unless you had one question, because you never got paper.

I think that the idea of going back and revisiting the whole history of everything that went wrong with the Central Intelligence Agency every time one little thing goes wrong has begun to happen with the press, and the Reeves article about the Nicholson spy case is a good example. This case is bad news—very bad news. I can imagine how devastating this is to a career CIA employee who is serious about a career, and serious about their Country, and is a patriotic American.

When Reeves introduces his story, he dredges up this litany of bungles, or apparent bungles, and I am going to quote (and remember, this is a story about the Nicholson case):

> It was after the Japanese discovered their trade negotiators were being bugged and tapped by the boys from Langley during ongoing negotiations with their American counterparts, and the French said we were spying on their hi-tech companies. That’s right up there with paying salaries to Manuel Noriega and the Haitian folks who organized the “Yankee Go Home” rallies. Actually I guess it’s not as bad as the revelation just a year ago that the Agency was passing along stuff from Soviet assets without telling the President that they knew that information was false.

The article goes on like that. Even before you get to Nicholson, you get the idea that these guys don’t do much right. I can go through virtually every one of those points and say that I think Mr. Reeves has missed the mark rather sensationally—and in most cases I’m sure it was meant to be sensational—and I think that if you look at every one of those cases from the inside out, which we do in our oversight, you would not come to statements like those that have been made.

Articles appear every day in the newspaper that are like the Reeves article—several articles every day—and I have come to the conclusion that it is really impossible to answer them. It’s counterproductive in fact. In the first place you just keep the thing going, and in the second place you basically put yourself in a position where you can’t win; because you can’t talk about what you know is the good stuff, whereas they can always raise questions. Even if you come out with something that is good, they can always keep on going and say “What about . . ., What about . . .,” and I think that we have come to the conclusion that defending the Intelligence Community just doesn’t work very well. And that
means that somebody has got to stand up and say, "We need this stuff, and we're doing fairly well at it. National security is very important to us, and these folks are a big part of it." You don't hear much of that anymore, and you sure don't read much of it any more. If you review the headlines about the CIA, you find that almost all of them are unflattering, none of them are positive.

The most recent example was in yesterday's New York Times—"The Incorrigible CIA"—which suggests the measure of success for Tony Lake is going to be how well he destroys the remaining morale and esprit of the Central Intelligence Community. That's basically what the article concludes.

There is a friend of mine who is still in the Community who told me about his program, and this is one that has been going on for about forty years without compromise with extraordinary benefits to this nation and to all Americans. He says, "The secret of our success is the secret of our success." That is so, and it must remain so—and the media hates it. The media doesn't like that. If you think about it, we are in competition a little bit.

The second point I want to talk about is the need for a highly capable Intelligence Community, and if there is a group that doesn't need to hear that in Washington it is this group. I came tonight not knowing all of the psyche and all of the vibrations and response cords here, and after sitting at the head table it has become clear that you are not only interested but you know a lot about what is going on. I think there is probably nobody here who will argue that we ought to get rid of intelligence, or that we don't need intelligence anymore; so I'm not going to spend time trying to sell you the idea that we've got to keep intelligence going.

But I am going to spend a second telling you that there are a surprising number of people in leadership positions in this country who would like to do away with intelligence. There are still people who believe that it is really not necessary to have the kind of Intelligence Community we have. Some people believe that money might be spent better on other things—that's a fair debate, the kind of stuff we do all the time. But if you accept the idea that we are now in a safer world because we no longer have the Soviets, and we have much greater domestic needs, and we need to go neo-isolationist, and the money could better be spent for children who are deprived or in need (and there are clearly reasons why we need to be spending more in other areas), we begin to see that there is an audience out there—especially when day after day we hear: "Why are we spending money for these bunglers to do all this stuff when there are so many needs in this country?"

I think that is a very dangerous and growing fact. There are more and more people buying in to that type of argument now. I don't know how you build a constituency among my colleagues, among Americans, in the media, to support the intelligence activities today when we can't talk about the things we do. It is a very hard chore.

To those who would say that the world is a better, much safer, place today—and I am not sure that on the fifty-fifth anniversary of Pearl Harbor it is a great time to say the world is a safer place—I can mention four or five places to illustrate that serious risks exist.

Russia—it is fashionable to say that the old Bear is gone, it's dead, now the woods are full of poisonous snakes. But the old Bear is still there, and it would be a mistake to turn our back on the old Bear too soon. Russia has so many problems that threaten its domestic stability and the stability of its neighbors. I've just come back from NATO expansion talks, and I can tell you that a bunch of countries are very concerned over there about the threat to the international equilibrium.

We were almost forbidden from talking about NATO expansion before the Russian presidential elections lest we excite the Russians. When we talk about the international equilibrium, we are talking seriously about things that some people believe. The revanchists not only want to reestablish the lost Soviet empire as we all know, and we've got nationalist tendencies that are dealing with secessionist movements. The thing that impresses me the most about the threat in Russia is that the war on lawlessness and corruption is being lost big time. I don't know how you win that war, either.

There are still a lot of nuclear weapons around. Anyone who has ever been to Russia or done business with the Russians will understand what the concept of Mother Russia means to a Russian. To say, "the Russians are out of it, they're not a threat, they're our friends," may be a big, big mistake.

Let's go on—forget the Russians—let's move forward in history, what's next? Obviously the most noteworthy regional power is going to be China. It's a superpower, and the view that China's hegemony goes as far as its army can walk—which was the conventional wisdom—is no longer true. Technology has replaced that. We have the question of China, and what's going on over there; and if you think it isn't going to happen, just look at recent headlines. We are going to do something with Hong Kong. Something is going to happen in Taiwan. One of the big votes in Congress, one of our major litmus tests, is whether or not we are going to trade with China—and under what circumstances.
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Turning to developed nations, some folks ask why we need intelligence about developed nations. Well there are places like Japan and Germany—they want their rightful place, their piece of the pie. They are out there competing, and some people describe "national security interest" these days as access to the international marketplace. I'm not advocating that we get into economic espionage—that's not what I'm talking about—but we do need to understand decision making at the political level on an international basis so we do have access to the international marketplace. This is vital. We cannot sustain our quality of life in this country just producing and buying amongst ourselves. We know that; and if we don't know that, we'd better learn it fast.

Another area of concern is attack by dangerous international elements using weapons of mass destruction. These are the people that we are very concerned about. The nuclear club is going up into the double digits. We have rogue States out there that we all know about. It is so easy, and so horrible, to think of what can be done with chemical and biological weapons—and they are relatively cheap. To ignore those would be a very serious mistake.

People say, "Well, we've got a containable number of hot spots in the world. We've got the Balkans, the Baltics, the Middle East, Southern Asia, Africa, Haiti—the list keeps getting longer, and it's going to get longer. In my view, almost any place where two people gather together, you can have a fight, sooner or later. I think it is in our national interest to understand that we have to be ready to deliver timely information to our decision makers when a fight breaks out that is going to be of interest to us.

We also have the mega-problems: the starvation problems, the overpopulation problems, unemployment, ethnic divisions, fundamentalism, fanaticism, repressivism—all this stuff that goes on in alleged democracies and nearby countries.

Consider the problem of poor Third World countries, whose people can readily see through technology and change the wealth that they don't have. We are talking about billions of people, and eventually somebody is going to get mad, and somebody is going to recruit someone to do something mischievous, and then we are going to have a problem. It is the kind of problem that we want to head off, not clean up after.

So what it comes down to is that intelligence is not just a part of this, it is not just a key, it is the key, I think, to the problems that we are facing today. I don't care whether we are talking military or non-military, we are going to need eyes and ears—technically enhanced eyes and ears—that can see and hear in all of those remote places and dark spaces in the world. We've got to have reliable agents all over the place next to the decision makers who want to make decisions that could do us in, and we certainly want to have analysts who know what they are doing. We need this today, we will need it tomorrow, and we're going to need it every day thereafter. So don't tell me that we aren't going to have a need for intelligence. All of you who care about this have your job to do in building a constituency.

The last area is law enforcement versus intelligence, which I am now changing to law enforcement and intelligence because of the progress that has been made. We have threats of international terrorism, proliferation, organized international crime. We have to have a division of labor and authority between intelligence and law enforcement. Both of these communities obviously have legitimate interests and roles, and we've done a really lousy job in the past of sorting them out and making them work together to get more than the sum of the parts when they do work together. I know there are a lot of folks in this room who know more about this than I do, so I won't go into it in great detail. But it's got to happen.

As you know, over the past ten years Congress has come forward with a lot of statutes that have expanded the extraterritorial responsibilities of U.S. law enforcement. Offenses in this area involve foreign commerce, genocide, terrorism and air piracy—a big concern down in my state of Florida—threats to U.S. property and persons overseas, activities which tend to result in harm within the United States, such as drug trafficking. How do we apply these statutes in a way that doesn't diminish the Intelligence Community, but instead we get the Intelligence Community enhancing law enforcement? The problem is that we have different bottom lines for law enforcement and intelligence. That's something we noticed in the Aspin-Brown Commission and had a lot of chat about, and I think Aspin-Brown came down on the right side of it in the division of authority. Basically, we are going to do intelligence overseas and we are going to do law enforcement here, and the two are going to work together where it is necessary and profitable.

Aspin-Brown was divided. We had a huge debate about it, and we changed the threat from what I would call "transnational" to "global crime"—to symbolize that this is in part a law enforcement problem. We want to make very sure when we talk about global crime that we are not talking about replacing intelligence with law enforcement people, because
Seventh CNSL National Security Law Summer Institute Planned for June 1-13

The Center for National Security Law (CNSL) at the University of Virginia School of Law is planning its seventh annual National Security Law Summer Training Institute for professors interested in teaching in this growing new field and for government attorneys having a special need for such expertise.

The two-week program will involve an intensive schedule of lectures and debates featuring prominent experts on issues ranging from counterterrorism and counterproliferation, to the role of an Intelligence Community in a free society and the First Amendment rights of the press in military operations. Use-of-force issues to be addressed include international and municipal law—such as the War Powers Resolution—governing the commencement of hostilities, and the latest thinking about the correlation between democratic government and peace. The Institute will also include a four-day visit to Washington, DC, where the group will meet with senior practicing national security lawyers at the White House, the CIA, the Pentagon, and elsewhere in the government. Participants must provide their own travel to and from Charlottesville and there is a $500 registration fee.

For further information, check out the CNSL web page at http://www.virginia.edu/cnsl/, contact the Center at (804) 924 4080 (or by e-mail to: cnsl@virginia.edu) or send a letter and c.v. to the Center at 580 Massie Road, Charlottesville, VA 22903-1788.

what that says to me is we are going to focus on arresting people rather than trying to stop the bad stuff from happening. I think we need to approach this with the idea that threats are to be averted, not just cleaned up after. Crimes are to be punished. I think that's extremely important.

To put it in very straightforward language that we will all understand: if we had it to do again, I think we'd rather not do Pan Am-Lockerby with trade powers; if we'd had great intelligence we might have been able to stop those people. That's the kind of question we've got to ask, rather than simply can law enforcement and intelligence work together. The answer is they have to work together, and they will work together.

The final point is that you don't get that work done unless you have good intelligence penetrations of the target and good plans to disrupt the guys who want to do the bad things. You don't get that unless you've got a good intelligence organization, well managed. It takes a long time to build. It's difficult work, it's dangerous work, there are casualties, and today we're getting to this place where it seems that risk aversion is more important in some ways than national security. That's a dangerous trend for this country to follow.

We've talked about something I call the "Guatemala matter." There are some people who feel that the lesson of human rights violations in Guatemala and all that that case engendered should be that we should only deal with clean assets, that we should only work with reputable and morally responsible individuals. Well, you don't get the penetrations, and you don't get the assets you need, if you do that. So somehow we have to get over that, and we have to understand that we have to recruit agents to ferret out the bad actors, because the bad actors are the guys we are worried about. I guess the punch line is that you can't deal very well with the Third Reich unless you are willing to deal with Nazis, and you sure can't deal with terrorism unless you are willing to deal with terrorists in one form or another. That's not fun to do, and it's not pleasant to do, but you don't get there if you don't do it. That's what the Intelligence Community is there for.

The last thing I wanted to say, for those who feel that somehow or other we should be giving up our sources and methods when there are human rights violations, let me tell you that we have seen to that. We have something called congressional oversight, and it really works. We have good committees in the House and Senate, and they do a very good job of making sure that what the Intelligence Community does is justifiable and justified. That is extremely important. I think that is going to continue to go on in the future. I would put it this way: We've got good watchdogs right now. I think we're doing our job as watchdogs very well, and I think we also are able to understand that part of that job is to make sure, when the Community is malign, that it has defenders. So I think we're being good watchdogs.

I wonder sometimes: who are the watchdogs of the media?
Book Review—Executive Privilege . . .

Continued from page 4

There is an old aphorism to the effect that "where one stands depends upon where one sits." Professor Rozell's study provides a wealth of evidence of this phenomenon that would be almost humorous were the consequences not so tragic. A foreword by series editor Michael Nelson notes that "From the 1930s until the 1960s, an era in which the Democrats usually controlled the White House, executive privilege was championed by liberals and opposed by conservatives. During the 1970s and 1980s, when Republican presidents were the norm, conservatives and liberals changed sides on the issue and, often, exchanged arguments . . . ." 17

As if to emphasize this, Professor Rozell notes that the Eisenhower Administration—which apparently coined the term "executive privilege"—invoked the doctrine on more than forty occasions, 18 and in doing so was strongly defended by the Washington Post, which asserted that the constitutional power of the President to withhold documents from Congress "is altogether beyond question." 19 And yet, when President Kennedy "used executive privilege to prevent legislative oversight of foreign policy," an indignant Richard Nixon charged that "a return to secrecy in peacetime demonstrates a profound misunderstanding of the role of a free press as opposed to that of a controlled press." 20

In Professor Rozell's view, the modern attacks on executive privilege resulted almost entirely from the excesses of the Nixon Administration. Chapter three is devoted to a summary of this era. It is here perhaps that this reviewer would quarrel with Professor Rozell's assessment, as a pretty strong case can be made that—for all of his imperfections—President Nixon's reliance upon executive privilege was in large part a defensive response to virtually unprecedented congressional usurpations of authority historically recognized to belong to the Executive. But that is another essay.

Chapter four examines the efforts of the Ford and Carter Administrations to embrace government openness, avoiding the term "executive privilege" whenever possible even in situations where congressional demands for documents were initially denied and seeing compromise wherever possible to avoid collision.

Chapter five examines the Reagan-Bush years. Despite the clearly increased emphasis upon government secrecy during the Reagan era, Professor Rozell concludes that even Reagan was reticent to invoke the discredited doctrine of executive privilege:

The Reagan administration experiences reveal two important facts about executive privilege. First, executive privilege lacks the political support nec-

cessary to withstand congressional demands for full disclosure of information. That is, it lacks support in Congress, so much so that members of the legislature are unrestrained in their efforts to seek compliance with requests for information. Presidents, too, appear to have lost the will to do battle with Congress over executive privilege to protect their constitutional powers. Furthermore, it is now inherently difficult for presidents who challenge congressional demands for information to make an appealing public case for governmental secrecy, especially given the media's natural bias in favor of complete openness in public affairs. 21

Indeed, Professor Rozell is quite critical of President Reagan's failure to defend the powers of his office. He writes:

Perhaps no action by Reagan did more to harm the constitutional doctrine of executive privilege than to establish the precedent of turning over his personal diaries. If such materials are not entitled to protection, it is hard to imagine executive privilege being accepted for anything but the most compelling national security information. Even if Congress had subpoenaed the diaries, it is most likely the courts would have favored the president's claim of privilege . . . .

Although President Reagan invoked executive privilege on several occasions, he never fully exercised that power. When confronted by congressional demands for information, Reagan generally followed a pattern of initial resistance followed by accommodation of Congress's request. Reagan never made a concerted effort to defend his prerogative in this area. As a result, he further weakened a constitutional presidential power that already had lost stature because of Watergate. 22

Calling President George Bush "our first bureaucrat president," Professor Rozell argues that Bush "knew how to work the system" and managed to protect sensitive information more successfully than his predecessors. However, wary of the discredited term "executive privilege," the Bush Administration often couched refusals to surrender documents behind language like "attorney-client privilege" or "internal departmental deliberations." 23 Rozell argues that in so doing, "it is the Bush administration further downplayed, and hence weakened, the doctrine of executive privilege by failing to articulate or defend any constitutional arguments for its exercise." 24 He concludes this chapter by observing: "No post-Watergate administration has been willing to take an aggressive posture toward executive privilege to reestablish the political viability of that constitutional doctrine. Clearly, each administration has perceived the political costs to be too great. The United States needs to return to a pre-Watergate understanding of the legitimacy of executive privilege in our constitutional order." 25
Chapter six is entitled "Resolving the Dilemma," and provides some useful prudential guidelines for the exercise of executive privilege. For example, Professor Rozell argues that "Executive privilege should be exercised only rarely and for the most compelling reasons."28 Rejecting an activist role by the courts in such matters as being "neither practical nor desirable," Professor Rozell concludes "that executive privilege is a legitimate, though often controversial, presidential power, and that disputes over withholding of information can best be resolved by the political ebb and flow of the separation of powers system. 28"

Executive Privilege is not addressed exclusively or even primarily to disputes in the national security realm—although Professor Rozell acknowledges time and again that it is in this area that the President’s authority is strongest—but it is nevertheless a critically important contribution to the understanding of national security law. It is short enough to make an excellent supplemental text for any of a number of college or graduate school courses, and it ought to be mandatory reading not only for every Member of Congress but also for national security lawyers both in the Legislative and the Executive Branches.

Professor Turner is Associate Director of the Center for National Security Law at the University of Virginia School of Law, from which he holds both professional and academic doctorates. He chaired the Standing Committee from 1989-92 and now serves as Editor of the Report.

NOTES


2 To mention but one example, during the August 17, 1787 debate on James Madison’s motion to change the power given Congress from that "to make war" to authority merely "to declare war," Madison notes that after Rufus King made the point that "makes" war might be understood to 'conduct' it which was an Executive function," Oliver Ellsworth dropped his objections and the measure passed with but a single dissent. 4 Writings of James Madison 228 (Paul Ford, ed. 1903) (emphasis in original). If the Founding Fathers learned anything from the Revolutionary War it was that large deliberative assemblies lack the competence to manage the conduct of war, and as early as 1775 the Continental Congress had found it necessary to entrust the day-to-day-conduct of foreign intercourse to a single member.

3 Rozell, supra note 1 at 10.

4 Id. at 26-27.

5 One of the best accounts of this incident is Irving Younger, Congressional Investigations and Executive Secrecy: A Study in the Separation of Powers, 20 U. Pitt. L. Rev. 765 (1959).


7 Id. at 35-36.

8 2 Francis Wharton, THE REVOLUTIONARY DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES 151-52 (1889) (emphasis added).


10 Rozell, supra note 1 at 26.


12 1 Stat. 123-29 (1790).

13 U.S. Const. art. I, sec. 9.

14 1 Stat. 129 (emphasis added).

15 1 Writings of Thomas Jefferson 305-06 (Mem. ed.).

16 Rozell, supra note 1 at x.

17 Id. at 44. Eisenhower told a group of Republican legislators that "any man who testifies as to the advice he gave me won't be working for me that night." Id. at 45.

18 Washington Post, May 18, 1954 at 14, quoted in Rozell, supra note 1 at 45.

19 Rozell, supra note 1 at 47, 20.

20 Id. at 109.

21 Id. at 122-23.

22 Id. at 125.

23 Id. at 128.

24 Id. at 140-41.

25 Id. at 143.

26 Id. at 153.

27 Id. at 7.

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JOHN H. "JACK" McNEILL
(1941-1996)

We mourn the recent death of John ("Jack") H. McNeill, Senior Deputy General Counsel of the Department of Defense for International and Intelligence, and a great friend of the Standing Committee.

Jack McNeill had many roles. Patriot... Professor... Scholar... Lawyer... Author... Arms Control Negotiator... Air Force Officer... Father and Husband. But no one label can do Jack McNeill justice. As a practicing lawyer, Jack never stopped learning and studying. He had a Ph.D. from the London School of Economics and Political Science, an LL.M. from the London School of Economics, an undergraduate degree from the University of Notre Dame, and a J.D. from Villanova. He also served as a Scholar at the Center for Studies and Research in International Law and International Relations of the Hague Academy of International Law and prior to that had received a Diploma from the Hague Academy of International Law. Jack was not just an expert on arms control, but a critical player in this area for more than twenty years. Before moving to the Department of Defense, Jack served in various capacities in the Arms Control and Disarmament Agency, including as Assistant General Counsel. He also served as a legal advisor to U.S. arms control delegations in negotiations with the Soviets in Geneva, on START, INF, and SALT II. Jack served as Chairman of the Department of Defense Task Force on the Law of the Sea Convention. He was a member of the U.S. Delegation and presenter of oral argument to the International Court of Justice in the 1995 cases of the Legality of the Use by a State of Nuclear Weapons in Armed Conflict and the Legality of the Threat or Use of Nuclear Weapons. His responsibilities spanned arms control, international peacekeeping and operational matters, overseas base agreements, status of forces matters, security assistance, intelligence oversight, law of armed conflict, and export controls. For his distinguished service to our Nation, he received not only the ACDA Meritorious Honor Award but also (twice) the Presidentially-awarded rank of Meritorious Executive. Jack was generous in sharing his knowledge and experience with others. He was an adjunct professor at Georgetown University Law Center. He lectured at the Paul H. Nitze School of Advanced International Studies at Johns Hopkins University, and at the University of Notre Dame London Center for Legal Studies. He also served as the Charles H. Stockton Professor of International Law at the U.S. Naval War College. Jack was also the author of many respected law journal articles.

At his memorial service, DoD General Counsel Judith Miller noted that Jack had a way of "cutting to the chase" regardless of the complexity of the issue. For those of us who were fortunate enough to work with Jack, we know and appreciate the truth of that comment. Jack's legal work was complex and riddled with the politics of world affairs. But Jack was never political in any partisan sense. Jack understood the complexities and responsibilities of the United States in world affairs. We trusted him to represent our country on the most important national security issues and that trust was well-placed. He was our friend, our colleague, and an important member of the national security community.

We will miss him.

—Kathleen Buck
Member, Advisory Committee
Former General Counsel, Department of Defense