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

Promoting the Rule of Law: 
A Tribute to Lewis F. Powell, Jr.
Edited by Pamela M. Jimenez

On November 6-7, 1997, the Standing Committee on Law and National Security of the American Bar Association, the Center for National Security Law of the University of Virginia School of Law, and the Center on Law, Ethics and National Security of the Duke University School of Law, co-sponsored the seventh annual conference devoted to the review of developments in the field of national security law. This year's conference, titled "National Security Law in a Changing World," was dedicated to Lewis F. Powell, retired Associate Justice of the United States Supreme Court, former President of the American Bar Association, and co-founder of the Standing Committee, in recognition of his efforts in promoting the rule of law. The Standing Committee also paid tribute to the late Jack McNeill, bestowing upon him the first Morris L. Leibman National Security Law Award (see Fall 1997 Report). Leibman, a Presidential Medal of Freedom recipient who cofounded and chaired the Standing Committee for a dozen years between 1962 and 1982, originally suggested this series a year before his death in 1992; and the "review of the field" conferences have become a major annual event for the Washington-area national security law community. —Ed.

The Standing Committee was honored to have ABA President Jerome J. Shesnick (left) attend the entire two-day conference. He is shown chatting during a break with Standing Committee Counselor Max Kampelman. His tribute to Justice Powell during Thursday's dinner begins on page 12.

Chairman's Welcome

Paul Schott Stevens, chairman of the Standing Committee on Law and National Security, introduced the Standing Committee and its co-sponsors. In planning the conference, he explained, the sponsors had several specific purposes in mind. One fundamental objective was to honor the work and contributions of Lewis F. Powell, Jr. "His entire career," Stevens observed, "has been dedicated to building the rule of law, through his jurisprudence as an Associate Justice on the United States Supreme Court, through his leadership in the legal profession as President of the ABA, through his role as a counselor and an advocate over many years of distinguished legal practice, and through his in-

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Panel I—Survey of New Developments in National Security Law:

Executive Branch Perspectives

As has become a tradition since the first Leibman conference, the first panel provided an opportunity for the senior national security lawyers within the Executive branch to report on the work of their offices and share thoughts informally with the national security law community. The panel was moderated by Standing Committee Chairman Paul Schott Stevens.

David Andrews

David R. Andrews, Legal Adviser to the Department of State, discussed five significant national security law developments reviewed by his office this past year. The first, and perhaps most noteworthy, development concerned the ongoing threat posed by Iraq’s defiance of UN Security Council Resolutions and refusal to allow the inspection of its weapons of mass destruction programs. These actions, Andrews warned, present a continuing threat not only to U.S. security, but also to the peace and security of the Middle East.

The second topic related to the status of sanctions regimes against Iran and Libya, including the 1996 Iran and Libya Sanctions Act (“ILSA”). ILSA is designed to encourage both countries to terminate their support of international terrorism and efforts to acquire weapons of mass destruction. To accomplish these objectives, ILSA withholds certain benefits of the U.S. economy to firms that invest threshold amounts in ventures which directly and significantly contribute to the exploration, extraction, refinement or transportation of petroleum in either country. ILSA also piggybacks on Libyan sanctions included in existing Security Council resolutions. Despite “sanctions fatigue” and resistance to U.S. efforts to isolate terrorist nations, Andrews stated that the Administration remains committed to the policy expressed in ILSA and stands firmly behind UN Security Council resolutions.

The third topic Andrews addressed was terrorism. On October 8, 1997, the Secretary of State designated thirty organizations as “foreign terrorist organizations” under the Anti-Terrorism and Effective Death Penalty Act of 1996. The most notorious designated groups include HAMAS, Hizballah and other rejectionist groups which use or threaten violence to disrupt the Middle East Peace Process, Aum Shinrikyo, which was responsible for the 1995 Tokyo subway poison gas attacks, and the Tupac Amaru Revolutionary Movement, which held dozens of hostages in Peru at the residence of the Japanese ambassador. While each organization has an automatic right to appeal its designation to the DC Court of Appeals, the designations are supported by thorough administrative records to ensure they will withstand any legal challenge. There are three principal consequences of designation: (i) under U.S. law, it is a criminal offense for persons subject to U.S. jurisdiction to provide designated groups funds or other forms of material support or resources, such as weapons or safehouses; (ii) aliens abroad who are members or representatives of designated groups are ineligible for visas.

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Panel II—Survey of New Developments in National Security Law:

Legislative Branch Perspectives

The panel on "Views from the Hill" was moderated by Richard E. Friedman, former Chairman of the Standing Committee on Law and National Security and current Chair of the Advisory Committee to the Standing Committee. For the past four years, Friedman recalled, the Standing Committee has met with the general counsels of various executive branch departments and agencies to help facilitate the exchange of ideas and information relating to national security law. The Committee has also worked closely with their counterparts on the staffs of congressional committees that deal with national security issues. This year's and future conferences, Friedman explained, will include a panel composed of senior Hill staff members to present their views of current issues of national security law.

Patrick Murray

Patrick H. Murray, Chief Counsel to the House Permanent Select Committee on Intelligence, presented his views on the Intelligence Authorization Act for fiscal 1998 and its whistleblowing provisions. The proposed legislation would authorize policymakers to collect and report on intelligence available to the intelligence community. Although the legislation has shortcomings, such as the absence of sufficient analytical support to enable policymakers to use the information, it is being held up for other reasons. Specifically, Murray asserted that the proposed legislation has been held hostage to Senate processes, negotiations and discussions over the Defense Department Authorization Act for fiscal 1998, even though the unresolved issues were unrelated to the intelligence community. This delay, and the inability of the intelligence community to operate without statutory authorization, necessitated interim appropriations through November 1997.

Murray reported that for the remainder of the Congress, Chairman Goss has strong views on transnational issues such as counter-terrorism, proliferation, organized crime and counter-narcotics. The Committee is currently engaged with the Office of Drug Control Policy and various offices of the executive branch to review the national counter-drug architecture. Presently there are 43 committees with some involvement in counter-narcotics, and there is bipartisan support for efforts to reduce overlap.

Encryption is another focus of the House and Senate Intelligence Committees. In proposed encryption legislation, Goss believed there was too much attention on unrestricted export of encryption software, and not enough attention on public safety and national security equities. Through amendment, there is now a mandate on domestic applications of encryption software that require certain capabilities to be included in any encryption software manufactured after a date certain so that access to plain text is available to both law enforcement and national security agencies. There has been no further movement on the encryption bill due to philosophical and ideological differences on U.S. encryption policy among Director Freeh and the law enforcement community, the intelligence community, and the commercial, software and privacy groups. Moving forward, Goss' mandate to Murray is to address the law enforcement and national security equities.

Regarding whistleblowing, Murray noted that the Senate version of the Intelligence Authorization Act had a whistleblowing provision which did not survive conference. That provision would have permitted any executive employee in possession of classified information relating to mismanagement, corruption, malfeasance or criminal activity to share that information with any member of Congress, and not necessarily members of the intelligence committees. The Administration threatened to veto the bill if that provision survived, relying on the separation of powers argument. Murray sug-

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United States and are subject to exclusion from the United States; and (iii) U.S. financial institutions are required to block funds of designated foreign terrorist organizations. The goal, Andrews said, is to make the United States “a no-support-for-terrorism zone.”

The fourth development concerned the proliferation of sanctions statutes to halt the spread of nuclear, chemical and biological weapons and delivery systems, and to destabilize transfers of advanced conventional weapons. These statutes include, without limitation, the Arms Export Control Act, the Iran-Iraq Act of 1982, the Foreign Assistance Act, and ILSA. In response to skepticism over whether the United States is pursuing sanction cases with sufficient vigor, Congress has proposed initiatives to lower the threshold for imposing sanctions.

The fifth development highlighted by Andrews was the Senate’s use of its advice and consent authority to impose conditions unrelated to the substance of the treaty under consideration. For example, the Senate’s approval of the Conventional Armed Forces in Europe Treaty Flank Document Agreement was conditioned upon a certification that the President submit any agreement governing ABM treaty succession to the Senate for its advice and consent. Although the Administration objected to the condition, Andrews noted that the President signed the agreement, which provides basic security in Europe and advances the overall interests of the United States.

Judith Miller

Judith A. Miller, General Counsel of the Department of Defense, provided an update on three topics covered last year during the sixth annual review conference, and reported on several new developments during the past year. One topic Miller discussed last year concerned the Administration’s efforts to inform the public of the advantages for military operations that would result from U.S. ratification of the UN Law of the Sea Convention. The United States declined to sign the agreement when it was first negotiated in 1982 because of its flawed provisions on deep seabed mining. Those provisions were improved by 1994 amendment, and the President has signed the treaty and sent it to the Senate for ratification. The DoD supports ratification of the Law of the Sea Convention because it would guarantee freedom of navigation for military vessels and aircraft in areas of the world that are critical to U.S. national security.

Second, the DoD continues to support the creation of an International Criminal Court (“ICC”) subject to certain conditions. One condition is that the jurisdiction of the ICC should be limited to Continued on page 5

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volvement in our own field of endeavor as co-founder of the Standing Committee on Law and National Security.”

Justice Powell’s example, Stevens suggested, should remind us of the privileges we enjoy, and the obligations incumbent upon us, as members of the American legal profession. In March 1990, Stevens noted, the Peruvian novelist and journalist Mario Vargas-Llosa spoke about how to sustain the democratic tide he perceived was sweeping Latin America. He stated, “if we want democracy to take hold in our countries, our most urgent task is to broaden it, give it substance and truth. Democracy is fragile in so many countries because it is superficial, a mere framework. Let us all make an effort, each one of us, within the limits of our own spheres of action, using the means at our disposal to contribute whatever we can to see that democracy works.” While this mission is widely respected in the US, Stevens proposed that on a larger world stage, there may be no greater national security challenge for the US than to give “substance and truth” to democracy among nations. In our sphere of action, the rule and the role of law are essential preconditions to and enduring guarantees of democracy and democratic institutions. These themes are instrumental in building democracy.

A second purpose of the conference was to renew an ongoing dialogue on key developments in the field, and to review in depth selected topics of interest, including adultery and the Uniform Code of Military Justice, controls on encryption technology, and a broad range of other issues. A third purpose was to assemble on our panels and in our audience the current and future leaders of the field of law and national security.

Acknowledging contributions of the past, Stevens paid tribute to the late Rear Admiral William Mott, who chaired the Standing Committee from 1973-1975 following a distinguished military career that concluded as the Judge Advocate General of the Navy. (See the special tribute to Admiral Mott by one of the two surviving cofounders of the Standing Committee, on page 17 of this issue.)
serious offenses against international order which may not be practicable to prosecute in U.S. domestic courts, such as genocide and war crimes. The other condition is that there must be an effective screening process to ensure that baseless charges are not brought before the ICC as a type of political theater. The trigger mechanism favored by DoD is referral by the UN Security Council.

The third subject covered last year concerned the legal aspects of information operations. The recent Report of the President's Commission on Critical Infrastructure Protection concluded that vital national systems, such as transportation, public utilities, communications and financial markets are vulnerable to terrorist attacks in various forms, including electronic attacks on automatic computer systems. Miller expressed hope that the Report will cause senior leaders throughout government and industry to focus on the question of who will be responsible for protecting the nation's critical infrastructure, and how different constituents will work together on this important objective. In this latter area, there are a host of legal issues concerning, among other things, the application of U.S. computer laws, the limits of intelligence sharing, and the resolution of jurisdictional and constitutional issues.

More recent developments at DoD include the negotiation and application of new status of forces agreements ("SOFAS"), which establish legal relationships in areas such as criminal jurisdiction, claims, taxes, civil litigation and contracts. The United States is currently party to SOFAS with nearly 90 nations, and enters into new military relationships each year. In addition, existing SOFAS agreements have been renegotiated as a result of changes in the nature of our relationship with certain defense partners, such as Germany, Japan, Korea, Panama and the Philippines. In some cases, proposed changes would result in an unacceptable level of control over the readiness and security of U.S. troops. The lesson from these negotiations is that many of our long time allies are looking to restructure their relationship with the United States, and SOFAS negotiations have proven to be a lightning rod for old grievances and new aspirations.

Miller briefly discussed the Oslo negotiations on landmines, stressing the enormous effort that went into crafting a compromise position that would protect essential U.S. national security requirements and be politically acceptable to the countries driving the process, to no avail. In her view, the inability to reach a compromise was ironic because the United States provides more resources for demining than any other nation, and the self-disabling mines used by the U.S. military form part of the international humanitarian problem.

Finally, Miller addressed the role of legal institutions in maintaining good order and discipline in the armed forces. The sexual misconduct controversies of the past year raise important issues concerning the role of formal disciplinary processes in dealing with military leadership issues, such as the extent to which senior military leaders should be held personally accountable for incidents which occur within their commands. Miller suggested that decisions about accountability, standards of personal behavior by senior military leaders, and standards of behavior of superiors towards subordinates, are just as critical to military effectiveness as decisions about budgets and major programs.

James Baker

James E. Baker, Legal Adviser to the National Security Council, addressed two topics, constitutional authority over control of national security information, and legal and policy issues relating to landmines. Regarding the former topic, Baker noted that two provisions of the defense authorization bill and the intelligence authorization bill related to whistleblower protection. These provisions would have required the President to notify all executive branch employees that the sharing of classified information with Congress was consistent with law and public policy in certain circumstances, including situations where the employee believed there was wrongdoing in the executive branch, such as waste, fraud or abuse. The President opposed legislation which vested executive branch employees with authority, in their sole discretion, to provide national security and other privileged information to Congress, on the ground that it violated the Constitution by infringing upon the President's authority to protect state secrets and the dissemination of classified information. In support of this position, Baker pointed to Department of Navy v. Egan, where the Court determined that the President's authority as commander-in-chief to classify and control access to information relating to national security flows primarily from the constitutional vesting of that authority, and exists apart from an explicit congressional grant. Thus, Baker argued, the authority to protect such information falls upon the President as head of the executive branch and as commander-in-chief.

In Baker's view, the whistleblower provisions also raise a separation of powers concern with respect to the President's authority as chief executive, by

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depriving the President and his department and agency heads of their ability to supervise and control the operations and communications of the executive branch. The Administration’s position on this issue was that avenues exist to address wrongdoing, through agency Inspector Generals, the Department of Justice, or Congress. From the Administration’s perspective, there has been no demonstration that these mechanisms have failed. Therefore, Baker believes that constitutional confrontations between the branches should be avoided absent a compelling and demonstrated need.

These same constitutional issues, Baker asserted, have arisen in a number of other legislative contexts, including the Government Secrecy Act, bills which direct the declassification of certain documents in a specified period of time, and the release of the aggregate intelligence figure for a particular year. Baker noted that these issues raise a presumption that the new executive order on classified information has not worked. Although the verdict is still out, Baker suggested there are indications that it is working. For example, 1/2 billion pages have been declassified in the last 17 years, 2/3 of this figure were declassified in the past 2 years, and 51% of the documents marked for declassification in the past year will automatically declassify in 10 years without a line by line review. In Baker’s view, this area has more to do with resource allocation than constitutional authority.

The second topic Baker addressed was landmines, a topic which raises significant policy issues. Each year, roughly 25,000 people are killed or maimed by landmines. In humanitarian terms, the United States has unique responsibilities to ensure that U.S. forces fulfill their missions with minimal casualties. The landmine issue also raises treaty interpretation and constitutional law issues. In September, the President determined the United States would not sign the Ottawa Treaty at Oslo because of its failure to include a transition period to phase-out landmines instead of an absolute prohibition and its exemption for anti-handling devices, which covered European but not American antitank mines. Despite Oslo, Baker indicated the United States has taken a number of steps to address the mining issue. Most recently, the United States, already the largest contributor in the world to demining efforts, committed to increase fourfold the funds earmarked for demining. The constitutional issue involved with legislation on mines, in the Administration’s view, is that while Congress may appropriate funds for the acquisition of weapons, it may not determine how weapons in the nation’s arsenal are used. That is within the province of the commander-in-chief. Thus, while Congress may decommission vessels, it cannot restrict the President’s use of a weapons system already deployed in a tactical situation in the Gulf. In closing, Baker voiced optimism that the branches working together will address the mining issue in a fashion that is consistent with the constitutional prerogatives of both branches.

Dawn R. Eilenberger

Dawn R. Eilenberger, Principal Deputy General Counsel of the Central Intelligence Agency, discussed information management. For the first time in fifty years, the top line of the Intelligence Community budget was released to the public. While the consequences of that release are difficult to measure, the release question raises complicated issues regarding classification, declassification, and the creation, maintenance and destruction of records. There is a great deal of Congressional, judicial, media and public interest in this area, as evidenced by the work of the Moynihan Commission on Reducing Secrecy, special search bills, and the recent court decisions on the destruction of electronic records. Thus, records management has become a hot legal issue, particularly for intelligence agencies interested in release but concerned about protecting sources, methods and classified information.

In the declassification area, there are a number of legal and policy mandates and release standards. In addition to FOIA and Privacy Act issues, the new Executive Order imposes mandatory declassification review, which requires agencies to review classified information more than 25 years old within 5 years of the date of the order. There are also special statutes with their own declassification standards, such as the JFK Assassination Records Act and the Foreign Relations of the United States Act. Information is also released as a result of administrative and diplomatic taskings. Last year, the CIA responded to a number of these requests, including one by the Honduran and Guatemalan governments for information related to human rights, and another on the Gulf War illness. In addition to mandatory declassification, the CIA releases a good deal of information on a voluntary basis. This is a resource intensive endeavor, in terms of people and dollars.

The number of release requests has grown in recent years. FOIA requests grew 25% in 1996, and another 20% in 1997. This is exclusive of mandatory declassification review, which will require the agen-
cy to review about 40 million pages of documents for release. In addition to resource demands on agency lawyers and declassification management personnel, these figures have legal implications. The Electronic FOIA Amendments impose penalties upon agencies that do not make significant progress in declassifying documents and reducing its backlog of FOIA cases. Although the agency has already increased dramatically its productivity in the information release area, it will need to process 40% more requests each year to comply with the new legal requirements. Contrary to popular belief, the CIA currently provides information, in full or in part, to about 70% of its FOIA requesters, and denies only 10%. The remaining 20% are in administrative proceedings. In the special search area, even where the agency is unable to release a particular document, the agency attempts to summarize the relevant information for the requester.

Another daunting task undertaken by the agency involves the creation of a records management system to permit the search, retrieval and declassification of information. This is a particularly difficult challenge for CIA which is heavily compartmentalized. The final subject covered by Ellenger concerned the problem of unauthorized disclosures of information. The number of incidents in recent years, he noted, has become alarming. While disclosure may be an inevitable result of openness, Ellenger cautioned that it may have dire consequences when the information disclosed comes from a sensitive source.

Michael Lohr

Captain Michael F. Lohr, USN, Legal Counsel to the Chairman of the Joint Chiefs of Staff, discussed operations. In Bosnia, there are 8,000 U.S. troops deployed. Contrary to suggestions in the media, Lohr does not believe the Dayton Peace Agreement is dead. In his view, NATO, the Stabilization Force (SFOR) and the Implementation Force (IFOR) have been very successful in implementing the Dayton Peace Agreement. Large scale demining has taken place throughout the region, the warring parties have been separated, the de-arming process has been completed, the joint commissions meet on a regular basis, and the number of checkpoints throughout Bosnia have been reduced dramatically.

Regarding the specific issue of “mission adaptation” in Bosnia, Lohr asserted that there was never a question whether SFOR could take action to prevent the media from inciting violence against SFOR or IFOR. The new question is whether action can be taken when the media threatens the Dayton Peace Agreement itself. In May 1997, the supervisor of the Dayton Peace Process gave the High Representative the authority to curtail or suspend media operating in persistent and blatant disregard of the Dayton Peace Agreement. Following a debate over whether the SFOR could execute this authority, the North Atlantic Council (NAC) authorized specific rules of engagement and granted SFOR authority, on the request of a High Representative, to support efforts to contain media that threatens the Dayton Peace Agreement. Pursuant to that authority, SFOR has taken over 4 transmitters, and the High Representative is negotiating conditions for the return of the transmitters to the warring factions in Bosnia.

Another recent issue concerns the special police, known as the MUP in Bosnia. During the summer of 1997, the International Police Task Force (ITF) discovered extensive bugging equipment, files, and unknown prisoners in police stations and jails. This activity was assessed as a violation of the Dayton Peace Agreement, which requires that police forces respect international standards, and prompted the ITF to inspect police stations. As a result of these inspections, 12 tons of weapons were seized and the police force was disarmed.

Regarding war criminals, the NAC has authorized SFOR to apprehend or detain Bosnian war criminals it encounters in the course of its duties. However, the powers of SFOR are circumscribed. The NAC has not permitted SFOR to hunt down war criminals, except in special circumstances.

Other operations where U.S. forces are deployed overseas include Haiti, where the United States continues to provide humanitarian assistance following the withdrawal of peacekeeping troops, Iraq, which is a current military operation, and migrant operations, which the DoD conducts for humanitarian reasons despite its lack of statutory authority. Turning to the greenhouse gas protocol, Lohr suggested it could have operational impacts because a 10% cut in DoD emissions, which currently represent only 1.4% of U.S. emissions, will affect the ability of the military to operate and train its troops both in the United States and abroad.

In the question session, there was an inquiry concerning tension between the DoD and the State Department regarding the creation of an International Criminal Court. Miller responded that the two agencies are working together. Andrews concurred, and added that DoD and State are in complete agreement on scope, jurisdiction and trigger mechanisms. Other countries, such as France and the UK, have concerns about trigger mechanisms which may delay the agreement.
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suggested there is a need to develop a system that protects employees for whistleblowing in a fashion that does not conflict with the separation of powers and the President’s inherent authority to protect national security and classified information, and at the same time, provide members of Congress the information they need to appropriate funds and exercise the oversight authority delegated to them under the Constitution.

During Q&A, Standing Committee member Suzanne Spaulding clarified Murray’s description of the whistleblowing provision, noting that the proposed legislation did not permit employees to report grievances to any staffer. Rather, it designated appropriately cleared staff, meaning the responsible oversight committees or the employee’s own member of Congress. The proposed legislation further provided that the recipient of classified information received as a member of a Committee would be responsible for maintaining the confidentiality of the information received.

Stephen Rademaker

Stephen G. Rademaker, Chief Counsel to the House International Relations Committee, indicated that the principal legislation before his committee, and its Senate counterpart, the Senate Committee on Foreign Relations, is the Foreign Relations Authorization Act, periodic legislation which authorizes funding for the State Department, U.S. Information Agency, U.S. Arms Control and Disarmament Agency, and several smaller entities. Although the bill is still in conference, two high profile issues have been resolved. The first is the provision which would have abolished the USIA and U.S. Arms Control and Disarmament Agency and merged them into the State Department. The second concerns the authorization of payment by the U.S. of UN arrearages. These issues have been worked out, and the Committee’s conference report will be incorporated into the Foreign Operations Appropriations bill, which must be passed this session, and which may be attached to an Omnibus Appropriations bill.

In other areas, Congress has voted overwhelmingly in favor of the concept NATO enlargement, leaving the door open to Romania, the Baltic States, and other countries. Other legislation under review includes seven bills on the floor relating to China, one which provides sanctions for religious persecution, the Wolf-Specter sanctions bill which provides sanctions against countries with ongoing persecutions based on religious belief, the Helms-Burton sanctions bill aimed at U.S. investment in Cuba, and additional sanctions against investment in Libya. There has been some counterattack to prevent these types of sanctions. Helms-Burton has been held up as a poster child of a bad law that created needless friction and has not achieved its objectives. Rademaker suggested that this criticism is unwarranted. In his view, the legislation has been effective in preventing investment in Cuba, and there is an important end game. The United States was on a collision course over Helms-Burton after the European Union filed suit in the World Trade Organization. In negotiations to resolve the dispute, the focus is on the underlying question of investment in expropriated properties in violation of international law, the resolution of which may have applications in other regions of the world.

Arms control issues before the Senate Foreign Relations Committee include the Chemical Weapons Convention and the CFE Flank Agreement, both of which were approved by the Senate. Another issue under consideration concerns the ABM Treaty. Rademaker cautioned that the continued viability of the ABM Treaty may be called into question if the Senate refuses to give its advice and consent to the succession treaty, because technically, the ABM Treaty is in force with the USSR, which no longer exists. Under the succession Memorandum of Understanding (MOU), Russia, the Ukraine, Kazakhstan, Belarus shall be deemed successors to the treaty. Unless the Senate gives its advice and consent to the MOU, there may be a serious debate between the Senate and the Administration about who the successor is. The Administration may challenge this view, but from the perspective of the Hill, if there is no treaty partner, there is no treaty.

Michelle Van Cleave

Michelle Van Cleave, Staff Director and Chief Counsel to the Senate Judiciary Committee’s Subcommittee on Technology, Terrorism and Government Information, suggested that since the fall of the Berlin wall, national security issues tend to have an economic dimension. In this new era, she suggested, there is a question of where national security ends and domestic security begins. Historically, this question has required policymakers to make judgments about the proper reach of government into the lives of Americans. During the Cold War, the threat of devastation by nuclear war overshad-
Peace Requires Justice

John Shattuck

The Honorable John Shattuck, Assistant Secretary of State for Democracy, Human Rights and Labor, described his first-hand experience with the challenges presented by war crimes and genocide. In the post-Cold War world, he asserted, war crimes and genocide complicate efforts to promote the rule of law and require a whole new approach to diplomacy. In May 1994, the President sent Shattuck on an urgent mission to consult with Rwandan leaders about uncontrolled violence in the region. There he witnessed thousands of human bodies floating down the Kagera River victims of a vast genocide. Two months later, as the first international overland traveler between Rwanda and Burundi, Shattuck witnessed the devastating effect of the genocide: a countryside completely devoid of people. The following year, in July 1995, Shattuck interviewed three survivors of mass executions in Srebrenica who confirmed reports of torture and cold-blooded murder of thousands of unarmed men by General Ratko Mladic and Serbian troops in the largest single genocidal event since World War II.

These haunting images, Shattuck observed, stand in stark contrast to democratization in Central and Eastern Europe, the institution of civilian governments in the place of military dictatorships in our hemisphere, the replacement of apartheid with multiracial democracy in Africa, and opposition to authoritarian government in Asia. Yet, the forces of integration, in communications, commerce, transportation and finance, and the forces of disintegration, in nationalist, ethnic and religious conflict, are related. As people facing uncertain change seek refuge in their national, ethnic or religious identity, they are exploited by political leaders seeking to enhance their own power by preying upon popular insecurity and inciting communal violence. This violence is directed against civilians who have no defense except principles of international law.

The challenge, Shattuck suggested, is to activate those principles to prevent destabilization by genocidal conflict—through early warning, intervention and justice. Early warning systems include human rights and refugee relief missions, which have been institutionalized in recent years through the Office of the UN High Commissioner for Human Rights, the UN High Commission for Refugees, and the OSCE High Commissioner for National Minorities. Field operations conducted by these institutions throughout the world provide an opportunity to resolve conflict though preventive diplomacy, in the form of visa restrictions, arms restrictions, denial of access to international financing, and economic sanctions. Conflict involving human rights abuses may also be resolved through mediation.

When early warning fails, active intervention may be required to protect civilians from violations of international humanitarian law. While the US has a clear national security interest in international stability and the rule of law, Shattuck asserted that international coalitions have more resources, add legitimacy to the peacemaking effort under international law, and as a result, have a greater likelihood of success. One lesson of Bosnia is that when conflict escalates to genocide, intervention requires not only peacekeeping but also peacemaking, by well trained forces under rules of engagement that can enforce principles of international law.

The second lesson of Bosnia and Rwanda is that "peace is not possible without justice" particularly where conflict is the result of genocide and crimes against humanity. War criminals must be punished to affix responsibility, remove the stigma of guilt by association with the ethnic group that committed the genocide, and thereby enable victims and survivors to reconcile with their countrymen. For these reasons, the US as been the strongest political and logistical supporter of the UN War Crimes Tribunal for the former Yugoslavia and for Rwanda. Despite their respective shortcomings, these tribunals represent the first attempt to develop and international legal approach to controlling global disorder. These ad hoc tribunals, Shattuck concluded, are a step forward, but not enough. Quoting President Clinton's remarks before the UN General Assembly, Shattuck called for a permanent international criminal court to prosecute violations of humanitarian law wherever such crimes are committed.

Other steps identified by Shattuck to deter war crimes include foreign assistance to promote the rule of law in transitional and post-conflict countries, through training to judges, court administrators, prosecutors, defense lawyers and the police, through legal education and constitution drafting programs, and through a variety of other law reform activities aimed at creating new institutions of domestic justice and human rights enforcement. The US has a direct stake in these initiatives because our national security depends on international stability and the rule of law, which promotes political and economic security. Finally, Shattuck proposed to create an International Institute of Justice, based in the UN, to serve as a multilateral source of support for new initiatives to promote justice, accountability, and the rule of law. 

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PANEL III

Democracy Enlargement: Building the Rule of Law

Professor John Norton Moore, Director of the Center for National Security Law at the University of Virginia School of Law and Counselor to the Standing Committee, moderated the panel on democracy enlargement. Pointing to statistics on homicide and genocide in democratic and totalitarian regimes, Professor Moore asserted that there is a strong empirical correlation between democracy, the rule of law, and the protection of human rights. In the past decade, empirical studies have revealed that democracies generally do not wage war against other democracies, and that democracies tend to protect their population from slaughter. By contrast, totalitarian regimes, built on undemocratic models without the rule of law, have slaughtered 170 million people in the twentieth century, as documented by Rudy Rummel in his recent book, *Death by Government*.

Moore observed that there is also a strong empirical correlation between democratic freedom and economic development, and between government structures and famines, which tend to be associated with non-democratic regimes and colonization. A study by the Norwegian Peace Institute on the relationship between government structures, the rule of law and environmental protection further confirms the superiority of democratic institutions. There is also a correlation between women's rights, democratic principles and the rule of law, as well as a correlation associated with the level of corruption in society.

There has been an effort to understand the differences between the principles underlying democratic and totalitarian systems that lead to fundamental distinctions in foreign policy goals. Moore suggested that the application of Nobel prize macroeconomic theories of governmental failure to democratic and totalitarian systems would provide insight. As we incorporate new data into our information base on democracy and the rule of law, Moore asserted that there may be implications for our foreign policy, and perhaps the basis for a new paradigm in international relations theory as a whole. If the new data is correct, Moore concluded that the rule of law engagement and democracy building are among the most important components of foreign policy, and it is essential for the international system to provide appropriate levels of deterrence against bad regimes to stop democide and prevent war. Following his preliminary remarks, Moore introduced a distinguished panel to comment further on these important issues.

Ambassador Mircea Dan Geoana

His Excellency Mircea Dan Geoana, Ambassador of Romania to the United States, suggested that Romania represents an example of how a country with a difficult legacy can make the transition to democracy. Although Romania is located in a complex geographic area that has undergone many dramatic changes in recent years, Romania has made tremendous progress. The objective of Romania's violent revolution of 1989 was to change the political system. With the February 1997 elections, Romania completed the first step on its transition of power to elected parties. This marked a major change in Romanian politics. Likewise, Dan Geoana suggested, there is tremendous change in the new transatlantic community, as democracy has become one of the most sacred traditions in Central and Eastern Europe.

Speaking from experience, Dan Geoana observed it is relatively easy to build democratic institutions and build democratic government where democracy once existed. It is very difficult, however, to change the culture of people who have lived under communist rule. While Romania has made huge strides towards developing democratic institutions and a free and independent judiciary, the greatest challenges are in combating international organized crime. There is a concern that under the facade of democracy, there may be a hybrid of democracy and communism, which is not a true democracy.

In Romania, Dan Geoana explained, both Continental and Anglo-Saxon traditions influence new legislation. The capital markets operate under the American system, and Romania is trying to harmonize its national, Continental tradition with the new American trend and European Union guidelines. In other regions of the world, however, such as Southeast Europe, Bosnia and Albania, it is more difficult to build the rule of law than to end conflict. In addition to teaching people to accept democracy and learn accountability, there is a need for new instruments to address global and regional problems. In Romania, Dan Geoana asserted, the key to stability and peace is continuous American involvement. Romanians deeply believe American support is necessary. As lawyer, politician and resident of Romania, Dan Geoana concurred, and concluded
that American interest in democratization will be the cornerstone for international stability.

Carl Gershan

Carl Gershan, President of the National Endowment for Democracy, asserted that democratization is complicated by the phenomenon of globalization. Globalization, in Gershan's view, is a contradiction. On the one hand, there is a genuine process of globalization, as evidenced by the impact of technology, communications, the effect of the global markets, as well as the globalization of consumer goods, educational opportunities and political norms such as the idea of holding elections. Simultaneously, Gershan argued, there is a different and contradictory trend of resistance to globalization in the form of xenophobia, rising nationalism, religious fundamentalism, and protectionism in the economic sphere. Gershan asserted that these trends are reinforced and exacerbated by the end of the Cold War and the removal of the ideological constraints of nationalism, pluralism and the shrinkage of the world.

Gershan noted that Huntington, in The Clash of Civilizations, argued that because of the shrinkage, there is greater interaction and potential to clash, which takes the form of anti-Western sentiment because globalization is viewed as Western ambition. There is a clash not only between but within civilizations, as evidenced by pluralists in Islamic nations. In the post-Cold War world, with the rise of illiberal democracy and the competing trends, Gershan contended we need to find ways to stretch across civilizations and reach out to pluralists who favor democratic structures.

In conclusion, Gershan asserted that the time has come for democratic nations to develop institutions to promote democracy by committing financial and personal resources. Then, democracy will not be a Western example, but rather a truly global democratization effort. This objective, Gershan concluded, may be accomplished by using advantages of technology and communications.

Max Kampleman

Ambassador Max M. Kampleman, Counselor to the Standing Committee, observed that the twentieth century has been the bloodiest century in history. Ironically, the twentieth century was supposed to be a time of peace and harmony. At the turn of the century, there was faith that better times would come. This dichotomy raises two questions. The first is, "Does human nature demand this type of brutality?" The second is, "Are we able to stop it?" Kampleman responded that we do not know the answers to these questions, but we do have important choices to make. One choice is to accept whatever the future may bring, and let nature take its course. The other is to take steps to influence the evolutionary cycle.

Kampleman reflected upon the changes that have improved the human dimension, such as increased longevity, advances in medical knowledge which undermine the principle of human vulnerability, and material conditions including refrigeration, air conditioning, ball point pens, airmail and other things we have taken for granted. He then postulated that while there may be a capability for evil and cruelty, there is also a capacity for good. Examples include the steps the United States is taking to promote human rights, and the evolution towards democratization in Romania. However, there is an absence of world leadership. The United States declined to join the League of Nations because the American people are inward-looking and do not want to be leaders. However, there is no one more capable of providing leadership than the United States.

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Justice Lewis F. Powell
Honored at Dinner

Thursday evening’s dinner served two important purposes: the presentation of the first ABA Morris I. Leibman Award in Law and National Security to the late John H. “Jack” McNeill (see Fall 1997 Report), and an opportunity to pay special tribute to former Supreme Court Justice, ABA President, and Standing Committee cofounder Lewis F. Powell. Reprinted below are some of the remarks made on that occasion about Justice Powell. —Ed.

Standing Committee Chairman
Paul Schott Stevens

As all of you know, this year’s conference is titled: “National Security Law in a Changing World: The Seventh Annual Review of the Field”; but there is a very special postscript and that is “Promoting the Rule of Law—a Tribute to Lewis F. Powell, Jr.”

When we began to consider this year’s conference, we thought it most appropriate to take this opportunity to honor the career and accomplishments of Justice Powell, who has an important connection to the Standing Committee, in fact he was a cofounder of the Standing Committee with Morry Leibman and others. Justice Powell is a towering figure in American law and we have many speakers this evening to attest to that reality.

I am pleased to introduce a successor to Justice Powell as President of the American Bar Association and that is Jerome J. Shestack.

ABA President
Jerome J. Shestack

Thank you, Paul. I am honored to be here. Indeed, Justice Powell’s attributes and his qualities and the real tribute to him is already written large and engraved in the jurisprudence of our courts, and preserved best of all in the minds and hearts of the people he touched and trained and taught and mentored and to whom he served as an inspiration. I want to mention three things he did as President of the ABA which remain as an exemplar for all future presidents of the ABA. It was 1965 when he was President of the ABA, and at that time, there were hardly any legal services for the poor. Justice Powell got behind a commitment to legal services to the poor and he got the ABA behind the federal legal services to the poor, a commitment made by the Bar which has sustained since then, and that was a major factor for equal access to justice, and

The conference dinner honoring Justice Powell and Jack McNeill filled the dining room to its legal capacity.

that is how he put it in his speeches—we cannot have the rule of law for those who are disenfranchised. He had a stellar influence on the bar. He was committed so closely and so dearly to ethics—he started a new review of the code of professional ethics while he was president, which developed into our Model Rules of Ethics, which still govern the ABA today, and the same with Criminal Justice Standards, which were a shambles when he became President of the ABA. He also was involved in the creation of the committee, because he had a vision and a gift for shaping the future to serve our society and our civilization. Justice Powell’s vision of the lawyer is one which we can hold forever before us. He said: “Lawyers share with judges the privilege and responsibility of preserving the rule of law in our country. This includes the liberties and rights guaranteed by our Constitution. I know of no other calling with a greater opportunity to preserve the public good.” And that still stands as the reason why we who are part of the profession became lawyers.

ABA President Jerome J. Shestack took an active part in the entire conference, and paid personal tribute to Justice Powell.
John C. Jeffries, Emerson Spies Professor of Law at the University of Virginia, clerked for Justice Powell and later authored a biography about him.

Justice Powell, you have touched the lives of all of us. For us, you have made the rule of law your beacon and our hope. Thank you.

Professor John C. Jeffries

Let me tell you three vignettes about Lewis Powell. I think they tie together. On May 17, 1943, after some difficult and protracted negotiations, British and American authorities reached an agreement on the sharing of top secret intelligence information. As a result, a guy named Robert McCormick, a wall street lawyer, was given the task of creating the so-called special branch, a unit in the intelligence division of the general staff, designed to disperse and to use under tightly controlled conditions, information derived by the British Intelligence from decoding German radio traffic encoded on the Enigma Machine. This was the so-called "ULTRA" secret. McCormick recruited 28 American officers, almost all of them lawyers, to serve as ULTRA representatives. Their task was to receive the ULTRA secret decrypts, to evaluate them in light of other intelligence sources, and to advise the senior commanders who were authorized to hear such information. The list was short, to make sure that no action was taken to reveal the ULTRA secret source. So, Lewis was recruited as an ULTRA representative and sent to Europe.

Technically, he was commanded by Telford Taylor; but he was assigned to General Carl Spaatz, who was head of the U.S. Strategic Air Force. For Powell, the formal line separating ULTRA representatives from the commanders they advise—it was ordered by General Marshall that they be separate and not "commanded by" the commanders they advised—but as Powell said: "When Spaatz talked, I listed." Powell became the Director of Operations for Intelligence, heading a staff of 40 officers; and in that capacity he briefed General Eisenhower. All sources agreed he was a superb ULTRA representative. Powell became a full Colonel, earning the Legion of Merit, Bronze Star; and various French decorations; and although he spent fifteen years on the Supreme Court of the United States, nothing in his life gave him as much satisfaction or enduring pride as his military career.

Like a lot of people who served in World War II, Powell came away with a certain conviction in the essential rightness of the United States. Maybe that explains his attitude in this second little story I want to tell you.

In 1967, Powell was a member of President Johnson's Crime Commission, and there was an issue on the table about whether legislation would be enacted authorizing wiretaps. After a long and bitter debate, the Omnibus Crime Control Act of 1968 did authorize wiretaps under stringent limitations for ordinary criminal acts. But the statute said nothing about the President's power, whatever it might have been, to order warrantless wiretaps in a national security case. The statute simply preserved the President's power, whatever it was, without having defined it.

The ABA subsequently took the position that the President ought to have the authority to make warrantless wiretaps against acts of foreign governments, but not any comparable authority to wiretap in the interest of domestic national security concerns. Powell was vehemently displeased by that recommendation and went public in terms that were less qualified than his usual manner of speaking. Let me quote to you his views in 1971: "There may have been a time when a valid distinction existed between external and internal threats, but such a distinction is now largely meaningless. The radical Left, strongly led and with a growing base of support, is plotting revolution. Its leaders visit and collaborate with foreign Communist enemies. Freedom can be lost as irrevocably from revolution as from foreign attack."

How ironic that, less than one year later, Lewis Powell—then Justice Powell—found himself in a conference room in the Supreme Court, in the chambers allocated to the Chief Justice, voting on whether it was constitutional permissible, as the federal government claimed, for the President to order warrantless wiretaps in domestic security cases. The case, many of you will remember, has the

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odd name of United States v. United States District Court. It involved the prosecution of a would-be Timothy McVeigh, a member of the radical White Panther Party who was foiled by the efforts of law enforcement. He had been intercepted on a wiretap, which had been authorized but had not been approved by a judge; and he claimed successfully, as it turned out, that the evidence had to be suppressed.

Now in 1971, Lewis Powell had barely been able to admit that warrantless wiretaps had the potential for abuse. One year later, Lewis Powell the Justice, found that danger concrete and vivid: “History abundantly documents the tendency of government, however, benevolent and benign its motives, to view with suspicion those who most fervently dispute its policies. Therefore, Fourth Amendment protections become the more necessary with the targets of official surveillance may be those suspected of orthodoxy in their political beliefs. The price of lawful dissent must not be a dread of subjection to an unchecked survivance power.”

Sounds more like Bill Douglas than Lewis Powell. What accounts for the about-face, for the real reversal in his view, within six months? Part of the answer is that he had educated himself about the value of the law department, he had performed the duty which we expect all judges to perform of learning the law, studying the precedents, and reading the opinions of the judges who had come before; and he had been persuaded by their arguments to a degree which we perhaps had not anticipated.

Much more important was the change of his role. In 1971, he had been a private citizen. As such he felt free to express himself and to indulge his dis-taste for the kinds of radical Leftists who were the objects of domestic security wiretapping. In 1972, Powell spoke as an Associate Justice of the Supreme Court of the United States under a sworn duty to protect the Constitution of the United States and under a sworn duty to protect equally the rights of all citizens, including those he did not admire. I think that’s about a vivid example of the “rule of law” as one can imagine. It is an example of the great power of the ideal of the rule of law that, whatever the rule is, it has to apply equally, uniformly, without deviation or special treatment, to all elements of a great and diverse society.

That’s my illustration of Powell and the rule of law. It seems to be a good illustration of the great and enduring value of that idea. Let me say in closing that I saw Justice Powell three weeks ago. He is now into his 90th year. His world is smaller now. He would have loved to be here. He would be enormously pleased and flattered by the judgment you have made in dedicating these proceedings to him. I hope you won’t think it presumptuous of me, but on his behalf, I thank you all.

Former Standing Committee Chairman John H. Shenefield

Mr. President, Mr. Chairman, Assembled Guests: It is for me a very special and personal pleasure to pay tribute to Lewis Powell. He was my first boss. I was his law partner for a time. I was proud to serve on his confirmation team. He was my mentor. He is a model I use frequently when I talk to younger lawyers about life in the law. He is a living lesson in how to practice law in the grand tradition.

His career, with its sweep of achievement, is a true wonder. Many of us younger lawyers, as we then were, used to marvel at how he could put together all of the components of the career that he did. It was all the more amazing because through a career of forty years in the private practice of law, he built a great law firm, one that has continued to flourish even after he left it for the bench. And if that were not enough, he amassed a record of public service throughout those years of private practice that is really quite extraordinary.

I do not suggest for a Commonwealth that has produced the likes of Jefferson and Marshall and Madison and Monroe that he is at the head of the parade, but he is certainly in the very next rank. I suppose if he were here tonight, he would want us to call attention to the fact that he was a practicing lawyer for most of his career. I think he was equally proud of his military service. Many lawyers believe if you haven’t practiced law, you haven’t earned your spurs, and he lectured us remorselessly on that point. You were a success if clients were willing to pay you for your legal services. He was a senior active partner in every matter that he undertook for clients. I very well remember that he was senior trial counsel in a bank merger case in the Alexandria Division of the Eastern District of Virginia in a case brought by the U.S. Department of Justice, within four months of the time that he was nominated to be an Associate Justice of the Supreme Court. He was proud of the fact that he had ended his practicing career as a litigator, just as he had started it. He was proud of the fact that he knew his way around the courtroom. And he and the rest of his trial team were pleased that he ended his career as a litigator with a victory. But he also — and this is another dimension of the remarkable quality of this man — was a trusted and value counselor of large
Among the speakers who paid tribute to Justice Powell at Thursday's dinner was former Standing Committee Chairman John H. Shenefield, a former law partner of Justice Powell's and Chairman of the Standing Committee between 1992 and 1995.

confirmed so overwhelmingly. It was also in part—and this is something Virginians remember with a little ache in their hearts—because he was Chairman of the Richmond Board of Education and also the State Board of Education in the 1950s and in the 1960s at a time when the words "massive resistance" were in the air and when schools were sometimes closed to avoid integration. It was by force, I believe, of his leadership and independent cast of mind, and his obvious humanity, that he was in that turbulent and divisive time for the Commonwealth of Virginia able to be a moderating and constructive force—and he was proud of that.

He served terms as President of the American Bar Association, President of the American College of Trial Lawyers, President of American Bar Foundation. He was an honorary member of Lincoln's Inn.

And then, of course, he was nominated to the Supreme Court, and as they say—the rest is history. That's the paper record of his life. Let me give you a sense of the man.

First, there is Powell the Teacher. When you went to work for Lewis Powell, as I did in the summer of 1965, you got a sense of the guildhall origins of this profession. He was not a lawyer who wanted you to learn by pulling down the form file so that you could fill in the blanks. I remember walking into Lewis' office, where he said: "John, we need to have a lease for a shopping center. We've done fifteen of them, but don't read any of those leases. Write it from scratch." So I went away to my office and tried to make a lease, utterly incompetently, and came back. He talked me through it and then gave me the actual lease, and he sent me back to study the differences. As a teacher, he forced me to go through the mental discipline of thinking it through myself. Lessons learned by doing are never forgotten.

Second, there is Powell the Student. United States v. United States District Court was the result of Lewis Powell's learning something that he hadn't known anything about. He was considerably helped by a Senator who sat on the Judiciary Committee that helped to confirm him: Birch Bayh. Senator Bayh seized on this issue as discussed by Mr. Powell in an article for one of the FBI internal house organs. Senator Bayh was a relentless cross-examiner; and under that hammering cross-examination, he showed Lewis Powell that the issue was complicated, and worthy of further thought. Then, in response to the question, "Will you, Mr. Powell, be able to come to this question with an open mind, and decide a case on its merits?" Powell said yes. The

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result, a year later, was his opinion for the Court in United States v. United States District Court, which came at the issue from an entirely new direction.

Third, there is Powell the Worker. At least for the young lawyers who worked in his law firm, he was legendary simply for the hours he put in. He worked as hard, or harder, than any lawyer I have ever seen. That’s explained by his sense of what excellence requires. He was considered to be chairman of "The Sunday Morning Club": His office was open and active on Sunday morning, unless there was a Redskins game he was trying to attend. He was a hard worker.

And then there was Powell the Detail Man, the Organizer. When he was nominated, Judge Haynesworth came up the hill from the Courthouse and said to him, "Whatever you do, don’t trust the Justice Department. Take your own people to Washington, and do the confirmation work yourself." That advice played right to Powell’s preferences — nothing was left to chance, not a single thing. He had scripted the entire confirmation: He organized everything; politics, logistics, document production, the hearing. Everything went like a military campaign. Positions were catalogued, research was done, briefing books were prepared, senators were contacted, staffs were lobbied. Witnesses were enlisted in this great crusade — former ABA presidents were brought in, one after another; potential adversaries were talked to and provided factual information we hoped would be persuasive; and at worst we tried to neutralize their testimony. The Hay-Adams Hotel became our command center; rooms were reserved; dinners were organized; and witnesses were staged until they were taken to testify at the hearings. Nothing was left to chance.

Justice Powell also has a sense of humor which I’d like to share with you. I’d describe it as wry, refined, and aristocratic — never at anyone else’s expense — probably just enough to get you to chuckle; but I can hear him laughing at something that he’d said — probably something about his own athletic exploits. He was a great sports fan — the Redskins were his team. Young Lewis, now a litigator at Hunton & Williams, was a gifted athlete and Lewis Powell took great pride in telling us about his son, the quarterback. The elder Powell once came to work with a finger in splints. How could that have happened? He didn’t allow us to ask — he told us he had broken it playing football. We later found that he had stuck his finger at the ball in an effort to catch it, but he exploited it as an athletic injury for all it was worth.

He is a quintessential family man. It didn’t take any effort at all to see how proud he was of his wife, Jo, and of his children. And he was interested in your family, too: It was obligatory that you be prepared to answer his question — "how is your wife doing, and how are the boys?" He is truly a gentleman, almost quiet, and certainly understated, never in any sense, rough or crude. He is one of the most loyal people I know — to his family, to his friends, to this Committee, to the Bar Association, to his profession, to his Country.

He was for all of us younger lawyers the essence of integrity and honesty. We used to think that there was a right way to do things and there was a wrong way to do things. You either did them as Lewis Powell did them, or you did them the wrong way. He taught me, and many of my colleagues, that ethics was simply too important an issue in the practice of law ever to walk close to the line. He always made clear where he stood, and I think he is shocked at what he might read in the papers today.

At the bottom line, for me it comes down to this: If I needed a lawyer, I would hope to find a Lewis Powell to represent me. If I were before the Bar of Justice, and my fate and my freedom hung in the balance, I would hope to find a Lewis Powell on the bench. If I needed a model for my son, that model would be Justice Powell. If I needed a counselor, and a friend, in a time of difficulty, a Lewis Powell would be my hope.

This is a very great man, and we all ought to congratulate ourselves for our very good fortune to have been in his company for awhile.

Save the Dates of November 12-13 for Eighth Review of Field

The Eighth Annual Review of the Field National Security Law will be held on November 12-13, 1998 in Washington DC. Program invitations will be out soon. Mark your calendar.

In addition to the usual panels of senior government national security lawyers, the program will feature panels on transnational threats, the divergence between civilian and military cultures, the Rome Treaty on an International Criminal Court, and the ballistic missile threat and the ABM Treaty.
An Old Friend Remembers
Admiral William C. Mott

by R. Daniel McMichael

Only two of the original founders of the Standing Committee now remain alive. One of them is retired Supreme Court Justice Lewis Powell. The other is R. Daniel McMichael, of the Sarah Scaife Foundation, who has closely followed the work of the Committee since he helped establish it more than three and a half decades ago. We asked Mr. McMichael to share some of his memories of Admiral Mott—who passed away on the eve of the "Leibman VII" conference—for our readers. —Ed.

Rear Admiral (Ret.) William C. Mott was a symbol combined with integrity and achievement. If that sounds like a non sequitur, it's not, as those who knew him well can testify.

The first time I saw "The Admiral" was in Chicago at the 1957 Military Industrial Conference. (Yes, you could use those words then.) And symbol he was. Robust in his blue, braid and ribbons, he had NAVY stamped all over him. Indeed, to one who still carried a leftover World War II enlisted man's sense of things, he was Navy. His bearing, his no-nonsense, rumbling voice and decisive arm movements put me in mind of a battleship. And when Frank Barnett told me he was a JAG, yet, the impact was complete.

We were in a small, after-dinner setting, and, of course, the discussion centered around national security and geopolitics. I think all of us were drawn to him more or less equally, not just because of my own sense of his imposing splendor, but because of his firm, clear, grasp of issues and details that revealed an encyclopedic mind—and a willingness, indeed readiness, to say what was on his mind.

That's where his integrity comes in. He spoke out and said it like it was, at least, as he saw things. His arguments were tough because he used rational thought and unfiltered reality as his lance and sword to probe and cut to the heart of things—so that this particular evening, lively enough already, was made considerably more so by what I later came to know as Bill's trademark: be blunt but honest.

As to achievement, even at that first meeting, it was clear that Bill Mott not only could talk a good argument and be sharply observant, but was driven, by what was clearly his nature, to seek action. As I later sorted it out, his whole personality compelled him to put his ideas and those of others to work. If something struck him as for the common good, he invariably growled, "Let's do it!"

Thus, he instinctively understood process, the means by which ideas are put to work, and more importantly how to make process work in environments where many security and geopolitical concepts have not been all that easily assimilated by the status quo. That's what Bill Mott did so well throughout his professional and public service life, which never really ended until his death.

Whether it was challenging those in that room forty years ago to mobilize public opinion through bold new educational programs; whether it was persisting with the notion that the American Bar Association had a stewardship role to weigh in on critical national security issues (and thereby fortify Lewis Powell, Morry Leibman and Frank Barnett); whether it was to team up with the likes of me (I went willingly) to introduce the geopolitics of strategic minerals into U.S. vulnerability equations—in all of these endeavors, including his time with the ABA Committee and the National Strategy Information Center, The Admiral was a mighty force in forging constructive action out of words.

While I can't speak directly about his distinguished naval career or his impressive work in the private sector, my guess is that there—too, he blazed the same sort of trails. AFA
Panel IV

Adultery, Fraternization, and the Rule of Law in the Military

Scott L. Silliman, Executive Director of the Center on Law, Ethics and National Security at Duke University School of Law, moderated a provocative panel on the topic of adultery and fraternization in the military. The summer of 1997, Silliman remarked, was a tumultuous one for the Department of Defense. Widespread criticism of the DoD in the media, Capitol Hill and elsewhere was not about readiness or weapons systems. Rather, it was about the way the DoD handled allegations about adultery, fraternization and sexual harassment, and the question of whether there is a uniform and consistent policy under military law for dealing with these offenses, a policy that applies to all, regardless of gender, grade or branch of service.

The controversy began with allegations of rape and sexual harassment at some of the Army’s training centers, notably Aberdeen and Fort Leonard Wood, and the implicit questions of whether such offenses were the result of just a few “bad apples” as Secretary Togo West and members of senior leadership maintained, or whether there was something in the “military culture” that encouraged offenses against women, as others suggested in the literature. While the Army wrestled with these issues, the Air Force found itself in the spotlight over its proposed court martial of B-52 pilot Lt. Kelly Flynn, for what the majority of the American public believed to be a simple adulterous love affair, and a second case against Lt. Kife which tested the principle and proscription against fraternization in the service.

In both the Army and Air Force cases, the grade of the officers involved was relatively junior, which raised the specter of a separate standard for more senior officers. Many thought this question was resolved by the “appropriate” resignation of Army Major John Longhouser, who acknowledged having an affair with a civilian employee five years previously. However, two days later, DoD Secretary Cohen created the appearance of a double standard by affirming the nomination of General Joe Ralson as Chairman of the Joint Chiefs of Staff despite his admission of an affair fifteen years earlier. Although Ralson withdrew, questions regarding the existence of a double standard for officers and the integration of women in the military remain unsettled. These events have impacted the credibility of the services in dealing with sexual misconduct within the ranks, which has led to calls for reform in the military justice system and renewed arguments for greater Congressional oversight. In fashioning an appropriate response, Silliman suggested it is important to consider whether there are differences between the military and civilian communities which merit a separate military standard of review, and whether there are or should be consistent prosecutorial guidelines or overall policy standards for the services to use.

Col. Jack Rives

Colonel Jack L. Rives, USAF, Commandant of the Air Force Judge Advocate General’s School, set the stage for the debate with statistics and definitions. Between 1985 and 1996, there were 18,000 military court martials, 419 of which included a charge of adultery. Of this figure, only 9 cases were prosecuted where the only charge was adultery, and in the Air Force, 1 out of 15,000 cases was an adultery prosecution.

In the military, Rives asserted, the standard for responding to adultery and fraternization charges requires discretion. In about one half of the states in the US and in the District of Columbia, adultery is a crime which involves sexual relations between two people either of whom is married to a third person. Under the US Code of Military Justice, it is also necessary to prove that the conduct in question is prejudicial to good order and discipline. This, Rives suggested, is a flexible system that is applied on a case-by-case basis, as required to maintain good order and discipline, and permits the military to tailor its response accordingly.

Like adultery, fraternization is an unprofessional relationship that affects discipline, morale and the ability to effectively perform. Fraternization is a crime because of the power and authority leaders hold over others. It is an historical, gender-neutral standard of conduct which applies when an officer invites a favored subordinate to go hunting or fishing. Fraternization, Rives suggested, undermines discipline, trust, respect for the service and its officers. Fraternization offenses are handled at the lowest level so that conduct can be corrected.

Regarding criticism that the system is outdated Rives opined that he believes the system works. In his view, people voluntarily signed up for a service that requires adherence to a higher standard of conduct. He believes it would be inappropriate to change the system because people do not want t
adhere to the standard after joining the military. The Supreme Court of the United States, Rives pointed out, has recognized the military as a "specialized society" and gives great deference to military judgment. This deference allows the military to conduct itself in a fashion that enables it to go out and win wars, and accomplish its objective.

Susan Barnes

Susan G. Barnes, President of Wandas Fund, concurred with Scott Silliman's view that the adultery and fraternization issue is a readiness issue. She added that while sanctions against inappropriate conduct in the chain of command are a deterrent, there seems to be an undercurrent of opinion that women do not belong in the military. In Barnes' view, as long as the military is a volunteer force, if women are excluded, we may need to go back to the draft. This renders the question of sex and fraternization a readiness issue.

Barnes outlined the elements of fraternization, which requires: (i) a breach of custom of the military, and (ii) the acts which constitute the alleged fraternization must be detrimental to good order and discipline within the service. In spirit of debate encouraged by the conference, she then expressed respectful disagreement with Rives regarding the solution to the adultery and fraternization problem. In her view, there is too much discretion in the military and it is not exercised wisely. Further, the three services have different standards for fraternization. Noting that good commentators have suggested a single rule decriminalizing adultery, making it an administrative matter, and creating a bright line standard, Barnes called upon the DoD to review such proposals and take appropriate action.

Senator Dennis DeConcini

Former U.S. Senator Dennis W. DeConcini remarked that when problems such as adultery and fraternization come to Congress, they tend to be out of hand. As a public official, there are several options. If there is a direct complaint from a constituent, one option is to refer it to the base. Another option, endorsed by DeConcini, is to refer the complaint to an individual charged with responsibility for resolving such disputes. This option, DeConcini suggested, would help minimize adverse results attributable to the culture of the military, which is now 20% female.

As of 1993, the Pentagon had no records on rapes, convictions, jail sentences or sexual harassment. The only exception was the Army, which in 1993 reported 129 out of 100,000 rapes. Following the Vietnam war, 29% of the female veterans experienced forcible sexual relationships. This issue came to a head when three live witnesses testified before the Veterans Affairs Subcommittee about brutal sexual assaults on several occasions, and the inappropriate response of senior commanders to those who filed complaints. In one case, the female was demoted while the perpetrator was promoted.

DeConcini described the situation as a crisis, which requires a response from our political system. DeConcini did not advocate that Congress take steps detrimental to the military. Rather, he encouraged military leaders to come forward with innovative approaches to this problem. In his view, the rule of law on this subject should be administered outside of the Department of Justice. DeConcini does not believe that removing discretion from the military on sexual harassment issues would adversely impact morale, discipline of troops or readiness. DeConcini concluded that the military needs to address this issue as a cultural change, and consider outside inspections, investigations, and an outside tribunal to resolve these disputes.

Professor Michael Noone

Michael F. Noone, Jr., a Professor of Law at The Catholic University of America School of Law, argued that misconceptions have shaped the public debate over fraternization and adultery and will continue to do so. The questions, in his mind, are whether the military is a risky occupation or a separate profession, and whether standards of conduct should be different for the military. Regarding the question of whether the military should be dealing with adultery at all, Noone took issue with Major General Neal Creighton, who recently published an article contending that administrative rather than criminal sanctions are appropriate. Noone argued that Creighton's position does not take into account changes in the military today, including increases in the number of women, the marital status of enlisted women, and an increase in the number of temporary deployments. As demographics have changed, Noone does not believe the old generation is qualified to set standards of behavior in the military.

In Noone's view, standards should be set by a panel composed of military commanders, victims of sexual harassment, and perhaps even adulterers. In setting new standards, Noone proposed that the troops be surveyed for their views. This should be a high priority because the concerns raised by adultery and the military pose a national security prob-
Panel V

The Great Debate of 1997:
Encryption, National
Security and the Internet

Standing Committee member Elizabeth R. Rindskopf framed the issues associated with this controversial subject. Justice Lewis Powell, she noted, was a great admirer and in some respects a practitioner of cryptography. In World War II, he was one of the junior officers involved in decoding cryptic messages which many believe made a pivotal difference in the outcome of the war. In addition to his love for military service and admiration for code breakers and code makers, one of Powell’s distinguishing traits was his tendency to seek common ground in resolving difficult issues. He was instrumental in resolving the legal issues associated with the use of wiretaps for national security and domestic law enforcement purposes, and demonstrated his ability to solve complex problems with great wisdom, negotiating skills and common sense. In debating the use and application of encryption technology, Rindskopf encouraged the panelists to follow Powell’s example of seeking a common ground for the resolution of complex issues.

Encryption, Rindskopf explained, is a science based upon simple algebra which has historically been vitally important to our national security from the standpoint of military secrets as well as diplomatic secrets. Today, it has become an equally important issue at the center of our commercial viability and competitiveness. Thus, there are genuine but conflicting views on the resolution of the debate about encryption and its uses in the commercial sector. As definitions of national security change, and encryption has a commercial application, there is a national security aspect to the commercial world that heretofore we were neither focused on nor aware of. Encryption, then, becomes one part of an important set of security considerations we must be mindful of, in the systems we use to communicate sensitive information and in the systems we use to handle our commercial activities. Rindskopf cautioned that our search must be for systems that are secure, not vulnerable to those who would do us harm, and yet at the same time, be sensitive to individual rights and responsibilities.

William Crowell

William P. Crowell, Deputy Director of the National Security Agency (retired), provided an overview of the mechanics of encryption. Distinguishing encryption from security, Crowell pointed out that there is a lot more to security than encryption. Security, he noted, is about encryption, authentication, data integrity, digital signature, and non-repudiation. These terms, Crowell asserted, are important to the legal profession because they are used to provide services to people who use the Internet and other forms of communication or data storage. Trust is about key management and digital signature and the security management infrastructure that surrounds encryption operations. These “soft parts” include people and procedures and other factors which influence whether there is security in encryption.

Traditional encryption was symmetrical. There was a box on one end with a key, and a box on the other end with an identical key. On one end, there was ciphered text, and on the other end, there was plain text. All that was required was some trusted authority to provide the keys in some trusted way to the parties. Public key, by contrast, is asymmetrical. Each box has two keys, a public key and a private key. The public key puts mathematical formula on text, and is a freely public key. However, it can only be opened with the private key, which decrypts the message. Even the person who creates the mathematical formula cannot decrypt the data without the private key. On the Internet, for example, messages may be sent using a public key, and received using a private key. This system, however, raises another issue, which is, how do you ensure that the private key is held by the intended recipient of the message?

For example, suppose A encrypts a message using what he believes to be B’s public key and sends it to the address for B on the Internet, but instead the message is sent to C, who decrypts the message because he has the private key that belongs to the nefarious public key, and then resends the message to B using B’s true public key. The result of this scenario is that C is able to obtain access to B information without B’s knowledge. To prevent such a result, and to maintain trust in public key infrastructure, Crowell explained that there must be an overlay put in place over the public and private keys, such as certificate authority to certify that the public key belongs to the holder, or digital signature, which confirms the identity of the private key holder.
Crowell indicated that the current state of the encryption market is disorganized and unfocused. There is no legal framework or foundation for digital signatures or the certification of public keys. The products are widely available, but infrequently used because they are not trusted. There is very little understanding of whether the role of public key infrastructure is in the realm of the legal profession or the information technology profession. In the future, Crowell concluded that digital signature standards must be based on a legal framework in order to build public key infrastructures from the bottom up in all of the areas of electronic commerce we want to explore, so that the industry will prosper and we will benefit.

Lynn McNulty

Lynn McNulty, Director of Government Affairs at RSA Data Security, addressed policy issues associated with encryption. Encryption, he asserted, is one of the defining public policy issues as we enter the information age. The Clinton administration has been involved in cryptography issues since 1993, with the announcement of the Clipper chip, a hardware-based device that would have been used to protect telephone conversations but had government key escrow built in. There have since been a succession of announcements relating to cryptography policy. Each one has been characterized as an attempt to balance the competing interests of those involved in cryptography, namely, law enforcement, national security, the vendor community and privacy, but each initiative has been derivative and summarily dismissed.

Over the past year, however, the nature of the debate has changed as encryption has evolved from an executive branch issue to a public policy issue. As a result, Congress has become involved with encryption policy issues. The Senate proposed two bills last year, the Security and Freedom Through Use of Encryption Act and the Secure Public Networks Act. In the House, there have been many hearings on encryption bills, ranging from draconian domestic control legislation to legislation relating to export controls. The debate over export controls has turned into a debate over the domestic availability of and control over cryptography. This latter issue raises concerns by the law enforcement community over its ability to conduct wiretaps and electronic surveillance, and at the same time, touches upon constitutional issues which must be examined as we decide how this technology will be used.

McNulty pointed out that the cryptography issue has been examined extensively by a Congressionally mandated study group operated by the National Research Council. This group compiled a document titled, “Cryptography’s Role in Securing the Information Society,” which was released in late 1997. The major conclusions were that the cryptography debate can take place in an unclassified open environment, that U.S. policy should support the broad use of cryptography while taking into account the conflicting needs of law enforcement, national security and the vendor community, that current national policy is inadequate to meet the needs of an information society, and that the aggressive promotion of key escrow/key recovery is not appropriate due to technical and policy issues associated with its national and international use. Unfortunately, McNulty noted, these conclusions did not satisfy either side of the debate and have been largely ignored. The real losers in this debate, McNulty concluded, are public and private enterprises that want to use cryptography in the re-engineering process. McNulty suggested that going forward, some of the insights set forth in the report of the National Research Council should be revisited.

Robert Holleyman

Robert W. Holleyman, II, President of Business Software Alliance, an Internet software provider, observed that there is greater public awareness of the encryption issue, and greater interest on Capitol Hill. His company is concerned about it because the growth of the software industry in this country has provided a large number of jobs in the computer industry and secondly, in the personal computer software sector, nearly 70% of the market is held by U.S. companies. This dominance in foreign markets was instrumental to some of the findings of the National Research Council, because there is a question of whether U.S. software and hardware companies will continue to play a primary role in world markets, or whether we will trade that role to our foreign competitors. It is a threshold question because as we have moved toward a network based economy, and as the Internet has assumed prominence in the use of computers for the exchange of data, there is a whole new wave of buying decisions being made by consumers around the world, and security features, such as the use of encryption, is a fundamental part of that buying decision.

Due to export restrictions, U.S. companies are limited to 40 bits of encryption in products sold abroad, absent proof of an intent to create a key

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War Crimes Legislation

The Honorable
Walter B. Jones

In a luncheon address, Congressman Walter B. Jones, Third District of North Carolina, described the history of war crimes legislation in the United States. Jones became involved drafting war crimes legislation following his introduction to Mike Cronin, a US Navy pilot who became a prisoner of war when his A-4 jet was shot down over North Vietnam. For six years, Cronin lived in a cage, endured and witnessed unthinkable acts of torture, and was denied the most basic rights of the Geneva Convention, which North Vietnam had never recognized. Upon his return to the United States, Cronin earned a law degree, and learned that prisoners of war had no legal recourse for their physical and psychological scars.

Jones deemed the failure of the US government to provide for the welfare of its soldiers "a travesty." In the absence of an international criminal tribunal or a military commission, crimes of war committed by or against an American citizen could not be heard in US courts because in times of war, not all acts punishable under US criminal law are punishable as war crimes. Examples of such acts include the use of chemical, biological and other prohibited weapons, the continuation of fighting after surrender, the mutilation of a corpse, and the attack on places not defended. The term "war crime" was a product of this oversight. Although "crimes of war" were identified in the Hague Convention in 1907, and more recently, at the Geneva Conventions in 1949, and although the US ratified the Geneva Convention for the Protection of Victims of War, it failed to enact legislation to implement the convention.

In his first year in Congress, Jones was involved in drafting H.R. 3380, the War Crimes Act of 1996. The objective of the law was to provide criminal penalties for certain war crimes, to close the jurisdictional gap, and to codify mandatory procedures to vindicate the rights of American war victims injured by intentional acts of foreign governments that violate the laws of warfare. At the end of the 104th Congress, H.R. 3380 was signed into law by President Clinton. This past year, Jones introduced a follow-on bill, H.R. 1348, titled the Expanded War Crimes Act of 1997. This new measure expands the definition of "war crimes" to include not only a more general category of war crimes, but also other conventions and protocols which define war. Specifically, the bill extends criminal sanctions to encompass those activities prohibited by relevant sections of the Annex to the Hague Convention IV respecting the Laws and Customs of War on Land, Common Article 3 of the Geneva Convention dealing with non-international armed conflict, and the Protocol II on landmines.

The expanded bill has received the support of the Department of Defense, the State Department, the Justice Department, and the American Red Cross. As of the date of the conference, it had passed overwhelmingly on the House floor. In closing, Jones expressed gratitude to Congress for acting quickly and favorably on this important legislation, and for having the conviction to do right and correct the mistakes of the past.

Panel V—Encryption...
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escrow or key recovery system. In Holleyman's view, that level of encryption is not satisfactory. The Administration has proposed and has in place legislation to allow companies to export up to 56 bits of encryption, but it is subject to a requirement that over the next two years, the company must commit to develop key escrow or key recovery features, which Holleyman suggested are not workable or practical because they are not market driven. For this reason, Congress has entered into the picture and proposed alternative legislation.

Holleyman called attention to H.R. 695, which affirms the right of all Americans to use and sell all encryption products and modernizes U.S. export controls to permit American companies to sell stronger products available overseas. The Act prohibits mandatory key escrow, and provides that no person may be required by federal or state government to provide an encryption key to another for safekeeping, nor would easy backdoor access be provided to the U.S. government. The proposed legislation also modernizes export controls to permit exports of generally available software, and other software and hardware under license if a product with comparable security is commercially available from a large supplier. Finally, it would create a national net center that would bring together the best and brightest from government and the private sector to provide additional tools for law enforcement to deal with legitimate national security and law enforcement interests related to encryption.

Anish Bhimani

Anish Bhimani, Chief Scientist at the Center for Information Protection, Science Applications In-
ternational Corporation, observed that in our network economy, the Internet has done more for the spread of global commerce than anything else in recent years. It knows virtually no boundaries and allows small companies to compete in global markets. The era of solely domestic commerce is virtually over, and the question of regulation of this global network and commercial environment is hotly debated. Bhimani suggested it is unreasonable to expect a single country to set the rules to be followed worldwide. We live in a time when the widespread dissemination of information and the widespread connection of networks is not only common, but also essential, as companies come to rely on e-mail and Web access as part of their daily routine for electronic commerce. We also live in a time when traditional organized crime has found its way to cyberspace. As a result, many countries have turned their attention to information warfare and industrial espionage.

Quoting former President Ronald Reagan, Bhimani stated that "information is the oxygen of the modern age. It flows its way across national borders, and does not respect the efforts of countries or individuals to limit its spread." Nevertheless, Bhimani noted there have been efforts by certain countries, including the United States, to limit the free flow of information through the use of export controls on encryption and by requiring key recovery systems. "Strong" cryptography has been limited by the Commerce Department. Current policy restricts exports in excess of 40 bits in length. Ostensibly, the limitation is designed to restrict the capability of foreign entities to hide activities from the U.S. government, but Bhimani believes this is unfeasible for a number of reasons. First, encryption products are readily available in foreign countries on the Internet and may be downloaded freely. Second, there are no controls to prevent the spread of such products worldwide. Third, there are no restrictions on the export of printed source code, which means the technology can be exported, even if there are limitations on the export of software. These circumstances, Bhimani suggested, may create a false sense of security.

There have been proposals to approve the export of cryptography provided that companies or individuals provide copies of their keys to the government or to registered key recovery agents. The purpose is to enable the government to access the keys with an appropriate court order, without the knowledge of the key owners, to conduct wiretaps on illegal activities. In Bhimani's view, the adoption of this scheme may pose a threat to national security because nations that engage in industrial espionage may not adopt similar legislation and because the requirement of depositing all keys in one location creates security risks. Moreover, deployment costs would be much too high, and the system would be very difficult to implement. Rather than creating legislation that is unworkable and unfeasible, Bhimani suggested that time would be better spent creating a partnership between government and industry. Finally, Bhimani asserted that since most security incidents are caused by human error, and since business relationships are easily made and broken, perimeter defenses are not effective. In addition to export controls and key recovery systems, Bhimani suggested it is important to consider the use of encryption within corporate networks to protect information from the threat of industrial espionage.

Richard Haver

Richard Haver, National Intelligence Officer for Special Activities at the Central Intelligence Agency, made three observations on the international context. First, he observed that the level of debate in foreign countries parallels that within the United States. There is a conflict between those who view the encryption issue as an opportunity to move toward more liberalization in technology and electronic commerce, and those charged with protecting public safety and national security who are more concerned about the effects of an open and uncontrolled system.

Second, Haver noted that despite these similarities, each nation is unique. From nation to nation, differences exist in the control over exports. There is also a question of to what extent the issue is a national security concern and to what extent it is a commercial matter.

Third, Haver pointed out that many countries do not have a policy and are looking to the United States to see how the issue is resolved. Haver asserted that the U.S. response will affect the way other nations respond due to U.S. dominance in the market and U.S. power in the world. While some countries are skeptical of the U.S. desire to perpetuate global leadership, there is a shared concern for the law enforcement and national security position. Each country faces a similar dilemma: how to provide for the public safety and prevent abuse, and at the same time, advance the technology. As nations look to the United States for guidance, Haver emphasized it is important to remember that we are shaping the debate, and our response to these issues will have global implications.

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PANEL VI

Promoting the Rule of Law through EIMET and Other Military-to-Military Exchanges

Standing Committee member and former Air Force General Counsel Ann C. Petersen opened the final panel of the conference with the observation that Americans expect the military to stand on the front line to protect their interests around the world. However, efforts to further democracy and the rule of law are less visible than other military operations. The purpose of the panel, Petersen remarked, was to put the spotlight on the role of the military in promoting democracy and the rule of law through expanded International Military Education and Training programs and other military-to-military exchanges.

H. Diehl McKalip

H. Diehl McKalip, Deputy Director of the Defense Security Assistance Agency, explained the origins and objectives of the US International Military Education and Training (IMET) program. IMET was established in the 1950s as a low-cost policy program to provide training in DoD schools to predominantly military students from allied and friendly nations. It is authorized in the Foreign Assistance Act of 1961, as amended, and funded in the International Affairs budget. By statute, the State Department is responsible for policy, and DoD administers the program.

In fiscal 1997, training was provided to 6,800 students from approximately 120 countries. The overall program objectives were: to develop rapport, understanding, and communication links between US and international military personnel; to provide training to individuals who are likely to hold key positions of responsibility within their governments; to develop host country training self-sufficiency; to develop the host country’s ability to manage its defense establishment by training individuals in effective defense resource management; and to develop the skills needed to operate and maintain US-origin defense equipment that promotes military professionalism. The training and education provided under the IMET program is intended to generate support for the US and US policies, including the role of the military in a democratic society, and respect for internationally recognized human rights.

In 1990, Congress directed the DoD to establish an Expanded-IMET (EIMET) program focused on training foreign civilian and military officials in three key areas: managing and administering military establishments and budgets; creating and maintaining effective military judicial systems and military codes of conduct, including observance of internationally recognized human rights; and fostering greater respect for the principle of civilian control of the military. In 1994, Congress broadened the EIMET program to include participation by members of national legislatures responsible for oversight and management of the military, and individuals who are not members of a government.

The DoD has established three new education programs to address the topics of defense resource management, civil-military relations, military justice, and human rights. Programs in these areas are administered through three recently created entities, respectively, the Defense Resource Management Institute at the Naval Postgraduate School, the Center for Civil-Military Relations, also located at the NPS, and the Defense Institute for International Legal Studies, formerly the International Training Department of the Naval Justice School.

Performance indicators for the EIMET program include the promulgation of military regulations that improve military justice systems and procedures in accordance with internationally recognized human rights. The program has also promoted greater civilian control of the military, improved civil-military relations, and support for democratization. A longer-term measure of program performance is the increase in the number of US-trained military and civilian personnel in military, defense ministry, and legislative leadership positions. The post-Cold War era has allowed program expansion to new democracies in Central Europe and the Newly Independent States, effectively complimenting the ongoing Warsaw Initiative and Partnership for Peace program. These accomplishments have generated support for the EIMET program in Congress.

R. Adm. John Hutson

Rear Admiral John D. Hutson, the Judge Advocate General of the United States Navy, discussed the Navy’s role in promoting the rule of law through the EIMET program, and the application of the program in all regions of the world through DIILS.
The EIMET program, Hutson observed, is truly a joint program that depends on the expertise of all of the military services and succeeds because activities are tailored to each country where the program operates. Rather than transplanting our legal system into the host country, EIMET programs assess the national, political, military and economic situations and also the legal tradition in each country.

In 1992, the Navy established an organization at the Naval Justice School to build teams to fulfill the EIMET goals of creating, understanding and fostering civilian control of the military; improving military justice systems; and fostering human rights principles. This is accomplished through a three-phase approach. First, a small team visits the country for a week to meet representatives of the host government, which may include military leaders, members of the executive, judicial and legislative branches, and NGO representatives. During Phase II, the host country sends a delegation of military and civilian officials to the US to meet with their US counterparts and receive briefings on the subjects identified during Phase I. The delegation is also afforded an opportunity to see US institutions function through visits to US courts and meetings with legislative bodies, service and joint staffs, and civilian leaders in the DoD. This sets the stage for Phase III training which is conducted in the host country and presented 40-65 officials from the military, executive, judiciary, and legislative elements of their government. The subject matter is that which is identified and developed during Phases I and II. The seminars are frequently covered by national news media.

A key indicator of the success of EIMET programs occurs when plans for the next seminar begin at the conclusion of Phase III. Sample follow-on seminars include advanced military justice, trial practice, the law of the sea, and rules of engagement. This latter topic provides a platform to underscore the imperative of compliance with the law of war, both in military planning and in the conduct of military operations in the field. These subsequent seminars may focus on narrower audiences, such as lawyers and judges, particular combat arms groups, or investigators. In addressing human rights abuses, teams may be comprised of senior judges, civilian homicide detectives, and experts in the law of war and war crimes. Reservists also provide valuable contributions, including language ability, host country familiarity, legal and teaching skills. To date, sixty-one nations have participated in the program, and additional seminars and new countries are added each year. The DoD and the Navy are firmly committed to the EIMET program, which Hutson believes to be one of the most constructive and effective US national security programs.

**Maj. Gen. John Altenburg**

Major General John D. Altenburg, Jr., the Assistant Judge Advocate General of the Army, endorsed Hutson’s remarks on the importance of the EIMET program, and asserted that the program should be encouraged on the policy level. Although the impact on some countries is difficult to quantify, Altenburg indicated there is progress in the transition to democracy. The Army, Altenburg observed, has accomplished equally favorable results in its initiatives in the Ukraine, Latin America, and the People’s Republic of China.

Approximately four years ago, a group of Ukrainian officials came to the US JAG school seeking training on human rights and the role of the military in a new democracy. Using a human rights manual developed for the Peruvian military, a JAG group worked with the Ukrainians to develop a Code of Conduct for Participants in Military Operations, which was translated and distributed to Ukrainian soldiers. US Army reserves were also deployed to facilitate the transition, and complemented the efforts of the Partnership for Peace.

In Latin America, one of the Army’s general officers attending an Inter-American Bar Association meeting was invited to speak before the Ecuadorian Supreme Court for Military Justice following Ecuador’s transition from a continental to an adversary system. As a result of these contacts, four JAG attorneys from the three services were sent to Ecuador to conduct training on basic adversary skills, including case presentation, opening statements, rules of evidence, and examination techniques. This ground level training, Altenburg asserted, enhanced the rule of law, democracy and the protection of soldiers in the military justice system of that country.

More recently, the Army conducted a ground-breaking military-to-military exchange in China. Compared to prior exchanges, this was by far the most productive, resulting in the identification of areas of commonality between the two military justice systems, acknowledgment of the need for operational training, and agreement for a Chinese delegation to continue training in the US. These examples, Altenburg suggested, illustrate the usefulness of judge advocates and attorneys in making important contacts in other countries, and promoting national security objectives.

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Brig. Gen. William Moorman

Brigadier General William A. Moorman, USAF, Staff Judge Advocate of Air Combat Command, discussed the role of lawyers in beginning a dialogue on the rule of law through alternative funding sources. One such source is the Latin American Cooperation Fund, which funded an American delegation in Paraguay in 1990. The mission was to create a dialogue on how a disciplined military operates under the rule of law in a democracy under civilian control. This initial program, which began with a presentation to lawyers, was extended to military commanders.

Another funding source is the George Marshall Institute of International Relations and Studies, formerly known as the Russian Studies Institute. Through this program, the US, together with 23 central, eastern and western European nations, participated in a week-long dialogue on human rights, the law of armed conflict and the Geneva Conventions. Across the board, Moorman remarked, there was tremendous interest in the way the US implements the rule of law in its military forces.

Moorman also discussed Commander-in-Chief (CINC) initiatives, which provide DoD funding to regional commanders in areas most important to their respective theater of operations. In Europe, for example, funds were earmarked for military-to-military exchanges. These exchanges, Moorman reported, were beneficial to both civilian and military authorities. Finally, Moorman discussed an Expanded IMET program with the South African air force. He noted that despite initial resistance to the training, the participants expressed interest in the specialized seminars, and at the conclusion of the program, called upon the JAG core to provide further legal guidance to its commanders. In closing, Moorman noted that there are numerous training programs offered by each of the military services, and it is important for the services to share information. He proposed the creation of a database to track the various programs, to prevent overlap and to provide leads for further initiatives.

Panel III—Democracy Enlargement . . .
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In Bosnia, the United States made a mistake by assuming that Europe would step in. The tragedy that resulted illustrates that gravity of that mistake. Oftentimes, such decisions are influenced by public opinion polls which show the lack of desire of the American people to get involved. Yet, if the President explains why the United States should be involved, the American public will respond appropriately out of a desire to do the right thing. Absent an explanation of the reason for a proposed course of action, there will be no desire. The message is not only one of democracy, but more fundamentally, the human desire for human dignity. Our task is to explain the message, and internationalize it, because this essential drive exists in all cultures.

The final question posed by Kampleman was, "Is it enough to implore nations to live up to obligations assumed in the international arena, or does it require troops?" In the end, Kampleman responded, there must be a police force to ensure that indicted war criminals do not walk the street ignored. "We have a responsibility as a nation," Kampleman concluded, "to promote human dignity, to ensure that the twenty-first century is more civilized and humane, and less bloody, than the last."

Ambassador Mark Palmer

Former Ambassador Mark Palmer, now President of the Capital Development Corporation, argued that in foreign diplomacy, it is important to send a clear message which conveys a mandate, but shows an appreciation for cultural differences. President Reagan's gift, Palmer suggested, was his ability to communicate clearly our national objective. In the post-Cold War era, that message was, "Beat the Commies." In the United States today, where people are motivated by competition, opportunity and crisis, and besieged by a hundred priorities and complexities, Palmer contended it is difficult to send a clear message. Slogan's such as "The Age of Democracy" or "Beat the Dictators" are not appropriate given events in China, the spread of radical Islam, and the absence of a strategy to respond to dictators. To promote democracy, Palmer concluded, policymakers need a clear mandate and a conceptual framework.
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lem. Regarding DeConcini's proposal for an office of special investigations, and Rives' question of whether there would be sufficient time to respond, Noone stated that in his experience, these matters are resolved quickly.

Panel V—Encryption . . .
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Whitfield Diffie

Whitfield Diffie, Distinguished Engineer at Sun-Micro Systems, and author of a forthcoming book on wiretapping and encryption, titled Privacy on the Line, asserted that the problem we face is simple. We have a generally applicable tool for the protection of information, but it is accessible to the "bad guys" as well as the "good guys." The challenge, he suggested, is to control cryptography so we reap the benefits of the system, but do not suffer the consequences of its availability to our adversaries.

One proposed solution involves key escrow and recovery. In this system, master keys held by third parties are accessible without the knowledge of the owner by subpoena or warrant. In Diffie's view, this proposal is rational, but not feasible because it does not address those aspects of cryptography we would like to control or access by those people we would like to control. Second, Diffie noted that privacy, which people typically want to control, can be manufactured end-to-end in communication. Identity, by contrast, requires individuals to rely on a larger structure that needs introduction. Once introduction is made, Diffie suggested that external controls undermine the virtue of digital signature.

Diffie asserted there is some misunderstanding about whether the problem is a foreign intelligence or law enforcement problem. In response, Diffie noted that wiretapping is a specialized technique with limited application. Communications, by comparison, has been a mainstream intelligence technique for the past 50 years and represents an important part of our national security arsenal. The bottom line, as noted in the President's Report on Critical Infrastructure Protection, is that as we move our communications into flexible, cost-effective systems such as the Internet, and as critical infrastructures such as banking, power distribution, transportation and aviation control take advantage of this opportunity, they expose themselves to vulnerabilities inherent in the flexibility of these communications systems.

Diffie contended that the solution to this problem is a proper introduction to cryptography, integrated with other security tools. However, this job is too large for the national security community. It requires the cooperation of many segments of society, including industry. Without such initiatives, Diffie warned that information warfare will continue to be a very real threat, and we will be vulnerable to attack if we do not move forward rapidly with protection technology.

Panel II—Legislative Branch . . .
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owed these questions. Today, the threat of terrorism by weapons of mass destruction and threats to the U.S. infrastructure through the advent of information warfare render the answers to such questions relevant from a legal and policy perspective.

In the counter-terrorism arena, PDD 39 established a lead role for the FBI in counter-terrorism crisis response. The Bureau's responsibility to organize a unified inter-agency response extends to all terrorists threats in the United States, regardless of whether the source is domestic or foreign. The identity of the source is relevant in determining the appropriate response, however. It is necessary to distinguish between domestic and foreign sources to assess the predicate for action, to allocate investigative resources, and to obtain public support for the FBI to manage crisis response. The Nunn-Lugar legislation provided funding to train personnel to deal with such crises. Technically, the DoD has responsibility for domestic training, but due to resource limitations and the number of deployments overseas, it has handed the responsibility to FEMA.

Since its inception, the DoD has had a clear mission to protect the population of the United States against foreign threats. It is unclear whether threats on the nation's infrastructure fall within the domain of the FBI, pursuant to its authority to investigate criminal intrusions, or the DoD, pursuant to its mission to defend against strategic threats. What is clear is that in designing a response to the threat of information warfare and infrastructure protection, domestic concerns are interwoven with changing national security concerns, and therefore it is important to consider the relationship between national security agencies and law enforcement agencies, as well as the relationship between government and industry. National strategy, therefore, must properly integrate the private sector into a larger undertaking to protect U.S. infrastructure.

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First ABA Leibman Award
Given to Jack McNeill

One of the highlights of the conference dinner was the award of the first ABA Morris I. Leibman Award in Law and National Security to the late John H. "Jack" McNeill, whose many decades of public service concluded as Principal Deputy General Counsel to the Department of Defense. The citation which accompanied the award praised McNeill as an "accomplished scholar, gifted teacher, distinguished practitioner, and admired colleague."

The award, named in honor of former Standing Committee cofounder and twelve-term Chairman Morris I. "Morry" Leibman, was accepted before a packed dining room (see photo on page 12) by McNeill's widow, Helen (shown at left, accepting the award from Chairman Paul Schott Stevens), whose moving acceptance speech left few dry eyes in the room (above).

A tribute to Jack McNeill by former Department of Defense General Counsel and Standing Committee member Kathleen Buck appeared in the December 1996 issue (p. 14), and additional coverage of the November 6, 1997 dinner (including the full text of the citation and of Mrs. McNeill's acceptance remarks) appeared in the Fall 1997 issue.

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without overreaching into areas of the infrastructure where government does not belong. If there is an information warfare attack, it will be necessary to determine the legal foundation to defend the attack in a way that facilitates the exchange of sensitive proprietary information that may have commercial implications.

Van Cleave concluded that there is a need to conduct a review of national security and emergenc-