R. James Woolsey On National Security Challenges in the 21st Century

The remarks of Mr. R. James Woolsey, former Director of Central Intelligence, before a Standing Committee breakfast are summarized below. Woolsey has also served as: Ambassador to the Negotiation on Conventional Armed Forces in Europe (CFE); Under Secretary of the Navy; General Counsel to the U.S. Senate Committee on Armed Services; Delegate at Large to the U.S.-Soviet Strategic Arms Reduction Talks (START) and Nuclear Space Arms Talks (NST), and, as an adviser on the U.S. Delegation to the Strategic Arms Limitation Talks (SALT I).

I was on a panel once where we were all asked, "What will be the principal national security challenge of the twenty-first century?" Responses included the globalization of the economy, the information revolution, and similar subjects. Then Elie Wiesel spoke. "No," he said, "the principal problem that will challenge the twenty-first century will be the same one that was the principal challenge of the twentieth century." Everyone looked curiously at him. He concluded: "The principal problem of the twenty-first century is going to be: how do we deal with fanaticism armed with power." And, of course, he's right.

I want to look at the way we might deal with this problem in the context of a wonderful analogy. In the early 1930s, Dwight Eisenhower was a major in the Command and Staff school at Leavenworth. His professor of history there once said to him, "To understand the way the United States deals with really serious problems, you have to understand the wagon train." Ike thought about that over the

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After Burma: The Fifty States, Terrorism, and a Unified National Security Policy

by Dr. Laura K. Donohue and Juliette Kayyem

The Supreme Court's decision this term in Crosby v. National Foreign Trade Council unified the entire Court in an opinion that was simplistic and, perhaps, foretelling. The decision invalidated a Massachusetts' state law that restricted the authority of its agencies to purchase goods or services from companies doing business with Burma (now Myanmar). The Court addressed whether a state statute with foreign policy implications -- in this case, Massachusetts' desire to not associate with a totalitarian government -- violated a federal statute addressing, in a less draconian way, how the federal government would do business with Burma. The decision serves as a caution for states as they begin to inch their way into foreign policy, especially in the counter-terrorism arena. While this Court has taken every opportunity to adopt limited deference towards the federal government's authority to legislate in areas traditionally reserved to the states, the Burma decision was a reminder that there still remain areas exclusively in the province of the federal government, and for very good reason.

In Crosby, the Court made three important arguments that guide any analysis on whether state laws have gone too far in encroaching on federal authority. First, the Court stated that, regardless of express preemption within the federal statute to deter any state legislation in the same area, the Court "will find preemption where the state law is an obstacle to the accomplishment and execution of Congress' full purposes and objectives." Second, the Court held that the state legislation likely would result in undermining the authority given to the President in the federal anti-Burma legislation. In that statute, Congress granted the President discretion to leverage against Burma, to impose new sanctions and to suspend sanctions if appropriate. The "President has the authority not merely to make a political statement but to achieve a political result. ... It is implausible to think that Congress would have gone to such lengths to empower the President had it been willing to compromise his effectiveness by allowing state or local

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Kosovo Update

United Nations Efforts to Establish the Rule of Law

by F.M. Lorenz

News reports from Kosovo indicate that the United Nations (U.N.) mission is in trouble. Despite the presence of NATO forces, ethnic violence continues, this time against the Serb minority. Having an insufficient number of civilian police has plagued the mission from the outset. The U.N. mission in Kosovo is struggling to establish the rule of law. But more than one year after the start, the Kosovo courts are barely functioning, and in the early trials there is grave doubt about impartiality. The United Nations is unable to recruit enough international judges and prosecutors due to lack of funding. Security is a major concern, and few capable lawyers will work under such difficult conditions. There is increasing concern about human rights violations, and the lofty ideals that drove the NATO humanitarian intervention in March of 1999 have failed to create a peaceful, tolerant, multi-ethnic Kosovo.

At a meeting of U.S. military officers in Germany in May 2000, one speaker commented "the failures in Kosovo can be laid at the feet of the U.N." Is the U.N. at fault in Kosovo? In my judgment, the U.N. is no more than the sum of its Member States, and placing blame on the U.N. is not productive. The real question is what can be done by the United States to make the mission succeed? The United States is the most influential Member State, and the prime mover in the decision to intervene in Kosovo. But the U.S. Congress has considered legislation intended to cut off funding for U.S. troops in Kosovo after April 1, 2001, undermining U.S. efforts to stabilise the region. A failure in Kosovo will have broad implications for future U.N. missions, and the concept of humanitarian intervention.

On June 10, 1999 the United Nations Security Council authorised the Secretary-General to establish the U.N. Interim Administration in Kosovo (UNMIK). This marked the end of the humanitarian catastrophe during which thousands of ethnic Albanians were killed or subjected to ethnic cleansing by Serb forces. U.N. Security Council Resolution 1244 gave broad responsibilities to UNMIK, including the responsibility for basic civilian administrative functions, organizing and overseeing the development of provisional institutions for democratic self-government, maintaining civil law and order, and protecting and promoting human rights. For the first time a U.N. official has full legal authority to establish and run a government. UNMIK is led by Dr. Bernard Kouchner, the Special Representative of the U.N. Secretary-General (SRSG).

Adequate law enforcement is an essential component in establishing security, and courts cannot properly function without it. This is particularly true in Kosovo, where the threat of violence and other forms of intimidation for court personnel run high. Since no functioning local police force exists in Kosovo, UNMIK introduced international civilian police (CIVPOL) drawn from many different countries. The Secretary-General originally recommended to the Security Council that 6,000 CIVPOL be authorized, but only 4,718 were approved. Despite repeated requests, the international community has not provided sufficient numbers of qualified police. The result is an atmosphere of lawlessness, and the inability of the U.N. to protect the primarily Serb minority population. One indication is the fact that municipal elections in Kosovo were held without significant Serb participation. The serious security problem in Kosovo feeds a vicious cycle of inadequate police, lack of jail space, and a malfunctioning court system that makes it difficult to notice any progress in establishing the rule of law.

In Kosovo, the military security presence (KFOR) and the civil presence (UNMIK) have parallel and overlapping responsibilities under Resolution 1244. This violates the fundamental principle that success in peacekeeping can only be achieved with a unity of effort. Security for the courts presents just one example, with the most difficult situation in Mitrovica, where there is a real danger that the Ibar River will become the point of partition for Kosovo. The court is located in the Serb part of the city, but the court is composed entirely of Albanians. This has created a dangerous situation and requires extra security measures, stretching thin the CIVPOL and KFOR personnel in the region. But there is no agreement between KFOR and UNMIK on the overall responsibility for court security.

Disagreement between civil and military authorities in peace support operations threatens the entire mission. Moreover, the aftermath of a failed mission often results in finger pointing and allocation of fault. To this day, many Americans blame the failure of the mission in Somalia on the U.N., under the mistaken belief that U.S. forces were under U.N. command. The U.N. after-action report was critical of the U.S. military for failing to disarm the warlords and establish security before the U.N. mission began. And many in the United States attributed the failure to U.N. incompetence. The real lesson of Somalia is the requirement to match political will and the necessary resources to the U.N. mandate.

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years. I cannot find that he ever used it in a speech, but he talked with friends about it on more than one occasion. If you look at the institution of the wagon train it has some very interesting features. First of all, it is a temporary society, comprised of people who come together from all walks of life for a particular purpose. Second, it is a meritocracy, where it does not matter how much money you have or what your name is. If you are the best person to lead the wagon train, it is a serious matter: you are going to lead. While you are on the wagon train, it is an extremely collegial, almost familial, institution in which people pull together — all for one and one for all.

Because of these features, the wagon train can accomplish marvelous things. But after it has fought its way across the plains, survived the weather, the mountains, and the rest, and reaches California, it is over. It’s “beach time.” Everybody goes off to be a carpenter, shopkeeper, farmer, lawyer, or whatever. People often looked back on the experience as the best years of their lives, like the title of the famous post-World War II movie, because of what it did and what it was and what it accomplished. But no one maintained that a wagon train was a normal way of life — it was a temporary society designed to do something especially difficult.

If you begin to think, as I believe Ike’s teacher did, of the country organizing itself into a huge wagon train to meet a major challenge, a lot of things become clear. What he probably had in mind the years after WW I was that, within a period of approximately a year and a half, the United States entered World War I, mobilized its forces, began to clone divisions, sent them to France, turned the tide of the war at the end, and then began demobilizing. Indeed, if you look at serious challenges that the United States has faced in its history — if you begin unrestricted submarine warfare against us, or bomb Pearl Harbor, or invade Kuwait, or beat us to the moon — we will pull together a national wagon train. And then we will hand you your hat, your derriere, and your overcoat. We are a remarkable society in our ability to do that. Once the enemy has a face and a name, once the challenge is clear, there probably has been no other society on the face of the earth like this one in accomplishing these remarkable missions.

You might think of the Cold War as a rather long trip, but nonetheless one for which we did in a real sense mobilize a wagon train. What contributes to the spirit and attitude of the country in those circumstances becomes clear: when it comes to clear challenges, as a nation, we do remarkably well. What we do do not very well is deal with matters in the gaps in-between the clear challenges, or to use the analogy, in-between our national wagon trains.

Reflect with me for just a moment on an earlier era in which there are some interesting parallels to the 1990s. I am speaking of the Roaring Twenties. In the 1920s we had just won a war — a war that was going to make the world safe for democracy, a war to end all wars. We bestrode the world like a colossus. Our economy and political system were taken as a model in Europe. Our military capability, which we began to demobilize, was nonetheless unchallenged. We roared into the 1920s. We roared with radio, the talkies and speak-easies. The stock marked roared. And while we were roaring, we blew it. We blew it in part out of a national propensity toward material self-indulgence and we also blew it because of a remarkable national capacity for naïveté.

Take a few cases from the spirit of the 1920s. The President of the United States said, “the business of America is business,” implying that the business of America was just business. With respect to our allies, Britain and France, who had been bled of an entire generation in the trenches of Flanders in World War I, we loaned them money at a relatively high rate of interest and when they sought relief, the President growled, “They hired the money, didn’t they?” We put heavy faith in arms control agreements of all kinds, including the Washington and London Naval agreements and the Kellogg-Briand Pact. How could you have another world war if the weapons that everyone knew would always be the principal strategic instruments — namely, battleships — were limited in length and numbers? How could you even begin to think you were going to have a war if all relevant countries had signed a pledge not to go to war? Kellogg-Briand was signed, of course, by both Germany and Japan. My favorite example, however, comes from a man who was not given to wooly-mindedness, a crusty old Republican who was a fine Secretary of War in both World War I and World War II for Wilson and Roosevelt, and who, in between, served as Secretary of State for Hoover. Hard-headed, sound, practical, national security-minded Henry Stimson, at the end of the 1920s, closed down the code breaking that the State Department was doing because he later explained, “Gentlemen do not read one another’s mail.” He was very lucky that some naval personnel were being less than gentlemanly during those inter-war years with respect to Japanese codes and some Poles and Brits were being less than gentlemanly with German codes, because that lack of “gentlemanliness” came in very handy a few years later.

It would not be fair to point back to the statesmen of the 1920s and say, “Weren’t they stupid because they weren’t clairvoyant.” The twenties were not an era in which challenges to national security were clear. In the 1920s Hitler, after all, was a crazy failed putschist who had a few hundred, or perhaps at most a few thousand, followers.
His support did not skyrocket until the beginning of the depression. Even Churchill didn’t see the Nazi threat until the 1930s. So it would not be fair to look back at the Stimson’s and others of the twenties and say that they weren’t clairvoyant, using our 20/20 hindsight from today. However, I think it is fair to point out that they weren’t careful.

Like the 1920s, the threats of today are also somewhat vague and inchoate. During the Cold War, we got used to a stodgy and somewhat predictable enemy. The Soviet Union was not that predictable in the way it fell apart, but its military programs were relatively predictable. It tested on the same ranges, according to the same timetables, and we had been able to steal the plans of the ways they did their research and development. In many circumstances during the Cold War, we were thus able to save resources by only responding to clear, validated threats for which we understood the development cycle.

That was the Soviet Union, but that is not the world of today and it was not the world of the 1920s. In the twenty-first century, can we deal with vague and inchoate threats better than we did three quarters of a century ago? The jury is still out, but there is a fair amount of evidence against the proposition that we are dealing with these types of threats in a sound and sensible way.

Three types of threats we will face early in the next century are those from: major powers, rogue states, and terrorism.

Threats from major powers include Russia and China. The Administration to the contrary notwithstanding, I would not call either one a strategic partner. Russia increasingly resembles Weimar Germany, with two major differences: Weimar Germany had a much greater tradition of parliamentary government and the rule of law in the 1920s than Russia does today. And Weimar Germany was not equipped with nuclear weapons. In Russia today, there is such extraordinary inter-penetration of the intelligence services, organized crime, and business that it is very difficult to tell with whom one is dealing in almost any circumstance.

We are doubly vulnerable to this criminalization and potential destabilization of Russia. First, potential political chaos in a country which still has thousands of nuclear weapons and hundreds of ballistic missiles that can reach us, and for which command and control could be uncertain, is of course a very major matter. Second, the theft of the output of the Russian, the former Soviet, military industrial complex — whether fissionable material, chemical weapons, or guidance systems for ballistic missiles — and the potential sale of them to rogue countries such as Iraq and others, are very real possibilities. Because we have personalized our relationship with President Yeltsin over the past decade, his problems became our problems and his decisions have been rationalized by President Clinton. We have almost become economic determinists, believing that as long as there was something approximating a competitive market in Russia everything would work out all right. This is a sort of capitalistic version of Marxist philosophy. But it neglects the negative effect of the absence of the rule of law. If you look at the capitalism which Russia has developed, in part with our help and at least in some crucial matters without our criticism, it does not resemble the capitalism of Silicon Valley in the 1990s. It rather resembles the capitalism of the liquor market in Chicago in the 1920s: competition based not on price and quality, but on skill in the assassination of business rivals.

The United States government is quite divided about how to carry forward into the twenty-first century in dealing with Russia. It is divided between those who would largely continue the policies maintaining personal relationships and foregoing criticism of those at the top, and rather freely granting funds through international institutions, on the one hand, and, on the other hand, people who want to withdraw from Russia and do very little, if anything, with it. Frankly I find neither of these approaches particularly congenial. But in any case, since we are divided as a nation, we do not know where we are going in dealing with Russia.

In China, as economic change continues to produce unstable labor conditions, hard line factions have become concerned about chaos and have begun to do some very bizarre things. Among them is the recent arrest of large numbers of middle-aged people who like to do breathing exercises. The Chinese establishment in Beijing is highly tempted to play the nationalism card in order to hold the country together in the context of this potential chaos. Taiwan is an obvious target. In Taiwan, free enterprise, and now democracy as well, present a living, breathing affront to Beijing in exactly the same way that Solidarity Poland was an affront to Moscow; it is an example of how good things could be, as contrasted to how things are, for the Chinese people.

In this context the Executive Branch has tilted so far toward the PRC on human rights issues and on issues related to Taiwan that it got itself into a box and could not accept Zhu Rongji’s rather substantial concessions in April on the World Trade Organization negotiations. We turned down those compromises after having been more than accommodating with respect to PRC claims about Taiwan and PRC deprivations of human rights. What we ought to be doing instead is helping the economic reformers in China and standing firm against those who are trying to put brave Chinese democrats into prison and crowding democratic Taiwan. Instead we have been doing the reverse. The best characterization of this I can think of is Bishop
Cranmer's wonderful line in the Episcopal Book of Common Prayer: "We have left undone those things which we ought to have done, and we have done those things which we ought not to have done."

With respect to rogue states, our approach, I think, for the last several years has been to kick the can down the road. North Korea and Iraq are two examples. In North Korea, we are now removing sanctions for a vague verbal hint that they may not move forward promptly with the test of the Taepodong II missile. They are now getting used to our behavior in this regard. We are also, with respect to this continuing North Korean ballistic missile threat, dumbing down our ballistic missile defenses, both theater and national, in response to obligations we see under the ABM Treaty. But North Korea's weapons of mass destruction programs at this point proceed unlimited and their ballistic missile programs may not be stalled for long.

With respect to Iraq, we seem to have developed an approach of shooting a cruise missile or dropping a bomb now and then on some military target and letting it go at that. We are doing nothing to have any real effect on either checking their weapons of mass destruction development or helping the democratic opposition in Northern Iraq. The latter is weak, but does provide a basis from which to begin.

With respect to terrorism, there are two principal problems. One is that many of the new terrorist groups have a different motivation than terrorist groups did when we first started worrying about this problem in the seventies and even into the eighties. Many of the older terrorist groups wanted a place at the table. Today, terrorist groups do not want a place at the table. They want to blow up the table and everyone who is sitting at the table. The ideological or religious components of some of these groups are stunningly total in their desire for destruction. Take for example the groups that call themselves "Christian Identity." The FBI and almost everybody else calls them just "Identity" groups, not wanting to bestow the title "Christian" on them. They are behind most of the plots that involve working in one way or another on weapons of mass destruction in the United States, the number of which is up sharply over the course of the last few years. The Identity groups' principal belief is that what Hitler called Aryans are children of Adam and Eve, and everyone else — Jews, blacks, everyone else — are the children of Satan and Eve. They think that we are moving toward Armageddon between the children of Adam and the children of Satan. Since they think that the Jews control the financial system of the United States, they believe it is patriotic, indeed highly desirable, to do things like file false financial papers and liens and the like to foul up the financial structure, because that will help bring on Armageddon.

When one is working against groups like that, or like Aum Shinrikyu or Osama Bin Laden, one is not dealing with organizations that are going to be satisfied by occasionally setting off a pipe bomb to attract some attention and perhaps get some type of concession. That is unfortunately not the world we are in. We are also, as the result of the growth of the Internet and the World Wide Web, in a world in which information from one group of people who have those sorts of intent can be traded with others who know something about the technology. There are many web sites today that would curl your hair with respect to explicit descriptions of the way, for example, castor beans may be refined to produce ricin, an extremely lethal substance, designs of nuclear weapons and the like.

Both the FBI and the CIA are operating under guidelines that limit their ability to deal with these groups — inside the country for the FBI and overseas for the CIA. The FBI guidelines derive mainly from the mid-seventies and require a criminal predicate in order to take steps into an investigation. I believe they are more limited than either the relevant statutes or the Constitution would require. They were a response in the mid-seventies to COINTELPRO and some of the excesses of the FBI back in the fifties, sixties, and early seventies. In the same way, the CIA adopted guidelines in 1996 which essentially deter case officers from recruiting informants inside terrorist organizations if those informants might, for example, be human rights violators. Now, if you don't know what's going on inside Hezbollah, the problem isn't that you have too many human rights violators on the payroll, it's that you don't have enough. You need to be able to triangulate among informants, spies if you will, and have more information, not less. If your guidelines suggest that what you ought to be doing is only recruiting nice persons as spies inside terrorist organizations or organized crime organizations, you will essentially be able to recruit no one because those are voluntary organizations. The only people who are in them are people who want to be terrorists or who want to be narcotics smugglers.

It is a different situation inside governments. One often finds good people trapped inside bad governments. We had many Soviets who volunteered to work for the United States over the years because they were anti-Communists, decent people. But inside terrorist organizations or organized crime groups this is almost never the case. If you only have nice persons as spies, lets say in Beirut, you will be able to do a dandy job of learning what's going on inside, say, the churches and the Chamber of Commerce, but you won't have the foggiest idea of what's going on inside Hezbollah.

The point is that we do not seem to be dealing with any of these three types of plausible threats of hostility — from major powers, rogue states, or terrorists — very seriously because the threats are not yet clear enough in order to get the country to organize a wagon train. We are dealing
ously because the threats are not yet clear enough in order to get the country to organize a wagon train. We are dealing with many of the threats with short term, public-relations-focused decision-making, one day at a time. That is clearly not the way to deal with serious problems in national security.

Enough critique. What should we do? Since time is short, I will conclude with a few suggestions. In this room some months ago, the Chairman of the Joint Chiefs was speaking and I asked him a question. His speech was on national security, but every word of it dealt with overseas deployments for peacekeeping. I asked him if there were any consideration being given in the Joint Chiefs to homeland defense, such as ballistic missile defense or defense against terrorists. He seemed to acknowledge that those were interesting subjects, but it clearly was not at the heart of what he thought important. Apparently, the business of the American Department of Defense these days is principally, as he sees it, deploying forces overseas for enforcement and peacekeeping and ignoring homeland defense, ignoring the growth in ballistic missile capabilities of the Iran, Iraq, and North Korea of the world, and ignoring instability in Russia and China. That strikes me as the wrong principal emphasis. It is not as if the United States should never get involved in matters such as Kosovo. I supported that intervention and would have supported it with ground troops, but it should not be the main thing we are planning for.

I believe that we have to begin to be very serious about ballistic missile defense for the country. By adhering to a treaty with the Soviet Union, which no longer exists, and dumbing down both our strategic and theater defense systems, we have produced a situation in which we are not effectively going to be able to protect the country against Iraq or North Korea, much less Russia or China. I believe we need to try to move back to try to engage Russia in talking about cooperation in deploying ballistic missile defenses.

I think we probably need to move toward space-based defenses, not directed energy so much as something along the lines of the old Brilliant Pebbles program. Those types of defensive systems are likely to be easier to deploy and use, not harder, than mid-course-intercept systems. It is inherently a much easier problem to deal with attacking missiles in boost phase, particularly with kinetic energy intercepts from satellites already in space, than to hit a bullet with a bullet in a mid-course intercept. This sort of program emphasis would affect our defenses not only against Russia and China, but also North Korea, Iran, and Iraq. Of this group I believe only Russia has even a colorable claim to any consideration of our dealing with them as negotiating partners on the matter, because of the history of the ABM Treaty. This is a complex subject, but I believe there are ways that we could deploy space-based defenses cooperatively with the Russians, and that perhaps is a subject for another day.

With respect to terrorism I think we have to re-examine the CIA's guidelines and perhaps the FBI's. With respect to the domestic side of this and the law, let me say this: I do not advocate treading on Americans' civil liberties, but there may be some ways in which we can do a more effective job in penetrating terrorist groups than we do now, domestically. If you are worried about the country attacking civil liberties, think of what it is likely to be like after the first major terrorist event using weapons of mass destruction in which the clamor will come, "Why didn't you know about it? Why don't you do this? Why don't you do that?" After Pearl Harbor we threw Japanese Americans into, essentially, concentration camps in this country and it was Franklin Roosevelt and Earl Warren who pushed it. So, this country is not immune from crazy responses to national security threats. I think we might forestall some possible crazy responses in the future if we can do a more effective job of penetrating terrorist groups both here and at home.

My general point in conclusion is that if we cannot learn from history, and from the way this country made its mistakes in the twenties and the way we have made some in the 1990s, we are flirting with tragedy. Our great weakness as a nation is that if we are not mobilized in a wagon train, we always believe that the oceans are going to give us time to get back from our beach parties and get organized and do what we need to do. The last time we were in circumstances like that, in the roaring twenties, we blew it. This time let's not.

Donohue and Kayyem on a Unified National Security Policy . . .

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ordinances to blunt the consequences of his actions." Finally, the Court noted that the Massachusetts law undermines the President's authority to speak, in national security terms, in one voice to the world's nations and, indeed, to Burma. The Massachusetts' law, which was criticized by other foreign governments and resulted in the lodging of a formal complaint against the United States in the World Trade Organization, complicated the unified objectives laid out in the federal statute.

The legal implications of the Crosby decision aside, the Court has contributed to an important assessment of how far states should venture into the foreign policy realm. This is particularly salient as the increase in state counter-terrorism laws addressing foreign terrorism continues unabated. Following both the real and perceived threat that we are at risk on American soil from foreign
terrorism, a number of states have introduced stringent counter-terrorism measures. No government, at a local, state or federal level, wants to be seen as soft on terrorism. In a liberal democracy the government bears the responsibility of protecting the life and property of the citizens. In order to fulfill—and to be seen to fulfill—this obligation, the states have begun to legislate in a number of areas that overlap with our federal foreign counter-terrorism enforcement. For example state measures prohibiting the solicitation of resources in support of international terrorism, legislating against weapons of mass destruction, and criminalizing certain already unlawful conduct (bombing, threatening, etc.) if done in support of a terrorist cause now exist.

While the Crosby decision provides ammunition for legal challenges against these state counter-terrorism laws, the decision also provides for policy and political analysis to determine whether these laws are desirable. First, it is essential, in national security generally, and counter-terrorism specifically, for the government to be able to speak in one, albeit multifaceted voice. There are many ways for the federal government to address terrorism, and the law is just one tool. States, on the other hand, approach the issue of counter-terrorism from one perspective: the legal perspective. States have no authority, let alone ability, to bomb foreign countries, write executive orders, change national policy, or negotiate international agreements. The “one voice” strategy is essential for two audiences: other foreign governments (who rely on the federal government’s assurances of complicity and swift decision-making in the policy realm), and the terrorists themselves (who may respond to federal policy). If a country wants to alter the conduct of terrorists and their organizations, a coherent anti-terrorism policy is essential. For example, Indiana passed a law to enable the governor to make it a crime to support or fund Hamas, after vague suspicion arose that Hamas was running funds and arms through Chicago. Hamas is presently on the foreign terrorist organizations (FTO) listing put out by the State Department, so comity exists—for now. But part of the justification for the FTO listing was that it would provide a carrot and stick approach to dealing with terrorists groups. The carrot of getting off of the FTO listing, coupled with the stick of future economic or legal deprivations, serve as tools in bolstering the Middle East peace process. Indiana’s singularity in introducing legislation aimed at halting funding to Hamas, with no statutory “carrot,” undermines the federal government’s ability to deal with a changing array of players and motivations, as Congress intended.

Second, First Amendment scholars, political activists and civil libertarians have often criticized the federal counter-terrorism strategy as sacrificing democratic norms in the name of national security. Many state laws seek to criminalize conduct that, as a matter of both federal and state law, are already crimes. Whether you are a terrorist or not, bombing a building is unlawful. The motivational element that is a part of many state laws severely curbs free association and speech in ways that our federal law has, at least for now, avoided. For example, Montana passed an anti-terrorist criminal syndicalism law that would prohibit certain advocacy and goes so far as to bring sanctions against landlords who might be renting to groups advocating violence. The potential for selective enforcement is obvious, especially as the United States focuses its attention on Middle Eastern charities that may be fronts for terrorist groups. In any event, quite beyond the constitutionality of such measures, the cleavage created in society by the introduction and operation of such politically-sensitive foreign policy measures suggest that this is one arena that the federal government—and not general domestic politics—should occupy.

Finally, as the Court recognized in Crosby, there is a role for states. Arguing that the states should stay out of the foreign policy aspect of counter-terrorist legislation does not imply that there is no role for the states in dealing with the important issue of foreign terrorism. Indeed, federal statutes give some indication of what that role should be. For example, in regard to weapons of mass destruction, the federal government has passed a plethora of laws to assist states in domestic preparedness, leaving to the states the ability and necessity of addressing their consequence management needs. Colorado recently passed a statute that provided for an Emergency Epidemic Response Committee with the expectation that the Committee would address the specific needs—medical, legal, etc.—of the state in the event of a biological agent release.

While it is unlikely that such a clear conflict between a state and federal statute, as there was in the Burma case, will exist in the counter-terrorism realm, the Crosby decision provides an essential mechanism for how state policy-makers should assess their role in addressing the terrorism threat. There is a role, no doubt, but it differs from that accorded the federal government.

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Lorenz on the U.N. in Kosovo . . .

Continued from page 3

There is no shortage of independent reports that identify problems in establishing the rule of law in Kosovo. The best reports make practical recommendations that can still be implemented. If the international community is to build effective legal institutions and the rule of law in
Kosovo a number of actions can be taken. For example, consider the following seven recommendations.

1. **Dedicated court security from KFOR.** A top-down directive from KFOR that mandates court and judicial security as part of its mission should be issued. Without this, a real threat exists that violence will overtake the fragile new court system. CIVPOL has to be part of the solution, but more resources from KFOR are needed to make this possible.

2. **Integrating Serbs and other minorities into the judicial system.** A series of new political initiatives are needed to induce the Serbs to participate. Progress on return of displaced Serbs could lead to an improved political and social climate that will lead to more Serb judges and legal personnel. Economic measures are an essential component of this effort, and a focus on aid to the Serb areas could hasten the integration of minorities into the system.

3. **More international judges and prosecutors.** The numbers of international judges, as well as an improper ratio of international judges in the system, is a serious problem. Where a panel of three judges is in place, only one is international. This has allowed the Albanian majority to override decisions of the international judge.

4. **Additional U.S. military attorneys.** A U.S. report issued in April 2000 mentioned the possibility of sending a “small number of military reserve attorneys” to Kosovo to provide support. A U.S. reserve detachment would be ideal, since it comes with its own manpower and logistic/transport support. An advantage in using a reserve unit is that it is capable of operating in the austere conditions of Kosovo and it needs very little time to become effective. They could augment the UNMIK and OSCE lawyers who are currently understaffed.

5. **Adequate pay for local judicial personnel.** Although they are given essentially the same powers under the law, a local judge in Kosovo receives less than 10% of the salary and expenses of the international counterpart. This disparity contributes to a difficult working climate and makes the local judges even more vulnerable to improper influence and threats from radical elements.

6. **Adequate logistical support for the courts.** Courthouses still lack many fundamentals such as desks, chairs, phones, pens, paper, and copy machines. Since few computers are available, communication is slow and new copies of the laws must be reproduced and hand delivered. UNMIK has been unable to keep up with the demands of translating the new law into Albanian and Serbian, and making sufficient copies for the courts. U.S. programs like the ABA Central and East European Law Initiative (CEELI) can focus on basic support measures such as getting sufficient copies of the laws of Kosovo out to the courts.

7. **Adequate translator support for the courts.** There are unique translation and reporting requirements for the Kosovo court system, posing problems much more difficult than those in Bosnia. The presence of international judges in Kosovo requires English translation, in addition to the Serb and Albanian. Add to that the language of the peacekeepers (French or Russian) and requirement for impartiality, and the difficulty becomes apparent. In Mitrovica, for example, a trial recently had to be postponed for lack of a qualified translator.

It is easy to place blame on the U.N. for events that actually reflect the shortcomings of U.S. foreign policy. But, as Secretary of State Madeline Albright says, the United States is the “indispensable party” in international peace support operations. If the international mission in Kosovo fails, it will not be the fault of the U.N. It will be the result of the inadequate support and lack of political will of U.N. Member States. As the indispensable member of the U.N., the U.S. has to take the lead in focusing the necessary effort.

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Judicial Review Features of the Drug King Pin Act

On October 2, 2000, Elizabeth Rindskopf Parker, Chair of the Standing Committee, delivered comments to the Judicial Review Commission on Foreign Asset Control on the judicial review features of the Foreign Narcotics Kingpin Designation Act of 1999. Although Chair of the Standing Committee on Law and National Security, her presented remarks were her own and were delivered in her personal capacity.

INTRODUCTION

The Foreign Narcotics Kingpin Designation Act (FNKDA) is complicated legislation with the ability to significantly affect the rights and liberties of U.S. citizens. As such, judicial review of all of its features is desirable and should be presumed, unless the strongest possible showing is made as to why national security demands make such a review impossible. In my view, it is doubtful that such a showing could be made.

The FNKDA was enacted in December 1999 as part of the annual Intelligence Authorization Act of 2000. It provides for a public presidential designation of certain foreign persons as “significant foreign narcotics traffickers” (FNT) through a process that involves the participation of the Secretaries of the Treasury, Defense and State, the Attorney General and the Director of Central Intelligence (the “DCI” who also serves as the Director of the Central Intelligence Agency and the head of the U.S. Intelligence Community). That designation serves as the predicate for subsequent provisions of the statute which provide for the blocking of assets of any foreign person so designated or any foreign person who may either “materially” assist, or who is “controlled” or “directed” by, such a designated FNT or who is found to “play a significant role in international narcotics trafficking.”

The Act further provides that such a designation be made annually in unclassified reports to eight Congressional committees as well as periodically during the intervals between such reports as may be warranted. The Act also contains provisions designed to protect sensitive classified information where such a designation might harm the national security of the United States in the opinion of the DCI. Under such circumstances both the President and the two intelligence oversight committees are advised of this decision. Once made, such FNT designations provide the predicate on which a variety of legal steps may be taken within the United States to block the assets of those defined by the act to be involved with such FNT individuals or entities. Substantial criminal and civil sanctions are also possible when specific provisions of the Act are violated.

As thus summarized, it is clear that the Act is both complicated and technical; moreover, with no clear definitions of the facts on which a designation as a “foreign Narcotics Trafficker” may be made, the Act supports actions that will cause the public identification of such designated individuals and entities and then, relying upon such a designation, support the imposition of a number of actions which combine to limit access and use of property owned both by foreign and domestic individuals and entities. Under such circumstances, judicial review of the imposition of such a public designation, or when such a designation is used as the predicate for limiting property rights and imposing civil and criminal sanctions, would seem wise, if not constitutionally required. Yet section 805(f) of the Act provides that “the determinations, identifications, findings and designations made pursuant to section 804 and subsection (b) [of section 805] shall not be subject to judicial review.” I will allow others who have, or will later, testify on the Act’s features to examine in detail the legal, regulatory and Constitutional implications of this provision of the Act. My comments address the practical and policy implications of limiting judicial review in this fashion. Before doing so, I wish to note that the judicial review exclusion does not extend to Section 805(c) which prohibits transactions by or with United States persons or within the United States involving property so identified FNT and other foreign persons designated under the act. Criminal prosecutions and civil responses to such activities under the act’s provisions would thus presumably be subject to judicial review. Nonetheless, the predicate for such prohibited actions remains unreviewable under the provisions of section 805(f) and it is this exclusion on which I wish to comment.

As a general rule, matters subject to criminal and civil penalties enforced by federal authorities pursuant to domestic enforcement mechanisms are subject to judicial
review in an open process. This is the strong bias of our legal system and one which has long served us well since the tension between individual rights and maintaining efficient governmental operation was first commented upon in Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803).

Leaving aside for the moment the Constitutional rationale for such judicial involvement in bureaucratic activities, from a practical perspective the courts have provided invaluable expertise in the careful interpretation and application required to understand and apply technical statutory definitions fairly and effectively so that individual rights and liberties are preserved while yet permitting the bureaucratic execution of important governmental functions. Exceptions to this rule strongly favoring judicial review of statutory provisions which affect personal interests, such as property and liberty, are rare.

While there is a basis for limiting judicial review in the areas of national security because of the sensitivity and importance of those activities, here too such limitations should be taken only with great care. It has been my experience that even in the national security arena, judicial review is typically both practicable and useful when employed to review and protect interests and activities occurring in the domestic, as opposed to foreign, arena.

For example, the recent enactment of the Anti-Terrorism and Effective Death Penalty Act of 1996 contains the possibility of review of its terrorist designation feature. To date, the Foreign Terrorist Organization Act appears to have worked successfully and I am unaware of concerns that suggest that its judicial review features are problematic for protection of U.S. national security. Instead, what such a review insures is that such a designation is done carefully and thoughtfully, with full consideration for legal and constitutional safeguards. It provides an effective test for the thoroughness and adequacy of the government's factual predicate to establish the status of a designated individual or entity; it remains to be seen why this should not be equally true both for the FTO Act and the Drug Kingpin Act.

Other examples also exist as well where the benefits of judicial review and scrutiny have been shown successfully to co-exist with protecting our nation from national security threats. Consider, for example, two acts with which I have special familiarity: The Foreign Intelligence Surveillance Act, where a special federal court has been created to issue warrants for intrusive technical surveillance against certain specified national security targets, and the Classified Information Procedures Act, a statute which enables prosecutions to proceed despite the presence of classified information with the use of judicial review and guidance. Both acts demonstrate that normal judicial procedures can be combined with initiatives that either are designed to protect our security, whether from foreign threats that cross our borders as in the cases of FISA, or by prosecuting actions domestically despite the presence of national security information, as in the case of the CIPA. I am sure that other examples exist as well. In short, over the last two decades as the United States has endeavored to apply law enforcement responses to threats designated as national security in nature, we have learned how to do so without either jeopardizing national security or the constitutional safeguards contained in domestic legal systems.

In contrast to this trend, however, recently there appears to have been an increasing desire, perhaps born of impatience and a desire to help, to explore shortcuts – approaches that permit us to tackle national security problems without the need to involve ourselves in the complicated and time consuming response embodied in judicial prosecutions. Recent changes in the Immigration Laws to permit deportation actions based on secret evidence appear to offer an important example of my concerns. My conclusion is that either limiting judicial review, or limiting access to critical foundation facts in judicial proceedings by the imposition of secrecy, is unnecessary. At most, the use of such devices should be severely limited and employed only when demonstrated as necessary to protect essential national security information within a specific factual context. Similarly that determination, in my judgement, is handled most effectively when judicial review is available.

I have mentioned that it is my view that denial of judicial review and imposition of secrecy to preclude public availability of significant facts is seldom, if ever, necessary; I believe it also unwise in all but the rarest of cases. I am dubious that such a situation exists here.

Moreover, my experience shows that judicial review is actually beneficial to the intelligence agencies with which I have worked: processes are tested, oversight augmented and the basis for decisions improved; most important, credibility of our intelligence agencies is enhanced. Whether in the context of Freedom of Information Act Requests, Classification Information Procedures Act Reviews or applications for surveillance under the Foreign Intelligence Surveillance Act, the certainty of an independent court review of agency actions, decisions, and requests, in my view, has led to a more careful internal process and better decisions. Nor do I believe that national security concerns have been compromised in the resulting bureaucratic steps taken to accommodate judicial review.

I am personally unaware of situations where the compromise of classified information has resulted from court review and, while none welcome the additional bureaucratic burden that preparation and participation in judicial activities represent, I am not aware of any legitimate national security initiatives that have been prevented as a result. Perhaps there will be a time when involvement...
in national security matters by the judicial branch of
government becomes so burdensome that it is counter
productive to essential national security concerns. I am not
aware that such a situation exists today or is threatened.

Instead, I perceive a different danger. First, since
the end of the Cold War there has been an increasing
reliance on law enforcement as the “response of choice”
where traditional national security threats are involved.
Here I refer, for example, to the proliferation of weapons
of mass destruction or terrorism. While reliance on law
enforcement, in addition to the traditional responses to
national security threats of military and diplomatic actions,
have been shown frequently to be valuable, the differing
legal, cultural and practical circumstances under which we
traditionally govern law enforcement, as opposed to diplo-
matic or military responses to national security threats,
have been difficult. Training the law enforcement and tra-
tional national security components of our security appara-
tus in ways to coordinate and work effectively together,
despite differing rules, cultures and missions, has been
challenging. This may explain why many who are eager to
help, but impatient, have urged that we employ the broad
powers available to our traditional national security capa-
bilities for actions arising in a law enforcement context.

Second, with the end of the bi-polar world, a
tendency has arisen to oversuse words such as “national
security threat,” “national emergency” and so on. Although
narcotics trafficking has been an appropriate subject for
national security attention under E.O. 12, 333, which has
governed national security activities at least since the mid
1970’s, I fear responses to the drug scourge that too readily
 liken our actions to a war. In any event, if we resort to the
use of domestic law enforcement responses to problems
with a national security character, I believe that we must be
governed by traditional law enforcement processes.

In conclusion, I believe it will be difficult to justify
a categorical statutory need for the elimination of judicial
review that section 805(f) of the Foreign Narcotics Kingpin
Designation Act currently provides. At most the Act should
be amended to allow for the protection of specific informa-
tion from public release when an actual need has been
demonstrated pursuant to statutorily defined requirements
with the possibility of court review.

Finally, the broad reliance on secret information
in the Act is also not helpful in achieving effective and
reliable bureaucratic participation in support of the Act’s
purposes. The reliance on secret proceedings that the Act
fosters will instead produce a tendency to pursue marginal
cases. Inevitably, when such cases are identified, they will
erode public confidence in governmental processes and the
credibility of the agencies and their dedicated personnel
who are involved. In the end, no one benefits.

The International Legal
Regulation of Navy Space
Operations

by Mark E. Rosen, John Davis, and Gary Federici

The following is a summary submitted by the
authors of a study sponsored by the Naval War College
under the cognizance of the Center for Naval Analyses
(CNA) which examines the international legal issues implica-
ted by future Navy space control operations. The thesis
of this study is that the U.S. Navy needs to adapt its doctrine,
training, and platforms to meet two basic DoD space
missions: space control (counterspace, denial, and surveil-
ance) and force enhancement.

International law is comparatively underdevel-
oped when it comes to the law of outer space and military
operations therein. Moreover, since many space operations
will have an information operation (IO) component, it is
useful to examine both warfare techniques in tandem. In
general, we postulate that any direct or indirect action to
cause the interference or destruction of a space object (or an
associated ground station) is akin to a use of force. Some
indirect actions, however, may be legal and appropriate.

We also conclude that space is an extension of
theaters of military-operations, even though aspirational
language in the 1967 Outer Space Treaty states that space
is to be used for only “peaceful purposes” and explicitly
prohibits certain types of weapons in space (WMD) or
military activities (military bases on the moon). The
possibility of manned space-to-space conflict cannot be
excluded but in most cases the legal issues will involve
remote sensing of activities on earth or to what extent
objects in space (or their support systems on earth) may be
interrupted or destroyed as part of a military operation.

All uses of force during periods of belligerency are
governed by the laws of how force is used in war (jus in
bello) and how enemy space platforms can be engaged,
assuming they can be identified as “enemy” platforms and
the other tests of military necessity and proportionality
can be satisfied. Less clear are those uses of force involving
space systems during low-intensity conflict or periods of
peace. Those operations are governed by the law regulating
the initiation of force (jus ad bellum) and International
Humanitarian Law, which protects the victims of conflict.
Also, the laws of peace (which include the Law of the Sea
(LOS), Outer Space Treaty, and arms control and telecommu-
nications treaties) establish norms that must be consid-
ered before conducting a military activity in space that may
cause intentional or inadvertent interference.

The starting place for analysis of maritime space
operations is the LOS Convention and 1967 Outer Space
Treaty which place almost no restrictions on space activities outside of territorial airspace so long as those activities are done with a due regard for others in space, nearly identical to the regime of high-seas freedoms. The right of warships to conduct all-source surveillance at sea is well established by many years of state practice. Surveillance and remote sensing from orbiting surveillance platforms in outer space is a similarly well established practice. Surveillance using unmanned aerial vehicles and other systems within a coastal nation’s territorial airspace is not a recognized high-seas freedom and must be legally justified. However, the weight of authority is that so long as these operations are not provocative and involve nothing more than a simple trespass, they are tolerated because they are not expressly prohibited. Operations involving simple trespass do not constitute armed aggression but the coastal nation may demand that the trespasser leave the territorial seas or airspace. Consideration of domestic intelligence laws is mandatory because surveillance operations against U.S. persons or targets in the United States require interagency coordination.

More robust space denial operations including the destruction or interference with foreign space objects must be individually justified as would any other operation involving use of force to be lawful and consistent with U.S. Standing Rules of Engagement (SROE). The concept of operations for space denial needs also to account for U.S. domestic laws, which prohibit the interference with U.S. communications, satellite, or weather systems. Nevertheless, under the U.N. Charter, an operation against a foreign space object could be justified by a use-of-force mandate by the U.N. Security Council, in self-defense.

Customary international law would also recognize minor acts of coercion, to include covert espionage operations that result in temporary interference with systems, as “below the threshold” in that they constitute an act of armed aggression (i.e., the actions amount to an unfriendly act or technical violation of international law) but are not sanctionable conduct. Customary international law also recognizes a right to use force against a space system when it is a necessary adjunct to a humanitarian intervention mission or rescue at sea or in the context of a Grenada-like rescue operation. Use of force as a reprisal or to enforce general international norms (jus cogens) has historic support but both rationales are controversial.

Overt and covert operations against foreign space targets that cannot be justified under the U.N. Charter or a recognized theory of international law must also take into account the Law of Peace. The LOS Convention prohibits unauthorized broadcasting and actions that are not conducted with “due regard” for other maritime actors in proximity. The Outer Space Treaty is quite similar and permits most types of military presence activities in space (including surveillance) but there is a prohibition on orbiting weapons of mass destruction, a duty to show “due regard” to others, and an obligation to consult before undertaking space activities that would cause “harmful interference” with the space activities of others.

The United States is also required by various international telecommunications treaties (INMARSAT, INTELSAT, ITU) to not operate communications systems that would cause “harmful interference” with other licensed systems and to give primacy to distress frequencies. Similarly, the Chicago Convention and ICAO (in legislative enactments) impose a similar duty with respect to navigation systems (including GPS) that are used by civil aviation. Most of these treaties impose an obligation to render assistance at sea and in outer space, which would, in addition to the general non-interference principles, need to be considered in peacetime military operations.

International arms control regimes affect the fielding of various types of space platforms and space weapons and attempt to limit the types of military activities that can be conducted in or from space. These regimes would not universally apply during a period of belligerency, but an indiscriminate use of weapons that cause unnecessary suffering would also be a violation of the laws of war (jus in bello). The ABM Treaty, for example, prohibits the development, testing, or deployment of space-based ABM systems that rely on traditional missile interceptors or lasers. As a result of the recent Helsinki accords space-based theater missile-defense systems are similarly prohibited. Anti-satellite (ASAT) weapons are not subject to any per se bans but development or deployment of such weapons raises policy issues. Various treaties prohibit orbiting nuclear weapons or other WMD. Space mines that are not under positive control or cause indiscriminate fragmentation damage to neutral satellites are also probably illegal.

The Environmental Modification Treaty and U.N. Framework Treaty on Global Climate Change together would prohibit the use of space as a platform for intentional weather data modification (as a use-of-force technique). The Framework Treaty and various other weather agreements place no restriction on the U.S. withholding weather data but spoofing foreign or international databases with false weather data may violate International Humanitarian Law if it adversely affects neutrals or civilian non-combatants. Conversely, space is a preferred observation platform under the 1972 ABM Treaty, CTBT, START I, and the CFE Treaty. Under those treaties the U.S. pledges to not interfere with surveillance-verification activities. Finally, the economic impacts of space operations need to be considered in peacetime since the Law of Peace imposes a general obligation on nations to not cause intentional injury to another nation’s economy without proper cause. Given the high degree of linkage between space and information systems to the U.S. and world economies, this general duty cannot be lightly dismissed, the U.S. is far more economically vulnerable than most states to attacks on its information and space systems.
Once a decision is made to undertake an operation, international humanitarian legal principles of protection of victims of conflict, of military necessity and proportionality, of chivalry, and of no illegal indiscriminate weapons would govern all space operations. Under these principles, attacks on civil astronauts or spacecraft, weather satellites or precision navigation systems would be problematic because of the unintended consequences of those actions on non-combatants. Neutrals must also be respected. Due to the increasing number of multinational consortia or corporations that now own space systems, avoiding attack on neutrals will be increasingly difficult for military planners since collateral damage is a concept that is recognized and tolerated in belligerent settings but not in covert operations.

The absence of black-letter prohibitions or entitlements reinforces the need for prudence in those areas of unilateral military operations in space that would be perceived as “aggressive.” As indicated, the United States will be at risk militarily and economically if it opens up space as a new frontier for warfare. China, India, Russia and other countries are investing in space countermeasures and there are determined and well “armed” IO adversaries that could do great damage to U.S. space and information systems. Also, finding the correct policy balance is becoming increasingly difficult because of the heavy use of commercial practices and systems, such as GPS, in Navy systems. This means that there will be greater transparency in Navy combat operations and the attendant potential for loss of control over very important national security systems. Finally, there is a strong strain of romanticism in policy circles that wars and national defense operations are terrestrial activities and that space should be exclusively reserved for scientific exploration. It would be a mistake to ignore this strong policy undercurrent in deciding whether to push the military envelope in space. The objective should be the deliberate but low-key reinforcement of the notion that space can be legitimately used to enhance terrestrial transparency and deter conflict. To do otherwise may invite new space legislation that would be very difficult for the United States to defeat.

In addition to maintaining a low-key but consistent message that military space operations can enhance world peace, there needs to be a recognition that various trends in space law development need to be closely monitored or freedom of action may be lost. For the time being, for example, preservation of the legal status quo is desirable vis-à-vis calls in academic circles for (a) delimitation of air and space, (b) codification of passage rights in space, (c) a clearer definition of “peaceful uses” of outer space, (d) mandatory dispute settlement, and (e) mandatory and prompt registration of military space objects and clearer identification of them as such.

We also urge close monitoring of developments in U.N. specialized agencies such as the World Meteorological Organization (WMO) and the International Civil Aviation Organization (ICAO) to ensure that new “rights” are not created that would make it impossible for the United States to place restrictions on or withhold weather data, GPS, or space segments to a military adversary. And, given the high value of the U.S. military and commercial investment in space, there is clearly a need for a high degree of due diligence in the planning and execution of space operations in times of peace and war. It is recommended that the concept of operations for covert space be tasked and coordinated in a consistent manner, undergo close legal review and be subject to a consistent risk-analysis matrix.

The bottom line is that military operations in space face many difficulties because of the absence of clear rules and the political/legal risks associated with a misstep. Even so, there is no choice but to be prepared to plan and execute U.S. military operations in space to protect our military and commercial interests. Continued operations in space are also essential to establish patterns of state practice that may later ripen into customary international law.

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