National Security Law in a Changing World: 
The Sixth Annual Review of the Field Conference

Edited by C. Joseph Coleman

Introduction

On December 9-10, 1996, the ABA Standing Committee on Law and National Security, the Center for National Security Law of the University of Virginia School of Law, and the Center on Law, Ethics, and National Security at Duke University School of Law, co-sponsored the Sixth Annual Conference Reviewing the Field of National Security Law. Held at the Hotel Washington in Washington, DC, the conference consisted of a series of panel discussions led by some of the leading scholars and practitioners in the field of National Security Law. Several members of the Standing Committee participated including Chairman Paul Schott Stevens, John Norton Moore, Suzanne Spaulding, and Advisory Committee Chairman Richard Friedman.

In an effort to examine the full range of issues involved in this critical area of the law, the conference organizers invited a diverse group of panel members from government, academia, business and private practice. This produced a spirited series of discussions and exchanges between the panelists and conference attendees. The opinions expressed at the conference were those of the individual participants and do not necessarily reflect the positions of sponsoring organizations.

Opening Remarks

Paul Schott Stevens, Chair of the ABA Standing Committee on Law and National Security, opened the conference with a general welcome on behalf of the Conference’s sponsors. Mr. Stevens noted that the Sixth Annual Review of the Field continued in the tradition of a series of conferences originally suggested by the late Morris I. Leibman.

I. A Roundtable Discussion: 
A Survey of New Developments

John Norton Moore, Walter L. Brown Professor and Director, Center for National Security Law at the University of Virginia Law School introduced the topic by explaining that he had asked each of the members of the panel to identify during their presentations what they believed to be the most important or least understood issue in national security law. He then provided some historical background in which to frame the discussion of national security law. He concluded that it was clear that the United States must stay engaged in a very important way on the global scene and that one of the most important duties of the United States is to promote democracy.

Colonel John T. Burton, JAGC, USA, who is currently the Legal Counsel to the Joint Chiefs of Staff, began his presentation by noting that the Armed Forces have done an excellent job in incorporating international law and national security law into the military policy decision making process. He stated that there is more to national security law than the obvious issues such as war powers, treaties, chemical weapons conventions and land mine protocols, and that the military aspect is just one part of the overall program. Colonel Burton focused his remarks on “two topics which don’t make headlines,

Continued on page 2
Panel I—Executive Branch . . .
Continued from page 1

but have a profound effect on how we deploy military forces as part of our national security strategy abroad." On the first topic, Rules of Engagement, Colonel Burton noted that there have been recent changes which now allow U.S. military forces to take preemptive actions to stop a hostile act before it is initiated. On the second topic, the protection of military forces abroad, Colonel Burton cited the recent memorandum of understanding in which the State Department returned responsibility for protection of over 40,000 military personnel to the Defense Department where it rightly belongs. Colonel Burton concluded his remarks by praising recent Congressional efforts to find solutions to the problems faced by the military in these and other areas.

Alan J. Kreczko, Special Assistant to the President and Legal Advisor to the National Security Council, focused his remarks on President Clinton’s September 1996 decision to assert Executive Privilege over documents pertaining to Haiti. He stated that the privilege in this case is well founded in Constitutional law and is not indicative of a “nefarious” act. He then discussed in detail the actions taken by both the Executive and the Congress which led to the President’s invocation of the privilege and noted that the Congress did not hold the President in contempt largely because the Attorney General had issued an opinion stating that the President has strong Constitutional support for his actions. Mr. Kreczko concluded that he was pleased to see a strong precedent set for invoking Executive Privilege in the case of unwarranted congressional interference.

Acting State Department Legal Advisor Michael J. Matheson focused his remarks on several national security issues currently being addressed by several international tribunals. First he discussed the International Court of Justice (ICJ) and a case before that court in which the World Health Organization (WHO) had requested an advisory opinion on the legality of using or threatening to use nuclear weapons. Mr. Matheson noted that at the urging of the United states and other countries, the ICJ ruled that the WHO lacked competence to request such a ruling but it did consent to provide one for the United Nations (UN) General Assembly. The ICJ eventually ruled that the use of nuclear weapons is generally inconsistent with humanitarian law except in extreme circumstances involving a threat to the survival of a state. In effect, this ruling had virtually no impact on our nuclear doctrines and there was no change within the NATO alliance or the Western European Union. Mr. Matheson next discussed several cases involving claims by Iran against the United States including the downing of an Iranian Airbus and the destruction of Iranian oil platforms which had previously been used to stage terrorist raids. The first case was settled out of court with payments to the victim’s families and the second is still pending. Mr. Matheson closed by noting that contrary to popular belief, international tribunals are in fact having a great effect on our national security law.

Judith A. Miller, General Counsel at the Department of Defense, began her remarks by noting that the DoD faces a host of operational issues that affect national security. Ms. Miller chose however, to focus her remarks on four specific topics, the first of which was the Expanded Military Education and Training program (IMET), the second was the proposed International Criminal Court, the third was the UN Law of the Sea Convention, and the last was Information Operations. Ms. Miller explained that the Expanded IMET program provides Department of Defense lawyers with the opportunity to carry out the President’s mandate to “enlarge the community of democracies and free markets throughout the world” by teaching leaders in emerging democracies how military forces should interact with civilian government. Ms. Miller stated that the broad goal of the project is to “expand respect for the rule of law.” Ms. Miller next discussed the DoD’s involvement in the UN’s efforts to create an International Criminal Court by noting that while the DoD favors such a court, it believes that it is vitally important that the Court’s jurisdiction be carefully defined. Ms. Miller explained that the DoD’s primary interest is how the court will define violations of the law in circumstances involving armed conflict. Ms. Miller also stated that she hoped that the Sen-
ate will soon ratify the Law of the Sea Convention since participation is critical to our national interests. Finally, Ms. Miller noted that Information Operations, also known as Information Warfare, involve efforts to steal, degrade, or disrupt information systems and that the United States must be prepared to conduct both offensive and defensive operations in this area. In concluding her remarks, Ms. Miller stated that the definition of national security continues to expand and as more organizations and agencies participate, we will continue to grapple with these complex yet vitally important issues.

Central Intelligence Agency General Counsel Michael O’Neil began his presentation by recognizing that it has been a year of reflection and debate about the Intelligence Community and its proper organization. Mr. O’Neil explained that a good portion of this reflection has centered on the relationship between the Director of Central Intelligence (DCI) and the Secretary of Defense. Mr. O’Neil then summarized the recommendations of the Aspen-Brown Commission, impaneled to look at this issue by noting that they included a proposal to grant the DCI additional authority in the areas of appointments of component elements of the Intelligence Community, the creation of new "confirmed officials" at the CIA in roles of coordination and management, the creation of a new defense agency (the National Imagery and Mapping Agency) as part of the Intelligence Community, and an additional role for the CIA in the establishment and construction of budgets that affect intelligence. This last point is important considering that ninety percent of the human and economic resources expended on intelligence are controlled by the DoD. Mr. O’Neil noted that with this in mind, it is important that there exists clear lines of authority as the Intelligence Community continues to move toward improved collection, analysis, and production of intelligence information. Mr. O’Neil also addressed the new relationship between intelligence and law enforcement that has emerged as a result of their overlapping areas of concern. Mr. O’Neil noted that the Intelligence Community’s involvement under these circumstances is unavoidable since it is now charged with investigating international organized crime, narcotics trafficking, and terrorism. In concluding his remarks, Mr. O’Neil stressed the need for an increased dialogue between the Intelligence Community and the DoD as well as with other agencies and groups in order to foster an increased level of understanding and a willingness to be involved in operations of mutual benefit.

II. A Roundtable Discussion: A Survey of New Developments in National Security Law—Views from the Hill

Paul Schott Stevens, Chairman of the Standing Committee on Law and National Security and former Legal Advisor to the National Security Counsel, was the moderator for the second roundtable discussion of the conference. After introducing the panel, which included Standing Committee member Suzanne Spaulding, Mr. Stevens stated that he hoped that a panel of legislative branch representatives would become a regular feature of the annual review of the field conference.

House International Relations Committee (HIRC) Chief Counsel Stephen G. Rademaker initiated the second panel with a discussion of the major accomplishments of the 104th Congress in the area of foreign affairs. Discussing the Helms-Burton Act, Mr. Rademaker noted that although the sanctions applied against Cuba operated differently from those against Iran and Libya, both were designed to discourage investment by foreign businesses in the economies of countries that threatened the security of the United States. Mr. Rademaker then turned to a discussion of recent legislation aimed at abolishing three foreign affairs agencies: the Agency for International Development, the Arms Control and Disarmament Agency, and the U.S. Information Agency. The functions of all three agencies will now be consolidated in the Department of State. Mr. Rademaker noted that this is a cost saving effort which eliminates overlap and enhances coordination in the management of foreign relations. Mr. Rademaker next described the future of foreign policy issues in the new Congress as being “more continuity than change” and noted that Congress hopes to gain Executive support for future reorganizations. Mr. Rademaker also stressed the need to work closer with the executive branch in dealing with the fall of the Soviet Union and with recent developments in the People’s Republic of China. He also stressed the need for deeper and more rapid reform in the United Nations, including improved handling of the outstanding U.S. debt. In concluding, Mr. Rademaker took issue with Alan Kreczko’s earlier remarks regarding the President’s assertion of Executive Privilege over documents relating to the U.S. intervention in Haiti. Mr. Rademaker stated that although treated as a legal issue, in reality, the President’s refusal to hand over the documents was politically motivated and was an attempt to withhold information involving embarrassing happenings in Haiti that occurred under a

Continued on page 4
Panel II—Capitol Hill . . .
Continued from page 3

Suzanne E. Spaulding, General Counsel to the Senate Select Committee on Intelligence, focused her remarks on issues from the last Congress that will continue to be important in the year to come. She noted that, since the end of the Cold War, significant changes have taken place which have eliminated the Intelligence Community’s primary mission. Instead, its focus has widened to a number of missions, all of which occur in a dynamic and unpredictable environment. Ms. Spaulding noted that a long term policy on intelligence is no longer the primary focus and instead, “actionable intelligence” is needed on a daily basis in a very specific and timely format. This represents a dramatic change in emphasis from the Cold War era. Additionally, since the Intelligence Community is now providing information to a much broader group of agencies and organizations, efforts are needed to train intelligence consumers in the use of the information they receive. In addressing this issue, Ms. Spaulding stressed the need to use intelligence assets efficiently, especially in light of the shrinking intelligence budget. Ms. Spaulding also noted the growing public mistrust of the Intelligence Community and stated that this problem must be addressed and supported with greater accountability from the intelligence leadership. In closing, Ms. Spaulding discussed the issue of law enforcement’s tasking of the Intelligence Community and noted that there is a need to clarify the authority to gather information abroad on non-U.S. citizens. Ms. Spaulding stated that there is no need for a new law to be passed but a clarification of existing authority is essential. She stated, “if there ever was a clear distinction between intelligence and law enforcement, there certainly isn’t anymore.”

House Permanent Select Committee on Intelligence Chief Counsel Louis H. Dupart focused his remarks on what the Committee had accomplished during the 104th Congress. He noted that the committee helped to bring spending cuts under control and he reaffirmed the Committee’s intentions to provide funds for intelligence operations that are important to national security. Along these lines, Mr. Dupart stated that it is the Committee’s hope that the Intelligence Community will take advantage of the opportunities for change following the end of the Cold War and in so doing, help the country prepare for the future. Looking to that future, Mr. Dupart next focused on the new leadership in the House of Representatives and stressed the need to coordinate its actions with those of the House National Security Committee, the Senate Intelligence Committee, and the Administration. We need to build a consensus for change where we can all come to agreement. He went on to say that we “don’t need to fight” about these changes and we don’t need to focus on solely incremental change, but “there are areas where we can move forward.” Mr. Dupart concluded his remarks by stating that we need to remember what is good for America. In doing so we shouldn’t “trash the people in the Intelligence Community.” Instead, we should honor them and “get out in front and say I believe these people.”

Luncheon Address:
The Functions of the National Security Council

Nancy E. Soderberg, Deputy Assistant to the President for National Security Affairs, National Security Council (NSC), presented the luncheon address. She opened her remarks by emphasizing the importance of policy makers understanding the legal aspects of the issues confronting them. She went on to explain that the NSC is currently focused on building a democratic, peaceful, and undivided Europe, creating a new partnership with a democratic Russia, extending the reach of peace in the Middle-East as well as Africa, and with opening new markets in Latin America to strengthen democracy there. In addressing the question of whether these diverse efforts can be attributed to so-called “Clinton Doctrine,” Ms. Soderberg stated that owing to the complexity of the issues involved, no single “Clinton Doctrine” could possibly apply. She stated that there is no “Clinton Doctrine because the answer” is no longer as simple as it once was. After a short discussion of the current organization of the NSC, Ms. Soderberg went on to discuss the three key priorities currently being handled by the NSC staff: the promotion of our own stability through the advancement of peace and democracy, handling today’s transnational threats, and building on the foundation of the international economic system. She noted that while many believe that this is a “soft” policy, increasing the support for democracy is one of the best long term moves that we can make as a country since historically, this has led to an increase in trade and a decrease in war. Ms. Soderberg stated that additionally, it is important that the United States continue to work with NATO to strengthen its ranks with new missions and new members. We must work towards the reform of
democracy in Russia and we must build on the freedoms in Latin America and Africa. Ms. Soderberg went on to discuss one of the NSC's primary goals which is to reduce the potential threats posed by weapons of mass destruction and terrorism. She noted that a decrease in the availability of nuclear weapons translates into a decrease in the overall nuclear threat.

Ms. Soderberg went on to discuss several other goals of the NSC including passage of the Chemical Weapons Convention, stopping the production of fissile material in order to reduce its availability to rogue states and terrorists, strengthening the Biological Weapons Convention, and working to achieve an international ban on land mines. In discussing the final priority of the NSC, economic security, Ms. Soderberg noted that, in the past, the country was faced with the question of whether or not to promote free trade. Now, the question has become, How quickly can we promote it? Ms. Soderberg then listed some of the accomplishments of the previous four years including the successful conclusion of over two hundred trade agreement including the North American Free Trade Agreement and the Uruguay Rounds. She noted that the United States is once again the world's number one exporter and that the Administration is now working on reaching a Latin American Free Trade Agreement by 2005 and an Asian Free Trade Agreement by the year 2020. In concluding her remarks, Ms. Soderberg stated that "efeach of the national security goals is mutually reinforcing." The United States needs to keep moving on in the next term and American leadership and bipartisanship is essential to this process. It is our responsibility to make sure that the 21st Century becomes an American century.

III. Legal Aspects of Post-Cold War Security Threats: Controlling Weapons of Mass Destruction

Colonel Guy B. Roberts, Staff Judge Advocate for the 2nd Marine Division at Camp Lejeune, North Carolina, moderated the panel discussion on weapons of mass destruction. In his introduction, he noted that during the Cold War, nuclear proliferation took a back seat to superpower competition, however, weapons of mass destruction are quickly becoming one of our primary national security concerns. Colonel Roberts stated that with the advent of Iraqi weapons development and the collapse of the former Soviet Union, the fear of "loose nukes" has taken over for the "Red Scare" of the 1960's. Colonel Roberts closed his remarks by noting that many countries still sell the materials used to manufacture weapons of mass destruction and that the availability of these devices will continue to be a security concern for the United States in the future.

Robert G. Joseph, Director for the Center for Counter Proliferation Research at the National Defense University, began his presentation by providing an overview of the threat posed by nuclear proliferation and the spectrum of possible responses. He then discussed the military responses available to counter various scenarios posed by the proliferation of Nuclear, Biological and Chemical (NBC) weapons. Mr. Joseph emphasized that chemical and biological weapons are cheaper to produce and easier to conceal than nuclear weapons and he went on to state that, since there are more than twenty-five nations who either now possess or are in the process of developing NBC weapons and the delivery systems necessary to use them, these weapons are more of a threat than ever. In discussing the options available to the United States for dealing with weapons of mass destruction, Mr. Joseph cited the classic non-proliferation option which includes denial of access to the materials necessary for the construction of a weapon, strict control of existing weapons, and increased international pressures. A third option for the United States is to simply use its vast conventional military force to discourage a state actor from producing or otherwise acquiring a weapon of mass destruction. Mr. Joseph also discussed the possibility of preemptive use of force against a potential threat but noted that this option has traditionally been avoided by the United States since it was felt that the ramifications of a confrontation with another nuclear power, such as the former Soviet Union or China, would far outweigh the original threat. Finally, Mr. Joseph noted that the theory of deterrence known as "Mutually Assured Destruction" does not apply to rogue states and terrorist organizations. Consequently, it is vital that the United States military develop the capability to deter and if necessary to defend against a nuclear armed adversary. Additionally, in the future, it will be just as important for the United States to concentrate on deterrence through denial of access to weapons construction materials.

Ambassador Thomas Graham, Jr., Special Representative of the President for Arms Control, Non-proliferation, and Disarmament, began his presentation by reviewing the unprecedented successes in arms control reached over the past eighteen months. First and foremost, the Nuclear Non-Proliferation Treaty was extended indefinitely. Additionally, two

Continued on page 6
Panel III—WMD...

Continued from page 5

new nuclear weapons free zones were created, the United States Senate ratified the START II Treaty, and the Comprehensive Test Ban Treaty was signed. However, Ambassador Graham noted that despite these successes many problems still remain. In the coming year, the United States' primary focus will be on the ratification and extension of several other weapons treaties. Additionally, the Chemical Weapons Convention must be ratified as quickly as possible in order to preserve the strength of the regime created to ban these weapons. Ambassador Graham noted that if the United States fails to ratify the Chemical Weapons Convention, we will "miss out on a chance to help banish poison gas and make our own military forces and citizens much more secure." Ambassador Graham also stressed that the United States must move forward towards quick ratification of the Comprehensive Test Ban Treaty. Additionally, he stated that the United States must remain committed to a constructive, cooperative process leading to the Non-Proliferation Treaty Review Conference scheduled for the year 2000. In closing, Ambassador Graham noted that the coming year may see action on a Fissile Material Cutoff Treaty which would ban the production of fissile materials for use in nuclear weapons. Five nations now possessing nuclear weapons have expressed a willingness to begin negotiations on this issue and President Clinton has termed it the "highest arms control priority after CWC approval."

Richard A. Falkenrath, Executive Director of the Center for Science and International Affairs at Harvard University's Kennedy School of Government, began his presentation by outlining three important questions in the debate over weapons of mass destruction. First, "why is it that we care about this problem?" Second, "how has the agenda changed in the last five years?" And third, "what about fissile security?" In answering the first question, Mr. Falkenrath argued that weapons of mass destruction are the "only serious direct threat to the Continental United States" and he noted that given the "unique immorality" of these weapons, they rightly belong at the top of the list of threats to United States security. In discussing the second question, Mr. Falkenrath noted that the agenda has changed to focus much more attention on biological weapons since their small size and relatively low cost make it possible for them to be produced with minimal technology and without state support. On the issues of fissile security, Mr. Falkenrath cited the failure of the former Soviet Union's nuclear custodial system which has made the acquisition of nuclear weapons by rogue states and terrorists a real possibility. Mr. Falkenrath concluded his remarks by stating that the program of reducing the availability of fissile material will require the construction of an expensive processing plant in Russia and since Russia currently has no funds available for such a project, an effort will be required to find the funding elsewhere.

Former Assistant Secretary of Defense for International Security Policy Stephen J. Hadley began his remarks by challenging the morality of a U.S. military strategy that continues to rely on nuclear deterrence. Quoting General Lee Butler, Mr. Hadley stated that the "weapons themselves are so monstrous in their effects that their use would defy reason" and reliance on them "codifies mankind's most murderous instincts as an acceptable resort when other options for resolving conflict fail." However, Mr. Hadley posed an interesting question when he noted that it must be remembered that the security and order of the last half of this century has largely been the result of the presence of nuclear weapons and if their abolition would increase the chances of a conventional war, is nuclear deterrence so immoral after all? In closing, Mr. Hadley stressed that if the world is to remain free from a serious threat that nuclear weapons will be used, the United States and other nations must continue to maintain nuclear weapons in order to provide a counter balance to those states who would use these weapons in the absence of the threat of nuclear retaliation. In making this point, Mr. Hadley quoted the Chief of Staff of the Indian Armed Forces: "[T]he lesson you draw from the Gulf War is never to fight the United States without nuclear weapons."

Dinner Address: The Problems in the Intelligence Community

Following dinner at the Cosmos Club, the Honorable Porter J. Goss (R-FL), a former Central Intelligence Agency Case Officer who was correctly rumored to be in line for the Chairmanship of the House Permanent Select Committee on Intelligence, addressed several problems he sees in the Intelligence Community as it now exists. His remarks were published almost in their entirety in the December 1996 issue of the National Security Law Report.
IV. Legal Aspects of Post-Cold War Security Threats: Controlling Terrorism

Dr. Allan Gerson, Professor of International Law and Transactions at George Mason University’s International Institute, initiated the discussion on terrorism by noting that as a country, the United States has dealt with terrorism only by focusing on the criminal aspects. Looking to the Pan Am 103 incident, this fact is evident based on the government’s primary efforts being directed towards the extradition of the Libyans suspected of committing the act. Dr. Gerson commented that if a commission to compensate the victims of aggression following the Gulf war could be established, why not a commission to compensate victims of terrorism? In so doing, the system would provide for a direct civil claim by the victims against the terrorists. Dr. Gerson then noted that the primary impediment to the establishment of such a system in the United States is that states who sponsor terrorism are granted immunity from suit in United States courts under the Foreign Sovereign Immunity Act (FSIA). Dr. Gerson stated that it is inconceivable that the framers of the FSIA sought to give immunity to terrorists and he went on to point out that the United States has made efforts to correct for this abuse and currently, a provision of the Antiterrorism Act strips the right to claim immunity in U.S. courts from states who sponsor terrorism.

Frank F. Cilluffo, Senior Analyst and Assistant Director of the Global Organized Crime Project at the Center for Strategic and International Studies, next pointed out that for decades two potential threats have haunted U.S. terrorist experts: the possibility of a major terrorist attack in the United States and the fact that weapons of mass destruction may become available to terrorist organizations. Unfortunately, both of these fears were realized in the last few years. As an example, in the 1993 bombing of the World Trade Center, potassium cyanide, a lethal chemical agent, was a component of the weapon. Fortunately, the terrorists failed to realize that the heat and force of the blast would destroy the cyanide before it was dispersed. Mr. Cilluffo noted however, that the increasing sophistication of terrorist attacks, such as that exhibited in the Trade Center bombing, demand a vigorous and more flexible response than has been applied in the past. After reviewing the history of terrorism and briefly discussing his thoughts on its future, Mr. Cilluffo went on to more specifically discuss the prospect of a more vigorous and flexible response to terrorism. Potential options include: diplomatic and economic sanctions, law enforcement actions, military reprisals, and covert actions. Mr. Cilluffo stated that since terrorist make good use of ambiguity, the United States should respond in kind and perpetuate another kind of ambiguity: retribution will occur and it may come in a variety of forms. Mr. Cilluffo also argued that due to the fact that terrorist are most often a moving target, an increase in human intelligence is essential. Along those lines, Mr. Cilluffo noted that “terrorists don’t frequent the cocktail circuit and thus, the United States must be willing to recruit those who have blood on their hands since only these people will have true insight into the motivations and intentions of terrorists. Mr. Cilluffo also argued that the United States must target those who provide financial support to terrorists. This will be an expensive undertaking but the information received will be of vital interest to the country. Mr. Cilluffo concluded his remarks by further arguing that successful “hardening” of terrorist targets will only result in a shift to “softer” targets. An example is that as airports have become more secure, terrorists have shifted their focus to subways and trains. Mr. Cilluffo cited the fact that it is impossible to completely protect every possible target from terrorist attack and any attempt would result in a terrorist victory since it would result in the destruction of our way of life. However, he pointed out that an effective counter-terrorist program can be implemented by fostering a culture of inter-agency cooperation, innovation, and operations. With strong leadership, such a program can overcome the obstacles associated with fighting terrorist and would create a flexible and effective response to the problem.

Malvina Halberstam, Professor of Law at the Benjamin N. Cardozo School of Law, began her remarks by discussing two areas in which the United States should modify its stance on terrorism. First, Professor Halberstam noted the fact that, fearing an interference with its ability to prosecute terrorist in its domestic courts, the United States has opposed inclusion of terrorist acts in the jurisdiction of the International Criminal Court of Justice (ICC). However, Professor Halberstam points out that a reading of the preamble to the ICC would show that its jurisdiction is designed to compliment that of domestic courts and could be invoked to prosecute a terrorist who could not otherwise be prosecuted under domestic law. Professor Halberstam next discussed the problems associated with prosecuting terrorists who hold high diplomatic positions. She cites as an example, the alleged participation of Yasser Arafat in the murders of the U.S Ambassador to the Sudan and his Charge D’Affairs and

Continued on page 8
Panel IV—Controlling Terrorism . . .

Continued from page 7

argues that despite corroboration by both the President of Sudan and the CIA, the United States has refused to pursue Arafat's prosecution since it would interfere with the Middle East peace process. In another example, she cites the case of the terrorist Abu Abass who was arrested for and later convicted of the hijacking of the Achille Lauro cruise ship and the murder of an American citizen but who was, never-the-less, released because he possessed a diplomatic passport. She concluded by noting that Congress has asked the President to work towards the establishment of the ICC and has asked the Justice Department to pursue the extradition of Abu Abass and that neither of these requests have been honored as the Administration continues to refuse to act on either.

John P. O'Neil, Chief of the International Terrorism Operations Section, National Security Division, of the Federal Bureau of Investigation, next presented the FBI's views as to the future domestic and international terrorist threats to the United States. He set the stage by defining terrorism as "violence or a threat of violence associated with a political or social agenda." Mr. O'Neil then described two components of the terrorism threat response: the domestic program, which handles cases such as the Oklahoma City bombing and the international program, which handles cases such as the World Trade Center bombing. He then outlined the six primary tools used to combat these terrorist threats: diplomatic actions, economic sanctions, covert actions, military interventions, law enforcement responses, and the marriage of the public and private sectors. In discussing the specific role played by the FBI, Mr. O'Neil noted that the FBI is responsible for preventing acts of terrorism on American soil and for reacting swiftly to capture the perpetrators when terrorist acts do occur. However, he pointed out that, contrary to most countries, the United States maintains separate services to carry out counter-intelligence, internal security, and law enforcement actions and that most of the resources committed to these areas are spent on dealing specifically with state sponsored terrorism. Considering that the greatest threat to U.S. security now comes from radical extremism and not state sponsored terrorism, the problem is obvious. Mr. O'Neil closed by noting that terrorist attacks increased 35% worldwide last year and he predicted that the United States will continue to see attacks from both domestic and international terrorist groups. He stated that the fact that these attacks have increased in lethality is cause for added concern and he hopes to work with both the public and private sectors in order to defeat terrorism in the United States.

James S. Reynolds, Chief of the Terrorism and Violent Crime Section at the Department of Justice began his remarks by discussing the increasing interaction between diplomacy, the military, intelligence, and law enforcement. He stated that in the last decade, the role of law enforcement has escalated as the result of an increase in subnational terrorist actions which are particularly difficult to handle with diplomacy or military action and thus require a law enforcement based response. However, as Mr. Reynolds explained, in dealing with the growing threat of terrorism, the government is focusing on prevention which is the highest calling of law enforcement but which is difficult to do given the fact that law enforcement is a more responsive force. In order to enable law enforcement to deal with terrorism in the future, Mr. Reynolds stressed the need to identify terrorist plots as early as possible although he admitted the difficulty in attempting to do so. Mr. Reynolds concluded his remarks by noting that a final challenge exists in dealing with these cases and that is in the need to reinforce the idea that if a terrorist act is committed against Americans, U.S. law enforcement will never forget and will never give up in its attempts to bring those responsible to justice. He stated that this position has resulted in the reduction of safe havens for terrorists around the world and as these numbers diminish, the United States will be able to control terrorism more effectively.

V. Legal Aspects of Information Warfare

Scott L. Silliman, Executive Director of the Center on Law, Ethics, and National Security at Duke University School of Law, moderated the conference's fifth panel discussion and began his remarks by noting that information warfare, also known as "parallel war" or "cyber war," is causing a revolution in thought as to how warfare is carried out. Strategists now consider both information and information systems as weapons to be used and as targets to be defended. He went on to state that given this dual, offensive and defensive nature, the question of which body of law regulates information warfare remains unanswered. He argued that the scope of this subject has gone beyond the Hague Convention and the UN Charter and as the United States wrestles with the criteria to establish what constitutes an "armed attack" or a "threat of use of force," it becomes clear that there are many unan-
swered questions.

Daniel T. Kuehl, Professor at the National Defense University’s School for Information Warfare and Strategy, set the stage for the discussion by explaining the foundations of information warfare. In his opinion, the relationship between technology and the law is the primary issue in information warfare. Professor Kuehl then drew a distinction between the various definitions of information warfare as adopted by the Department of Defense, noting that they change every day. Professor Kuehl then stated that his personal definition would be “actions to control or exploit the information environment.” This definition takes into account both the human and technological aspects of information warfare but Professor Kuehl admits that this approach is often dismissed because most people tend to focus on the analyses of information without considering the necessity to control the environment. Professor Kuehl next made the interesting point that the information age marks the “end of physical sanctuary” that the United States has enjoyed for two hundred years with oceans on either side keeping us “safe” from outside interference. Now, the low cost of developing the tools to operate in the electronic environment has decreased the threshold of what it takes to be an active and capable player on the global scene. Professor Kuehl also pointed out that in addition, changes in the nature of information (the “informational component of national power”) and the ability to gain access to tremendous amounts of information, coupled with the emerging difficulties of applying the law to these advances in technology, has created a situation where the “information revolution is changing the world and impacting everything we do. Professor Kuehl concluded his remarks by stating that “our national security requires that we understand as well as possible these changes and these influences and learn how to operate in this new environment.” The information age is upon us and offers us some unique opportunities to take advantage of and some important structures to defend against.

Colonel Phillip A. Johnson, from the International & Operations Law Division of the Office of the Air Force Judge Advocate General, opened his remarks by describing the law of armed conflict and how traditional rules of warfare can be transposed to respond in the information warfare arena. Colonel Johnson pointed out that there has been a great deal of inter-service and inter-agency consideration of the legal issues surrounding information warfare over the last few years and he pointed out two new features of information operations: attack by electronic means on computer automated con-

trol systems and attack on dual use information systems used for both military and civilian purposes, including electric power, transportation, banking, stock exchanges, etc. In discussing these new issues, many issues of law must be taken into account. Under established laws of war, a military is not authorized to attack systems just because it can successfully do so. Instead, there must be a link to an attack on military forces before a military response can be carried out. Along this line, Colonel Johnson pointed out that issues of collateral damage apply to electronic attacks on information systems just as surely as they do to attacks using conventional munitions. As an example of this point, Colonel Johnson cited Iraq’s claim of “genocide” against the United States during the Gulf War after Coalition bombing destroyed Baghdad’s electric power grid which rendered a substantial portion of the city’s sewer system inoperable. In concluding his remarks, Colonel Johnson discussed the future problems associated with the control of space. Modern systems, especially military systems, are critically dependent on satellites. This creates a tremendous potential for crisis if satellites become fair game in warfare.

Robert E. Giovagnoni, General Counsel for the President’s Commission on Critical Infrastructure Protection, began his presentation with a description of the Commission and the role of the federal government in defining the legal regime and particularly the defense of our infrastructure. This concept is known as “information assurance” and Mr. Giovagnoni noted that critical infrastructure protection is a matter of significant concern to the nation. After next discussing the structure of the Commission, Mr. Giovagnoni turned to the issue of computer crimes. Mr. Giovagnoni stated that the military services have the best investigative procedures as they are familiar with guarding their own infrastructure and they constantly attempt to apprehend those who attempt to penetrate and/or attack the defense system. The Commission is now considering whether this knowledge can be used to defend against telephone systems and hackers in general. Mr. Giovagnoni went on to state that the country is now faced with the question of whether our military infrastructure is synonymous with or merely part of our national infrastructure. These types of questions also include consideration of the military’s involvement in law enforcement and the related issues of “posse comitatus.” If the United States doesn’t make use of the military under at least limited circumstances, it is debatable as to whether civilians can protect themselves adequate-
Panel V—Information Warfare . . .

Continued from page 9

ly, especially in the cyberspace arena. Mr. Giovagnonii closed by stating that the Commission is wrestling with these and other related questions and is seriously considering whether or not the Department of Defense should be used to protect the national information systems infrastructure.

Scott Charney, Chief of the Criminal Division’s Computer Crime and Intellectual Property Section at the Department of Justice, addressed several significant issues in both the investigation and enforcement of computer crime statutes. Mr. Charney pointed out that historically, in a network environment, it is difficult to know who you are dealing with, where they are located, and the significance of any attack they might make. In contrast to state sponsored actions which generally are easily identifiable, actions which occur in cyberspace are much more difficult to investigate. Mr. Charney cited the Internet as an example of this since its borderless form has pushed the bounds of national sovereignty. Traditionally, nations have used borders as a means of determining what is allowed and what is not. As a result of the new borderless electronic environment, previously simple issues, such as warrant execution, have become legal and logistical nightmares. As we move towards a global environment, the world is discovering that traditional borders no longer apply and as a result, the lines between internal criminal conduct, external criminal conduct, and eventually warfare, all blur together. Mr. Charney concluded his remarks by noting that the worse thing that someone could have done in the early days of hacking would have been to alter the fifth digit of pi by one. The United States uses pi for all of our astrological calculations and such a change would have had a catastrophic effect. The worse thing about such an attack would have been that no one was watching to catch it!

Luncheon Address:
“The CIA and the 21st Century”

The Honorable Frederick P. Hitz, Inspector General of the Central Intelligence Agency, presented a luncheon address entitled “The CIA and the 21st Century.” He prefaced his presentation by stating that his comments were based on what he had learned about the CIA during his tenure and what his views were about its future. Inspector General Hitz posed the question of what should we want and expect from U.S. intelligence in the 21st Century?

He noted that the goals of the Agency remain remarkably close to President Truman’s original hopes for the CIA which were to establish “an all source intelligence collection, analysis, and dissemination capability, capable of providing U.S. policy makers, civilians as well as military, with timely focused intelligence information that serves no particular policy brief or bias.” In order to make the CIA better, Inspector General Hitz suggested that the Agency play the role of principle intelligence provider to the President, without any policy bias. The CIA, via its Inspector General, has acknowledged the BCCI and Aldrich Ames scandals among others and has been trying to come to grips with the professional and legal shortcomings manifested in these cases. The CIA has been engaged in major efforts to improve its operations, including improving relationships with law enforcement, recognizing the criticality of counter intelligence and high personnel standards, focusing on the quality of sources and value of intelligence gathered in a foreign country, and maintaining the highest professional standards of tradecraft. Inspector General Hitz noted that an emphasis on heightened attention to law and oversight was not the chief answer to the question of how to make the CIA more effective as we enter the 21st Century.

In concluding his remarks, Inspector General Hitz discussed five efforts which he felt would help to improve performance levels at the CIA. First, the CIA must identify and settle on five or six critically important targets. The Agency has been working towards this under President Clinton but further refinements are necessary. Second, the CIA needs stability and consistency in its leadership. There has been too much change at the top in the last five years. Mr. Hitz stated that this change has not been the sole product of the Executive as the Congress has created significant disturbances with changes in the Chairmanship of its various committees. Third, the CIA should set a term limit for the DCI of six to seven years. This would create a more stable organization with high morale, allowing for the production of intelligence without any hint of a political spin. Fourth, the CIA must upgrade the quality of its case officers. In the past, the CIA had wonderful ties to the greatest universities around the country. With today’s explosion of technology, more than ever, the CIA needs to reach out to academia. On the collection side, the Agency needs to pursue opportunities with savvy, language-trained operatives in order to deal with the other agents abroad who are intelligent and committed. Fifth, the CIA needs to remember its role as the President’s intelligence purveyor. It is not the Cen-
VI. Ethical Considerations on National Security Law: Who is the Government Attorney’s Client?

Richard Friedman, of the law firm of Rosenthal & Schanfield in Chicago, Illinois, moderated the final panel of the conference. He opened his remarks by noting that the country is at a national time of transition. It is difficult to identify a prevailing ethos and the simple question of right versus wrong is blurred at the present. It has become very difficult to assess what are the ethical standards and even more difficult to assess what are ethical concerns, especially with regard to national security issues. Practical situations such as who is the client and what are the client’s expectations are but two of the dilemmas facing lawyers in the national security arena.

Christopher Schroeder, Acting Assistant Attorney General at the Department of Justice’s Office of Legal Counsel, opened her remarks by offering a conceptual mapping of how the Department of Justice (DoJ) determines who the client is. Stated simply, DoJ lawyers look to see whose interest the lawyer should be attentive to, who the principle agent is in the agency relationship, whose interests are paramount, to whom does the agent answer to, who does the agent have privileged relations with, and whose interests are being vindicated. Ms. Schroeder noted that the difference between public and private lawyering is that the obligation to the United States operates at a more conscious level than in private lawyering. When considering the question of whose interests are being carried out, the DoJ understands that it works directly for the President. Thus, the DoJ is not an arbiter of policy decisions or options. According to Ms. Schroeder, the DoJ attorney’s job is to, among other things, enable the President to accomplish what he or she seeks to accomplish to the maximum extent possible. In that regard, a public lawyer is not that different from a private lawyer. In concluding, Ms. Schroeder recognized that from time to time, lawyers at the DoJ have a third client which is the Office of the President. There is an obligation incumbent on the sitting President to pass on the office with the powers of the President intact. This is an important consideration since it has such long term implications for the Office of the President itself.

Alan J. Kreczko, Special Assistant to the President and Legal Advisor to the National Security Council, made his second appearance on a panel at this conference and made several personal observations on the issue of ethics in government lawyering. He addressed the question of who is the client of the government lawyer by noting that this was a
Panel VI—Who Is Client . . . ?

Continued from page 11

hotly debated topic in the past but that a consensus has emerged that as a general matter, a government lawyer’s client is his or her agency. In support of this position, Mr. Kreczko made four observations. First he quoted former White House attorney Beth Nolan in an article in 1990 as saying: “in our system of government, responsibility runs to the constitutionally authorized institution.” Second, he argued that it is important to recognize the relationship between the NSC Legal Advisor and the White House Counsel. Theoretically, there could be a conflict between these two offices however, in reality, there has been little historical friction. Third, Mr. Kreczko pointed to the relationship between the legal advisor and his or her employees. He stressed that it is important to remember that an employee may not have privilege with a government lawyer and government lawyers need to recognize the risk in becoming an “attorney for the situation.” Finally, Mr. Kreczko noted that it is more difficult to provide ethics advice in government. We have moved beyond the question of what is consistent with ethics rules to what is consistent with an appearance of impropriety.

Peter Morgan, of the law offices of Dickstein, Shapiro, Morin, and Oshinsky, in Washington, DC, began his presentation by recognizing that even in private practice, there is no fixed answer to the question of “who is the client?” The answer, according to Mr. Morgan, depends on the circumstances at the time the question is asked. It is important to identify the specific client to determine the scope of interests at hand and exercises aimed at identifying the client should always involve the liberal use of common sense. “If the person reasonably believes that you are their attorney, then you are their attorney, “end of story!” In this way, ethical considerations address the expectations from the lowest level employee up to the President. Mr. Morgan closed by noting that there are special ethical rules relating to organizations (as outlined in Model Rule 1.13) and thus a lawyer represents an organization and those operating throughout it. He stated that normally, an attorney should follow the instructions from above, unless illegal or contrary to the client’s or agency’s interests and he pointed out that Model Rule 1.13 applies to government as well as private lawyers.

Paul Schott Stevens, Chairman of the ABA Standing Committee on Law and National Security, also offered his personal insights on the issue of ethics and the government attorney. Mr. Stevens began by stating that he had gone to his files from his years as a government attorney and had found several sources of information on the ethics of being a federal employee. Based on the oath given with his appointment, Mr. Stevens noted that he owed his “first and last allegiance to our system of government.” This allegiance was first to the rule of law in following the Constitutional order, second to the President, and third to the Office of the Presidency. For this reason, Mr. Stevens felt that it is important for government lawyers to avoid situations in which they are involved with representing policy. Mr. Stevens closed by noting that the “appearances standard” has a tremendous impact on the way ethical issues are addressed in government. The Bar itself has never adopted this standard and asks instead whether the lawyer has done something wrong. The private sector has simply chosen not to be subjected to the appearances standard and while there may be good reason to adopt it in the federal government, it is difficult to understand and therefore it is difficult to apply.

—12—