Ambassador Max Kampelman Receives the Presidential Medal of Freedom

by John Norton Moore

On August 11, 1999, President Clinton called Ambassador Max M. Kampelman the "quintessential American citizen" and awarded him the Presidential Medal of Freedom for his especially meritorious contribution to the security and national interests of the United States and to world peace. The President noted that Ambassador Kampelman's efforts helped to set in motion the collapse of communism and the beginning of a new era of democracy. As a Counselor to the Standing Committee since 1985, the Standing Committee is particularly honored to dedicate this issue to Ambassador Kampelman's achievements.

Congratulations to Ambassador Max Kampelman on his receipt of the Presidential Medal of Freedom. The Presidential Medal of Freedom is the highest civilian award of the United States. It is particularly appropriate that Ambassador Kampelman be recognized for this award.

Historians will continue to debate the importance of individual statesmen versus macro-events in world history. Whatever the overall conclusions in that debate, Ambassador Kampelman is one of those extraordinary statesmen who has changed the world. As the United States Ambassador to the Conference on Security and Coopera-

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Ambassador Max M. Kampelman, recipient of the Presidential Medal of Freedom. Photo taken at ABA conference on "Democracy and the Rule of Law in Foreign Policy: A Tribute to Ambassador Max M. Kampelman"

Elizabeth Rindskopf Reappointed Chair; Richard Friedman Reappointed Advisory Committee Chair

Curtis, Davis, and Wood Named to Standing Committee

ABA President William G. Paul has named three new members to the Standing Committee and four new members to the Advisory Committee. He also reappointed Elizabeth Rindskopf Parker and Richard Friedman to their second terms as Standing Committee Chair and Advisory Committee Chair, respectively. Elizabeth recently accepted a position as the General Counsel of the University of Wisconsin System, and Richard remains in private practice at Rosenthal & Schanfield in Chicago, Illinois. Joining the Standing Committee for three-year terms are Dr. Willie Curtis, Professor Robert N. Davis, and Judge Diane P. Wood.

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Ambassador Kampelman . . .
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tion in Europe (the CSCE), Ambassador Kampelman led the world to effective human rights engagement. He demonstrated that a hard hitting focus on human rights could both generate a substantial block of like-minded allies, and, most importantly, even change the non like-minded. One of the most powerful influences from the West in bringing about the revolution against totalitarianism and human rights abuses in the former Soviet Union was the effective engagement by the CSCE process led by Max.

Further, as the revolution took hold in the former Soviet Union, Ambassador Kampelman correctly understood that the time was right to move from a focus principally on human rights to an even broader focus on democracy and the rule of law, the real requirements for lasting protection of human rights. As a result, after a briefing from the United States Delegation to the first rule of law talks with the then Soviet Union, Ambassador Kampelman led the world in a focus on a basic Charter of democracy and the rule of law. The 1990 Copenhagen Document which Max brought back from the next CSCE meeting, and which was signed by all former States of the Soviet Union and all the States of Europe but a then still radical Albania, was such a Charter. Along with Magna Carta and the Universal Declaration of Human Rights, the 1990 Copenhagen Document is one of the most important human milestones in mankind’s struggle for human freedom and the rule of law. Max’s contributions to human rights, human freedom, and the dignity of man simply cannot be overstated.

Ambassador Kampelman also provided extraordinary service to the United States as the Chief United States Arms Control negotiator in the Strategic Arms Reduction Talks (START). His leadership here too was exemplary, and is just one example of the superb service many associate with Max. But in the sweep of human history, his great service in arms control was dwarfed by his contributions to human freedom and the rule of law.

Ambassador Kampelman is brilliant, articulate, humane, creative and modest. He is truly an American hero for our times.

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**Professor Moore is the Walter L. Brown Professor of Law at the University of Virginia and has served as Counselor to the Standing Committee since 1997. He also served as the Co-Chairman of the U.S. Delegation and met with and briefed the CSCE Delegation led by Ambassador Kampelman before the 1990 Copenhagen meeting. Professor Moore reported that the revolution had fully arrived and that there was a great thirst for democracy and the rule of law in the then evolving situation in Moscow.**

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**Text of Citation for Ambassador Kampelman’s Presidential Medal of Freedom**

Throughout his distinguished career as a lawyer, educator, and diplomat, Max Kampelman has resolutely promoted social justice and democratic values. As the leader of the U.S. Delegation to the Conference on Security and Cooperation in Europe, he championed human rights and gave legitimacy to their pursuit, undermining the pillars of communism and helping to lead to its collapse.

As a tenacious negotiator, he laid the groundwork for long-term nuclear arms reduction between the United States and the Soviet Union. A skilled and courageous ambassador, Max Kampelman has made lasting contributions to human dignity and a more secure world.

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Book Review

by Rodney W. Jones, Mark G. McDonough, Toby F. Dalton, and Gregory D. Koblenz
Pages: 208 Price: $19.95
Reviewed by Ambassador Thomas Graham

For students and beginners with more than a passing interest in international security and arms control, much of the difficulty in studying the proliferation of nuclear weapons lies in developing an understanding of the fundamental elements of the topic. Perhaps because controlling the spread of nuclear weapons has been a topic of study since before the first nuclear test, few analysts address the elementary aspects of the subject. For these audiences, Tracking Nuclear Proliferation: A Guide in Maps and Charts, 1998 is an invaluable resource. Tracking Nuclear Proliferation 1998 is a well-written and thoroughly researched introductory assessment of the trends, key nations, and instruments of the international nuclear non-proliferation regime and is written in a manner that is useful to beginners and experts alike.

An updated version of a 1996 book with the same title, Tracking Nuclear Proliferation 1998 was written at a time when perceptions of the effectiveness of the regime were in flux. As the authors correctly point out, developments in South America, the former Soviet Union, South Africa and elsewhere, the indefinite extension of the Nuclear Non-Proliferation Treaty (NPT) in 1995, and completion of the Comprehensive Nuclear Test Ban (CTBT) in 1996 reflected favorably on the regime during the early part of the 1990s. On the other hand, the May 1998 nuclear tests in South Asia, the failure of the international community to bring the CTBT into force, three disappointing NPT Preparatory Committee meetings, and the continuing inability to secure Russian ratification of START II seemingly indicate that the non-proliferation regime is in a more precarious position since Tracking Nuclear Proliferation 1996 was printed.

Despite the potential for confusion brought on by these mixed results, the authors of Tracking Nuclear Proliferation 1998 succeeded in producing an articulate and realistic assessment of the health of the non-proliferation regime. This text soberly and evenhandedly details the prevailing trends in nuclear non-proliferation while at the same time resists the sensationalist tendency to demonize certain countries and glorify others. It addresses all of the

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Book Review

Policing The New World Disorder: Peace Operations and Public Security
Edited by Robert B. Oakley, Michael J. Dziedzic, and Eliot M. Goldberg
Pages: 573
Reviewed by Dale Bosley

When I was a military observer in what the United Nations still euphemistically calls Palestine, I discovered that there were at least two international institutions that inspired universal and almost visceral mistrust. The CIA, of course, practicing diplomacy by other means, tended in the Mid-East theater to be demonized, mythologized and feared probably more than it deserved. And the United Nations, its swords already beaten into plowshares, pacificistically requiring that its lamb-like forces lie down with the lion in order to depict peace, tended to be scorned, manipulated, and marginalized. The name itself spawned an endless round of sad and tired jokes: UN-armed, UN-wanted, UN-necessary, etc.

As the United States and its partners in Kosovo proceed under United Nations authority from warfighting to peacemaking, this book arrives almost presciently to address and suggest answers to some of the most pertinent questions raised by the Kosovo adventure. What role should the United States play regarding 'internal disputes of the sort characterized by events in Kosovo? If the United States chooses an activist role as it has in Kosovo and elsewhere, what is the best way to proceed, and what are the risks, costs and benefits?

The book and the project it represents grew out of a conference in August 1996 sponsored by the Institute for National Strategic Studies at the National Defense University (NDU). In cooperation with the Carnegie Commission on Preventing Deadly Conflict, the John C. Whitehead Foundation, the U.S. Institute of Peace and other groups, the sponsors advocate an active peacekeeping role and seek to organize and even codify the approach to peacekeeping in order, presumably, to help ensure that future peacekeeping efforts will invariably succeed.

The editors bring distinguished résumés to their task. Robert B. Oakley is a retired foreign service officer who served as Ambassador to Pakistan, Zaire and Somalia. He returned to Somalia post-retirement as a Special Presidential Envoy. Oakley held a number of other important positions and is now a Distinguished Visiting Fellow at

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New Committee Members . . .
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Dr. Curtis has taught national security law-related courses as an Associate Professor of Political Science at the U.S. Naval Academy since 1992. He received his Ph.D. in Political Science from the University of Delaware in 1983 after serving 21 years in the U.S. Air Force. While teaching at Minnesota’s St. Cloud State University, Dr. Curtis was awarded the “Distinguished Teacher Award” and the “Outstanding Contribution Award.” A recognized expert in the field of nuclear strategy and peace operations, Dr. Curtis is widely published and frequently lectures across the United States and internationally.

Professor Davis lectures as an Associate Professor of Law at the University of Mississippi School of Law where he teaches constitutional law, administrative law, international security law and policy, and sports law. As a reserve intelligence officer in the U.S. Navy, he was deployed during his summer breaks at the National Security Agency and ongoing military operations in the former Yugoslavia. As professor and practitioner of national security at the University of Mississippi since 1988, Professor Davis is a prolific writer and lecturer.

Judge Wood is the Circuit Judge for the U.S. Court of Appeals for the Seventh Circuit. After serving as Professor of Law at the University of Chicago Law School for seven years and Deputy Assistant Attorney General for International, Appellate, and Legal Policy Matters in the U.S. DoJ Antitrust Division for two years, she received her commission to the bench in June of 1995. She has been very active in law reform issues, particularly in the field of federal courts and procedure, and continues to lecture at the University of Chicago Law School as a Senior Lecturer in Law. She is also the author of over 36 published articles principally in the fields of antitrust and foreign commerce.

New members of the Advisory Committee are Charles Ablard of Perkins, Smith, Cohen & Crowe in Washington, D.C.; Professor Scott L. Silliman, Executive Director of the Center on Law, Ethics and National Security at the Duke University School of Law; Richard Shiffman, Deputy DoD General Counsel for Intelligence; and Walter Gary Sharp, Sr., a Principal Information Security Engineer at The MITRE Corporation.

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relevant developments in the nations it studies in a manner that is easy to read and understand.

Nevertheless, while written extremely effectively, the book’s true contribution, as the title would suggest, is the maps and charts placed the end of each chapter. The authors utilize charts to painstakingly list every component of the nuclear infrastructures in each nation of proliferation concern. They describe the activities at each of these facilities, indicate their status regarding International Atomic Energy Agency safeguards, and provide other relevant material in a format that is quickly referenced and appealing to the eye. The accompanying maps place these facilities in the geographic context of each nation, giving an important visual indicator of the scope of each nation’s nuclear program. Countries like Libya with one relevant facility stand in stark contrast to the maps of India, Pakistan or Israel which are speckled with facilities. These charts and maps are invaluable reference tools for students and practitioners alike.

Together with its effective text and most valuable charts and maps, Tracking Nuclear Proliferation: A Guide in Maps and Charts, 1998 is an excellent contribution to the field of nuclear arms control and non-proliferation. It will surely and justifiably be used by students and others interested in an introduction to nuclear non-proliferation.

Ambassador Graham is the President of the Lawyers Alliance for World Security.

Book Review by Bosley . . .
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NDU. Michael Dziedzic is an Air Force colonel who was Air Attaché in El Salvador during implementation of the peace accords; he is a Senior Military Fellow at NDU specializing in peace operations and security affairs in the western hemisphere. Eliot Goldberg is a Middle East security expert at NDU who recently spent a year in Jordan as a Fulbright Fellow.

Using a classic casebook approach, the editors have collected papers written by an equally distinguished panel of international authorities on the seven most significant international peacekeeping efforts of recent years: Panama, Cambodia, El Salvador, Mozambique, Somalia, Bosnia, and Haiti. Additional chapters are devoted to the Department of Justice International Criminal Investigative Training Assistance Program (ICITAP). One chapter each is also given to the perspectives of two states that have made practically an industry of international peacekeeping, Norway and Sweden.

Repeatedly the writers stress that promoting peace and security in a war-torn foreign land is never a short-term task. Ambassador Oakley early on provides a framework for how complex this task can be. He identifies three “gaps” that typify peacekeeping efforts and which together make such peacekeeping efforts unique. The “Deployment Gap” is the lag time between arrival of the military force, which can generally be deployed quickly, and the multi-national
civilian police force, which is crucial to peacekeeping but takes longer to deploy. Thus at the outset military forces are often employed as peacekeepers, cast against type in an environment where the line between permissive and non-permissive may be blurred. The deployment gap tends to be a matter of time and timing: it is a temporal gap. The second gap is one of function relating to the public security apparatus of local police, judges, jailers and which (or whose) legal code applies. This is the “Enforcement Gap” between the “inner shell” of public security and the “outer shell” of the area peace mission. A gap occurs when the peace mission is required to perform security functions that fall between these two “shells,” raising questions about the basic maintenance of law and order or compliance with the peace agreement. Finally, the “Institutional Gap” describes the status of local political development and the degree to which the existing public institutions can or cannot function effectively to provide sustainable security for the citizenry. If the institutional gap is too great, the host nation (if indeed there is a functioning nation) will have to rely increasingly on external stabilizing force, and the likelihood of independent self-governance declines proportionally.

For all the difficulties described, it is clear and not at all surprising that the editors advocate international peacekeeping as a proper use of military force and civilian police for achieving a desirable humanitarian end: curtailment of human suffering, and a means of sowing the seeds of democracy. The writing is rarely compelling, but the individual authors clearly know what they are writing about. For example, Charles T. Call describes the difficulty in Somalia of trying “to construct a police force in the absence of a government or legitimate political authority.” Sadly, he concludes that:

Perhaps too late, it was determined that an internationally supported police force, no matter how professional and popularly accepted, is unsustainable in the absence of a governmental structure to support it.

Similarly, writers describing the mission of the U.N. civilian police (“CIVPOL”) observe that “CIVPOL is not a security force. In most cases, CIVPOL is unarmed and does not have executive law enforcement authority...Hence, the security of the CIVPOL relies largely on the moral authority of the blue beret.” (Emphasis added.) One need not be a cynic to have doubts about the wisdom of relying chiefly on “moral authority” to bring order to a non-permissive environment. This sort of earnest and overt advocacy abounds throughout this book as an idealistic promise of how well things can be expected to work in a Utopian world under United Nations sovereignty. On the other hand (and, one assumes, quite unintentionally) such advocacy also reveals how contrary this idealism appears in the real world of armed conflict and mass state-sponsored murder. The gap between the idealistic promise and the harsh reality is so vast that those who have already made up their minds will hardly be persuaded to the alternate view.

And here lies the great problem with this book. It is rather like a private chat room for specially initiated members of the chattering class, the work of a common forum they all helped establish and consequently share, a self-congratulating advocacy piece to be passed around and doted over by the same academics and members of the defense establishment, in power and out, who participated in its creation. Yet this observation is not meant to belittle either the effort or the result. The book presents, after all, authoritative and undeniably important stuff. But it is unlikely to be read by many among its intended audience. Who comprises that audience? Oakley himself states (on the last page of his conclusions, at the very end of the book’s text) that his intended audience is none other than “the American people.” By this term it is pretty clear he means the voting, taxpaying members of the American public and not just the elite academics, journalists, bureaucrats and policy wonks who take more than a passing interest in international peacekeeping and who would help form and influence public opinion:

Perhaps the most daunting constraint for the United States is the impatient character of the American people, especially when they do not understand why tax dollars and especially lives are being spent in some obscure corner of the globe. On the other hand, policy makers are apt to be bombarded by vocal and well-organized human rights and special interest groups pressing for an aggressive policy to rectify past wrongs immediately and to remake an uncivil culture promptly into an incubator of democracy. If peace operations are going to result in sustainable security over the long haul, the American people must come to a much clearer understanding of what we are about, what interests are at stake, and what our expectations realistically ought to be. It is hoped that this work can contribute modestly to that important task.

Unfortunately, that very “impatient character” of the American people is what will predictably keep most of them from reading this important book so that they might “come to a much clearer understanding of what we are about.” Not that the book itself is at fault. To what is in sum a serious collection of highly specialized symposium papers, the editors have added nearly every helpful feature imaginable except an index — and because of the way the work is organized, an index would in most cases be of only
marginal additional use. There are biographical sketches of each of the authors, a list of commonly recurring acronyms (six pages worth!) — even an appendix listing the questions and issues each author was asked to consider in drafting his respective case study. It is all very helpful in assessing the viewpoints and qualifications of the authors in order to assess further the merits of the case studies and the other analyses included.

Nor is the problem that an author or editor has failed to make his case or to support it. Rather, the problem is that the argument is unlikely to persuade those who come to it with an opposing view. Those who advocate peacekeeping operations as a legitimate use of U.S. military force, for example, will find ample vindication in these pages for the merits of so employing that force. Even where a case study describes debacle or failure, the advocate will point to what specifically went wrong, and what can be corrected next time. On the other hand, opponents of such use of force will find every reason to uphold their view, and will hardly be persuaded that next time it will go better, or that last time would have succeeded “but for” this or that intervening cause. Consider the following statement as a lightning bolt that illuminates, if only momentarily, the gulf between the two camps, advocates and opponents. Peter Fitzgerald, Chief of Operations in Cambodia, includes among the many reasons why CIVPOL should not bear arms the conviction that

Unarmed, we do not pose a threat to any person and so can perform our duty more effectively. Our best protection is the professional performance of our duty in a neutral, impartial manner.

To an advocate or proponent that statement no doubt represents the ultimate ideal of peacekeeping under a United Nations mandate — the “moral authority of the blue beret” against the historical model of the unarmed British bobby. To an opponent the assertion of moral authority more likely represents the height of folly and naivety. How to bring these distant camps together is in the final analysis a political problem of credible moral leadership. The pages of this book record more difficulties, challenges and failures than instances of outright success. Does that mean such peacekeeping efforts should be repudiated and abandoned?

Not surprisingly, Oakley and Dziedzic argue fairly persuasively that it does not. Admitting that not all international conflicts are ripe for the ministrations of a peace operation, the editors recommend steps for closing each of the three public security gaps. These steps are not in themselves without controversy. To close the Deployment Gap, for instance, they note that the capacity of the international community should be strengthened to mobilize CIVPOL (civilian police) more quickly and effectively. However, because this gap cannot be entirely closed, the military also needs to be prepared to discharge the peacekeeping function on an interim basis. Those who do not believe soldiers should be used as peacekeepers will find this a prescription in which they can take little comfort. Similarly, the editors suggest that the Enforcement Gap can be closed at least in part by establishing a standing interim international police force, operating jointly if necessary with an integrated and mutually reinforcing military force. If this prescription sounds over-blown, some critics might be surprised to learn that Haiti is its model. Finally, the editors suggest that the Institutional Gap can be closed by strengthening those very institutions whose weakness — police, judiciary, prisons, legal codes — in most cases contributed to the need to bring in external peacekeepers in the first place.

Finally, the editors conclude, the United States should follow the Swedish example by creating a single, permanent, properly staffed and funded office to coordinate international policing functions now dispersed among several agencies including State and Justice.

Certainly the average member of the American public is not likely to have read far enough to weigh the merits of following “the Swedish example.” But international policy wonks both in and out of office will have their views and their preferred courses of action confirmed if not actually tested, and the book will no doubt find its rightful place in certain history, law and national security courses. Whatever the forum, the issues and opportunities described are not likely to go away. Al Gore and George W.: are you and your advisors listening?

Dale Bosley is Marshal of the Supreme Court of the United States and a Member of the ABA Standing Committee. As a Navy lieutenant in 1976 he was a member of the U.S. Military Observer Group, United Nations Truce Supervision Organization — Palestine (UNTSO-P).

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Call for Articles

The Standing Committee solicits your support in making the National Security Law Report as topical and informative as possible, and encourages you to contribute your thoughts for consideration by the editorial board. A short article of 600-900 words that highlights a current national security issue of interest to you or that reviews a book related to the field would serve as a welcome addition to this report. Your contributions will greatly strengthen the Standing Committee’s ability to maintain a vigorous public forum for national security issues. Submissions should be forwarded to Gary Sharp at 28 Bridgeport Circle; Stafford, VA 22554-1776 or WGSharp@aol.com. — Elizabeth Rindskopf Parker.

by Thomas E. Crocker

In a decision which is of signal importance to the national security community, on May 6, 1999 a three-judge panel of the United States Court of Appeals for the Ninth Circuit in Bernstein v. United States Department of Justice et al., 176 F.3d 1132 (9th Cir.), struck down U.S. export controls on encryption source code as an impermissible “prior restraint” on speech protected by the First Amendment. Immediately many leaders of the technology industry and privacy advocates hailed the decision as a landmark ruling which will foster the growth of electronic commerce and privacy. The Government subsequently appealed the decision by filing a motion for reconsideration or, in the alternative, for a rehearing en banc by the Ninth Circuit. The ruling is currently stayed, pending the appeal.

Narrow Ruling with Broad Implications

Judge Fletcher’s majority opinion in Bernstein focused narrowly on the First Amendment issue without considering in detail the context of the relevant export controls or U.S. national security. The court stated:

The parties and amici urge a number of theories on us. We limit our attention here, for the most part, to only one: whether the EAR restrictions on the export of encryption software in source code form constitute a prior restraint in violation of the First Amendment.

Having thus set the scope of its inquiry, the court issued holdings on two points and dictum on a third. The two holdings are that (i) encryption source code is “speech” protected by the First Amendment and (ii) because of this conclusion the Government’s export licensing scheme for encryption source code does not meet the requisite level of scrutiny because it allows the Government “boundless discretion” to deny license applications, imposes no time limit on final licensing decisions and grants no right to judicial review. In addition, in dictum the court asserted that privacy is an important right and that “secure encryption . . . may offer an opportunity to reclaim some portion of the privacy we have lost.”

In reaching these conclusions, the Bernstein court focused in particular on whether the functionality of encryption source code is an expressive element which warrants First Amendment protection. The court gave no consideration to distinctions between commercial and non-commercial speech in its First Amendment analysis nor did it consider in any significant way relevant regulatory law or broader national policy implications.

Perhaps the most important aspect about the Bernstein ruling is the potential collateral implications it holds for all U.S. export controls and for U.S. national security. The ruling is written as a narrow decision on the First Amendment coverage of encryption source code. However, the implications of the holding are broader and may well go to the U.S. Government’s ability to control exports generally. If Bernstein is upheld, the “compelling U.S. national interest” argument will be weakened, and the United States may no longer be able effectively to control exports of technology relating to dual-use goods, munitions or nuclear material or to maintain controls over classified information, all of which potentially could be attacked as an impermissible prior restraint under the First Amendment.

National Security/Foreign Policy Rulemaking

The encryption export controls considered in the case were established and implemented pursuant to the national security/foreign policy rulemaking authority vested in the Federal Government. When encryption export controls were formerly administered by the Department of State’s Office of Defense Trade Controls (ODTC), the underlying statutory authority was the Arms Export Control Act. With the transfer of licensing authority for such exports from ODTC to the Department of Commerce’s Bureau of Export Administration (BXA) in 1996, the underlying statutory authority became the Export Administration Act (EAA) (or to be more exact, the International Emergency Economic Powers Act (IEEPA) because the EAA lapsed in 1994, and since then BXA has administered the EAA controls under authority of the IEEPA).

All three statutes grant extraordinary powers to the President to control exports and other dealings in order to protect U.S. national security interests or further U.S. foreign policy goals. Typically, programs administered pursuant to these statutes are exempt from most customary due process and procedural requirements on the grounds that the provisions of the Administrative Procedure Act, 5 U.S.C. Section 553 et seq. (APA), do not apply. Indeed, Section 553 of the APA contains seven exemptions from required rulemaking procedures. One of these exemptions, at Section 553(a)(1), is a blanket exemption from all procedures required by Section 553 as to “a military or foreign affairs function of the United States.” For example, rulemaking under this exemption is normally done without public notice or opportunity for public comment. Authoritative commentators have long recognized this exemption to the APA, although some have criticized it. See, e.g., § 7.10 Davis & Pierce, Administrative Law Treatise, 3d Edition.
Encryption export controls are only a small portion of the commercial activity which is restricted or otherwise regulated by the Federal Government pursuant to its national security/foreign policy powers. Other types of activity include a wide variety of controls on the export of dual-use goods and technology, munitions and nuclear material and technology, as well as the prohibitions of the Department of the Treasury's Office of Foreign Assets Control on dealings with embargoed countries (such as North Korea, Cuba, Iran, Iraq, Libya, Sudan, Yugoslavia and others) and Specially Designated Nationals (including terrorists and narcotics traffickers).

Also pursuant to this broad power is the system of classification of official information (top secret, secret, confidential and other classifications) by which vital U.S. secrets, sources of information and methodologies of collection are protected. There has been substantial litigation upholding the Government's ability to restrict the disclosure of classified information on national security/foreign policy grounds, notwithstanding First Amendment claims. See, e.g., Snepp v. United States, 444 U.S. 507, 62 L. Ed. 2d 704, 100 S. Ct. 763 (1980) (holding that "even in the absence of an express agreement... the CIA could have acted to protect substantial Government interests by imposing reasonable restrictions on employee activities that in other contexts might be protected by the First Amendment... The Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service."); also United States v. Marchetti, 466 F.2d 1309 (4th Cir.), cert. denied, 409 U.S. 1063, 34 L. Ed. 516, 93 S. Ct. 553 (1972).

The Government's Position

Consistent with this background, the Government argued in Bernstein that the United States imposes legal controls on the export of a wide variety of products whose use abroad could compromise U.S. national security, foreign policy and law enforcement interests. The Government further argued that export controls on encryption are content-neutral regulations whose effect on expressive activities, if any, is merely incidental and entirely permissible. The Government took the view that such a content-neutral regulation should be sustained under the First Amendment if, as here, it furthers an "important or substantial government interest; if that governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."

However, the court in Bernstein rejected those arguments. Perhaps as a result of its minimal consideration of national security/foreign policy rulemaking, the Bernstein decision appears to arrive at several questionable conclusions about the export control regulations that govern encryption source code.

First, the court states that the U.S. export control regulations allow the Government "boundless discretion" to deny license applications. In fact, the Export Administration Regulations, including those sections dealing with exports of encryption, are a complex regulatory regime designed to protect U.S. national security while at the same time facilitating legitimate U.S. commercial exports of dual-use goods and technology. Both the wording of the regulations and the interagency license review process in practice ensure that the Government considers a number of factors in reaching export control decisions, including such matters as the level of technology being exported, the potential applications of that technology for military end-uses, the identity of the intended end-user, the U.S. policy toward the country of the intended end-user, the risk of diversion and, in appropriate cases, retransfer restrictions and assurances. Export licensing decisions thus are a balancing by numerous concerned Government agencies of a variety of well-known factors. The result is a reasonably rational and predictable process, with relatively few denials given the overall volume of license applications processed. While inevitably some decisions involve subjective judgments, it is perhaps not entirely accurate to say that the Government has "unbridled discretion" to deny license applications for no specific reason.

Second, the Bernstein court states that the Export Administration Regulations impose no time limit on final licensing decisions. In fact, as specified in E.O. 12981 (December 5, 1995), as amended, the Regulations contain highly specific processing times for every stage of the export control review process, and license applications must be resolved or referred to the President within 90 days. However, the court goes on to state that "there is no time limit once the application is referred to the President." In practice, referral to the President is only the last and ultimate step following an interagency review process that involves political-level committees to resolve interagency licensing disputes and that operates within the 90-day framework. The Presidential review authority thus is a safety valve incorporated in the law for use by the exporter as a last resort. In effect, it is a benefit to exporters who otherwise might have their license applications denied because of disputes between agencies. Moreover, the lack of a timeline on the President's decision — which by its very nature is political and thus not amenable to mandatory regulatory deadlines — is academic at best. The Presidential referral process has been used only infrequently.

Third, the Bernstein court faults the export licensing regime for encryption source code because it does not
grant a right to judicial review. The court is correct in that the underlying statutory authority for the Export Administration Regulations grants no right to judicial review. Congress, in its wisdom, did not include it in the statutory language.

The question of judicial review of export control decisions has been a matter of considerable discussion in the export control community for some years, and there has been a widening consensus that it appropriately should be included in new export control legislation. Indeed, various draft bills to reauthorize the currently expired EAA have contained such language. However, it is up to Congress to enact it.

Split in Circuits

There is now a split in the circuits on the permissibility of controls over the export of encryption source code. In *Karn v. U.S. Department of State*, 925 F. Supp. 1 (D.D.C. 1996), remanded without op., *Karn v. U.S. Department of State*, 107 F.3d 923 (D.C. Cir. 1997), the U.S. District Court for the District of Columbia considered essentially the same First Amendment issue as the court in Bernstein with respect to a diskette containing encryption source code. However, the court ruled opposite to the court in Bernstein and granted the Government’s summary judgment motion with respect to the First Amendment claim of the exporter of the source code.

The Karn court expressly examined whether the regulation was (i) within the constitutional power of the Government, (ii) “furthers an important or substantial governmental interest” and (iii) was narrowly tailored to the Government interests — the so-called “O’Brien test” after the Supreme Court ruling in *United States v. O’Brien*, 391 U.S. 367, 20 L. Ed. 2d 672, 88 S. Ct. 1673 (1968), reh’g denied, O’Brien v. United States, 393 U.S. 900, 21 L. Ed. 188, 89 S. Ct. 1673 (1968). The court in Karn examined the purpose of the regulations, namely that the interception of communications by foreign intelligence targets is “essential to the national defense, national security, and the conduct of the foreign affairs of the United States.”

In addition, the U.S. District Court for the Northern District of Ohio also examined the nature of encryption source code in terms of First Amendment protection in *Junger v. Daley*, 8 F. Supp. 2d 708 (N.D. Ohio 1998). The court in the Junger case held that the same export controls under consideration in Bernstein did not violate Junger’s First Amendment rights when they prohibited his posting of encryption source code on the Internet. The dissenting opinion in Bernstein cited Junger extensively. Junger is currently under appeal.

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**The U.S. DoD Arms Control Compliance Process**

by Glenn T. Ware, Mark S. Ackerman, and Tom Burns

Within the Byzantine world of arms control, the process by which the Department of Defense (DoD) internally complies with its international obligations under various U.S. arms control agreements is often overlooked within academia and the journalist media for the more “attractive” aspects of arms control issues, such as the strategic implications of the various treaties themselves and the legal regimes which control weapon proliferation. The purpose of this paper is to generally unveil the DoD compliance process and argue that this process itself is critically important to giving underlying weight and strength to arms control treaty compliance.

**DoD Arms Control Compliance**

The United States is a party to a number of arms control agreements such as the START2 and ABM treaties, both of which are currently in force with Russia and the other participatory states (Ukraine and Belarus) for the purpose of imposing a fairly impressive array of constraints on strategic offensive and defensive weapons systems, respectively. Given the range of those constraints and the continually evolving nature of strategic systems, how is it then that DoD ensures that its activities to develop and test strategic offensive and defensive weapons systems are in compliance with U.S. obligations under international law?

The answer is that DoD has promulgated — and rigorously enforced — internal instructions which establish policy and procedures for ensuring arms control compliance. One in particular, Department of Defense Directive 2060.1, provides the policy that “all DoD activities shall be fully compliant with arms control agreements of the US Government.” Toward that end, the directive apportions responsibility within the DoD principally among the Undersecretaries of Defense for Acquisition and Technology (USD-A&T) and Policy (USD-P), the General Counsel (GC), the Chairman of the JCS (CJCS), and the heads of the various DoD components — for instance, the director of the DoD Ballistic Missile Defense Organization (BMDO). While the list of responsibilities for each of these offices is fairly detailed and lengthy, the compliance process — at its barest essence — is defined therein as follows:

USD-A&T has oversight responsibility — which is delegated for execution to staff level implementation working groups (IWG) and to compliance review groups (CRG). The IWG shepherds new arms control agreements into existence within DoD after they
enter into force and the CRG reviews DoD programs to determine whether they are compliant or not. For those found compliant, the chairman of the CRG recommends USD-A&T certify them compliant with such agreements.

With the exception of DoD component heads, all of the remaining offices (GC, USD-P, and CICS) have a representative on both the IWG and the CRG, who provide (respectively) legal interpretation, policy guidance/interagency perspective, and military advice to those bodies.

Each DoD component head is required to designate an implementation and compliance review manager who provides USD-A&T with periodic compliance status reports on activities under their purview and who is directed to: "Seek clearance from USD-A&T, through the CRG, before taking an action that reasonably raises an issue of DoD compliance with an arms control agreement. When there is doubt whether clearance is necessary, clearance shall be sought."

In practical application, when a DoD component decides to conduct a specific operation, experiment or test that the component compliance review manager determines might "reasonably raise a treaty issue" the appropriate CRG is notified and assembled. The parent branch of service or DoD organization (for instance, BMDO) will then present a specific and detailed oral and written briefing to the assembled members of the CRG. These briefings are usually highly technical in nature as they involve complex weapon system tests or experiments. The briefings are usually presented by a technical expert after thorough vetting by the compliance lawyers for the parent service or organization. After the briefing, the CRG debates the legal, policy and military implications of the activity under review. The CRG will then draft a compliance rationale and circulate it for comments among the relevant offices within DoD. If the compliance rationale is found to be justified, a compliance certification is issued to the organization seeking to conduct the activity. The actual compliance certificate which is signed by USD-A&T is usually unclassified, but the supporting memorandum or "brief" is almost always classified.

The other DoD instruction on system acquisition, DoD Directive 5000.1, does not significantly alter any of the guidance in DoD Directive 2060.1; however, it does provide additional requirements for a legal review prior to the award of an engineering and manufacturing development contract.

Lawyer's Role in Compliance

The lawyer’s role in the compliance process is varied. First, DoD lawyers must spot issues of compliance. When compliance issues cannot be resolved within a DoD component, the lawyer must develop a ‘compliance theory’ and ensure that technical briefings to the CRG concentrate on the underlying facts supporting the compliance theory. The lawyer must also keep an open and active channel of communication between the CRG and their organization. Most importantly, the lawyer must support the programs within the agency so as to cultivate an environment where program managers and engineers readily seek advice on compliance issues before they become a problem.

Conclusion

The DoD compliance review process is rigorous, time consuming, and detailed; so that proposals which in any way fail to provide adequate detail for CRG decision-making are routinely returned to the parent organization for re-work/re-submission and those which are not found compliant are denied authority to proceed. As a result, the painstaking detail by which the CRG conducts its activity has lead to a number of important advantages to the U.S in the arms control arena.

First, we have been able to negotiate other agreements with our treaty partners—which have brought to us improvements in strategic stability. Second, our good performance has provided us with the moral authority to seek agreements which put into place more rigid requirements for compliance performance. In other words, we have been able to raise the threshold of expectations for compliance performance—in ways which poor performance on our part would not have allowed. Third, we have been able to reach unprecedented agreements on reductions of offensive weapons systems. The point being that since this feat directly influences the national security of both parties, it could only have been accomplished under conditions of maximum trust in the compliance performance of the other party. Fourth, we have been able to negotiate agreements of sharply increased complexity, which allowed us to more closely meet our national security objectives. Complicated agreements tend to place a premium on excellent compliance performance. Fifth, and finally, our performance has allowed us to negotiate agreements which provide for intrusive inspection mechanisms (for instance, on-site inspections) which vastly improve our ability to verify compliance and accurately estimate strategic situations (preventing the sort of over-reaction which sometimes results from remote methods of verification). The point being that since intrusive inspection regimes render each party potentially vulnerable to exploitative claims of non-performance, a necessary prerequisite for such agreements is a funda-
mental trust by each party in their ability to accurately anticipate the performance of the other party.

In fact, the DoD compliance process is so rigorous and respected that it led the former First Deputy Minister of Defense and Chief of the General Staff of the Soviet Union, Marshal Sergei Akhromeyev to declare:

During arms control negotiations, U.S. Politicians and military commanders have shown themselves to be serious and responsible leaders who uphold their interests persistently and skillfully. It takes great effort to reach agreement with them, but upon signing treaties, THEY COMPLY with them. The 20-year experience of the talks with the United States on reducing nuclear and conventional weapons shows that they can be trusted to set up a reliable system of control over compliance with treaties and agreements.\(^1\)

The statement by Marshal Akhromeyev may be a considerable defacto seal of approval of the DoD arms control compliance activities and demonstrates that the United States has the respect of its toughest arms control treaty partner.

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1 See e.g. Jeane Kirkpatrick, *Target America: The United States is in the Sights of the Rogue States*, National Review, Feb. 22, 1999, at 28. (Ambassador Kirkpatrick argues that preserving the ABM Treaty gives the Russians a veto power over the ability of the United States to defend itself against rogue nations). See also, Barry Kellman and David Gualtieri, *Barricading the Nuclear Window -- A Legal Regime to Curtail Nuclear Smuggling*, 1996 U. ILL. L. REV. 667 (Prof. Kellman and Mr. Gualtieri proffer an international legal regime designed to thwart those who engage in nuclear smuggling.) But see, Bill Gertz, *Pentagon Considers Radar for North Korea, THAAD Would Monitor Missile*, Wash. Times, Aug 5, 1999, at A4. (The arms control compliance process is mentioned in a Pentagon decision to send the THAAD radar to Japan to monitor the Korean Missile Launch—one of the few recognitions of such a process in the press).  

2 The Treaty between the United States of America and the Union of Soviet Socialist Republics on the reduction and limitation of strategic offensive arms, signed in Moscow 31 July 1991.  

3 The Treaty between the United States of America and the Union of Soviet Socialist Republics on the limitation of anti-ballistic missile systems, signed in Moscow 26 May 1972.  

4 While the START Treaty deals with strategic offensive ballistic missiles (both land and sea based) and with strategic bombers and cruise missiles, the ABM Treaty limits systems which defend against strategic offensive ballistic missiles.  

5 DoD Directive 2060.1 of July 31, 1999 at paragraph C.  

6 A service branch or DoD agency could unilaterally determine that a proposed activity within their organization is not compliant and terminate the process prior to going to the CRG. Or, alternatively, the service organization or DoD organization could determine that the activity does not 'reasonably raise' treaty issues and authorize the activity to proceed without going through the formal compliance process. In this case, the service component or DoD organization will generally coordinate with the Chairman of the CRG or provide an information copy of the opinion which indicates that no reasonable treaty issues are raised. It is important to note that the Chairman of the CRG has the authority to direct a review of 'any activity' which in his discretion he believes raises a treaty issue regardless of a service organization opinion to the contrary. DoD Directive 2060.1 at paragraph 1.j.  

7 DoD Directive 5000.2 of March 15, 1996. Specifically, paragraph 4.2.10 states in part:  

DoD acquisition and procurement of weapons shall be consistent with applicable law and all applicable treaties, customary international law, and the law of armed conflict. The Head of each DoD Component shall ensure that the Component’s General Counsel or Judge Advocate General, as appropriate, conducts a legal review of the intended acquisition of a potential weapon to determine that it is consistent with U.S. obligations. The review shall be conducted before the award of the engineering and manufacturing development contract and before the award of the initial production contract.  

8 Some arms control tests involve highly technical experiments and it is not always readily recognizable that an arms control issue exists unless the compliance lawyer is intimately familiar with the program under his or her charge.  

9 Throughout the compliance process the CRG will pose countless number of interrogatories to clear up factual inconsistencies or to provide additional technical data not submitted during the briefing. Additionally, the lawyers will also staff countless draft certifications and provide coordination within their respective organization.  

10 Although as a practical matter, no organization wants to be the recipient of a noncompliance certificate and would likely cancel the experiment or test if such an event were likely to occur.


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The White House Press Release on the

The President signed the National Defense Authorization Act for FY2000 into law on Tuesday, October 5, 1999.

This Act provides for a strong national defense and supports our deep commitment to a better quality of life for our military personnel and their families. It marks the start of the first long-term, sustained increase in military spending in some fifteen years. The Act resulted from a bipartisan consensus that we must keep our military ready, that we must take care of our men and women in uniform, and that we must modernize our forces for the challenges they will face in the 21st century. Most significantly, the Act provides a comprehensive program of pay and retirement improvements that represent the largest increase in military compensation in a generation. The Act provides for important new and enhanced special and incentive pays that are needed to recruit and retain high quality military personnel in support of readiness. Personnel-related provisions include:

-- Increasing military pay by 4.8 percent — the largest increase since 1981 — and future raises that will exceed average private sector raises;
-- Increasing the reward for performance with targeted pay raises that will boost the pay of mid-career service members;
-- Increasing the use of special pay and bonuses to retain our highly skilled personnel; and,
-- Restoring retirement benefits by returning members to 50 percent at 20 years of service.

Other important provisions in the Act for sustaining and enhancing the readiness of our Armed forces include funding Operations and Maintenance at a level that exceeds the level per individual soldier, sailor, airman and Marine that was provided in the 1980s; and, adding over $400 million for Reserve training, operations and integration of Active and Reserve components into a truly Total Force.

The Act accelerates the transformation of our forces and empowers them with the ability to dominate the battlefield for decades to come. It authorizes 53 billion dollars for procurement — our second annual increase since reversing the trend two years ago — and puts us on the path to achieving our goal of increasing procurement funding to $60 billion per year by 2001. The Act authorizes important funding for both theater and national missile defense. It authorizes the full request for the Medium Extended Air Defense System cooperative program with Germany and Italy, funding for national missile defense, including military construction planning and design, and funding to help keep the Patriot, Advance Capability-3 and Navy Area Defense programs on track.

Although most of the Act’s provisions support a strong national defense, several of its features are troubling. These include some of the provisions concerning reorganization of the nuclear defense functions within the Department of Energy, provisions that prejudice the Chinese military threat, damaging restrictions on cooperative threat reduction programs in the former Soviet Union, and a number of other provisions that raise concerns relating to the President’s constitutional authorities as Commander in Chief and Chief Executive. The National Defense Authorization Act for Fiscal Year 2000, as a whole, will enhance our national security and help us achieve our military and related defense objectives. By providing the necessary support for our forces, it will ensure continued U.S. global leadership well into the 21st century.

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